

AUDITOR OF THE COURT OF SESSION

PARLIAMENT HOUSE, EDINBURGH, EH1 1RQ
RUTLAND EXCHANGE No. 304
031 225 2595 Extn. 309

The Scottish Legal Aid Board
Box No ED250
Rutland Exchange
EDINBURGH

27th July 1992

Date and Tax Point

VAT Reg. No. 553 7981 04

VAT Invoice No. 2859

JG

LHB

D W and [REDACTED] v [REDACTED]

LA Ref No 37/80/603131/86

The Auditor's Fee herein is £ 750.00

VAT thereon @ 7½% 131.25

£881.25

The papers submitted are returned herewith
by Rutland Exchange
by post
The papers submitted await collection

The Auditor J. Haldane Tait, S.S.C
Principal Clerk [REDACTED]

b/k 19in

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27th July 1992

The Scottish Legal Aid Board
Box No ED250
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Dear Sirs

D W & [REDACTED] v [REDACTED]
Solicitors' Additional Fee
Counsels' Fees

The Auditor encloses his Report herein along with a Note of his fee. The papers submitted for perusal are returned herewith.

Yours faithfully

Janet P. Buck

Principal Clerk

The Auditor J. Haldane Tait, S.S.C.

Principal Clerk: [REDACTED]

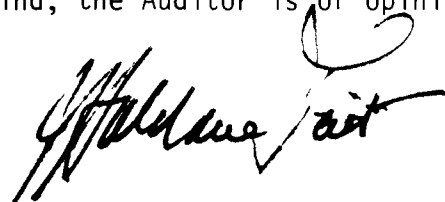
[REDACTED]

pursuers, which consultation according to the Fee Note lasted 11 hours, and according to the entry in the solicitors' Account 12 hours 30 minutes. Accepting the conservative time stated in Counsel's Fee Note, the Auditor is satisfied that substantially more than a normal day's work was involved and, having regard to the importance of the matters under consideration, considers the fee of £1,000 claimed to be justified.

The third Fee is one of £12,500, being the fee for "preparation for and conducting of Proof inclusive of all miscellaneous meetings and advisings including meeting on 22nd December 1989, to allow for responsibility etc., involved"

If the fee were simply to be apportioned equally over the eleven days of proof which Senior Counsel conducted it would produce a gross fee of around £1,136 per day which, considered in the light of fees generally recognised for Senior Counsel in 1989, would be very substantially greater than a 'normal' fee. However, when account is taken of the fact that Counsel was wholly engaged in preparation on the three days of the week-end preceding and of the one during the proof - a further 6 days - it brings out an average of £781.25 per day. However, in addition to that, consideration has to be given to the facts that, as were explained to the Auditor, (a) Professor ██████, Dr. ██████ and/or Dr. ██████ were present during most if not all of the days of Proof both during the pursuers' case and the defenders' case, and that there were discussions/consultations with these experts first thing in the morning, during lunch time, and after the court rose at 4 p.m. which averaged at least half an hour, and also (b) after the conclusion of the first tranche of the proof on 21 December, Senior Counsel **that** evening had to go through the whole of the notes for the eleven days of the Proof in preparation for a lengthy Consultation on the following day, Saturday 22nd December, with Junior Counsel and the solicitor for the preparation of a detailed summary of and commentary (extending to six and a half closely typed pages) on the evidence so far adduced and dealing with the perceived difficulties ahead, all of which was done in view of Senior Counsel's imminent Judicial appointment, in order that his successor as Senior Counsel would have a reasonable opportunity to understand the state the action had reached at that point.

Having all the foregoing considerations in mind, the Auditor is of opinion that the fee claimed is justified.



The Pursuers' case had been in Court since May 1987 and had been conducted by other Counsel both senior and junior who for diverse reasons had been unable to continue to act. Mr. Bruce, Q.C., was first instructed in the case at the end of September 1989, some eight weeks prior to the commencement of a proof set down initially for five days but the first tranche of which lasted eleven days. After consideration of the papers, Counsel had very serious doubts about the probability of success and had the responsibility of advising the pursuers of this against the background of over two years during which the case had been in Court and conducted by other experienced Counsel. There had been a consultation on 20th October when Senior Counsel had considered the evidence with three medical experts, Dr. [REDACTED], Dr. [REDACTED] and Dr. [REDACTED], the outcome of which did nothing to encourage Counsel and which required further anxious consideration of the case and the urgent need to consult with two other medical experts involved, Dr. [REDACTED] and Dr. [REDACTED]. That consultation which is referred to in the Fee Note took place at the latter's home in Aberdour during the late afternoon and early evening of 30th October. The Consultation, which was of crucial importance, resulted in the view being reached that the action would have to be abandoned. However, before that irrevocable decision was made, Senior Counsel and the solicitor again further reviewed all the evidence and, notwithstanding the fact that Professor [REDACTED] of London had previously expressed views which did not appear to be helpful to the pursuers' case, it was decided to discuss it with him again. The solicitor, therefore, contacted Professor [REDACTED] at home in the evening and thereafter that same evening discussed with Senior Counsel Professor [REDACTED] comments in detail and, during the following two days, attended on Senior Counsel and had lengthy discussions with him which resulted in a decision to have a consultation with Professor [REDACTED] which took place in London. In consequence when Counsel's Fee for the consultation with Dr. [REDACTED] and Dr. [REDACTED] on 26th October is viewed in the light of the subsequent discussions and considerations with the solicitor, which work was a continuum of that Consultation, the Auditor is of the opinion that the fee claimed is reasonable, especially having regard to the importance and complexity of the matters requiring to be considered.

The second Fee is one in respect of another consultation which was conducted by Senior Counsel on 4th December 1989 with four expert witnesses and the

fee and which apply every bit as much, if not more so, to Counsel.

In giving consideration to the proper fee to be allowed to Counsel in this case, the Auditor has also in mind the opinion expressed by Lord Mackintosh in **Elas v Scottish Motor Traction Company Limited** 1950 S.L.T. 397 where he said:

"In my opinion it was the duty of the auditor in the exercise of his own skilled discretion to determine what was a fair and reasonable fee to be paid to Counsel in this particular case and in the circumstances of the present time, and not to have been deflected from that aim either by reference to any scale of fees which he may have understood to have been propounded by the Faculty of Advocates or by waiting for some direction from the Court or general consensus of opinion in the profession regarding the proper fees to be paid to Counsel. There is not and never has been any rigid scale of fees for Counsel. As was stated by Lord President Clyde in **Caledonian Railway Co v Greenock Corporation** 1922 S.C. 288, 1922 S.L.T. 30, "both the 'normal' fee in an ordinary case and the 'proper' fee in a big and difficult one are just such fees as a practising law agent finds sufficient in order to command the services of competent Counsel in cases of a similar character."

In this case the fees claimed are not ones prescribed by the Faculty of Advocates. The Auditor is, however, of opinion that the fees for Counsel as prescribed in the Schedule are intended to be fees for what can be termed 'ordinary' or 'run-of-the-mill' cases. Mr. and Mrs. [REDACTED] case was clearly one of 'abnormal difficulty.'

The Auditor is well aware when considering an entry in an Account of Expenses or a Faculty Services fee note that it seldom, if ever, gives the full significance of the subject matter of the entry, which becomes apparent only after enquiry. The Auditor has had the benefit of explanations from both Senior Counsel, as he then was, and the solicitor intimately involved in the conduct of the case throughout, as to the full extent of the work in respect of which the fees have been charged.

The first of the fees submitted for the Auditor's consideration is one of £500 for a Consultation held in Fife with two medical experts and which lasted some three hours. To put that fee into perspective it has to be considered in the light of antecedent events which appear to be as follows:-

or otherwise involving a significant degree of preparation or lengthy discussion - £91.00.

Item 5 prescribes for a **Day in Court** a basic fee of - £252.00.

The Schedule commences with a number of general provisions number 4 of which confers on the Auditor power to increase any fee set out in the Table of Fees in the Schedule where he is satisfied that because of the particular complexity or difficulty of the work or any other particular circumstances, such an increase is necessary to provide reasonable remuneration for the work. The Auditor in the exercise of that discretion conferred in him is not directed to have any other considerations in mind.

The Auditor considers it appropriate to set out firstly the considerations to which he does require to give attention when considering what is a "proper fee" of 'competent counsel' and in that regard refers to the opinion of Lord President Cooper in **Macnaughton v Macnaughton** 1949 S.C.42 at page 46 where he states:

".... the search of the Court has always been for the "proper fee" of "competent counsel" for the conduct of a case of known magnitude and difficulty, involving a stake of known value or importance. The answer cannot be found by applying arbitrary standards or rules of thumb, but requires an appraisal of the nature and amount of the services given. The first approximation can be found by reference to the current practice of solicitors in instructing counsel in an average case of the type in question presenting no specialities. But, if the case is abnormal in magnitude or difficulty or in any other respect, a second approximation must be made to reflect these specialties, and this second approximation may yield a **substantially** higher figure." (emphasis added)

Paragraph 4 of the Schedule recognises and gives effect to the opinion of Lord Present Cooper in **Macnaughton** supra that there will be cases where the prescribed fee does not provide reasonable remuneration for the work performed.

The Auditor has already stated in the first part of this Note the heads under which the Court itself recognised that the solicitors were entitled to an additional responsibility fee and he has outlined the facts and circumstances which gave rise to the award of the additional responsibility

In an opinion running to 66 pages the Lord Ordinary found that the Pursuers' case of fault against the Defenders which was based on an alleged act of omission to supervise [REDACTED] mother properly during labour resulting in intrapartum asphyxia between 5.00 a.m. and his birth at 6.32 a.m. had not been established. The Court preferred the evidence of expert medical witnesses led by the Defenders which suggested that a catastrophic event had occurred after the birth at around 10.20 a.m.

In addition to the work which had to be done with a view to establishing negligence, a great deal of further work had also to be carried out in quantifying the claim and in evaluating [REDACTED] lifelong needs for maintenance and accommodation. The total claim for [REDACTED] was £664,130 and, the Court, if it had found that negligence had been established, would have awarded £505,072.

The Auditor has heard the submissions of the solicitor involved in the case throughout and the representative of the Scottish Legal Aid Board and has considered the detailed Account and process. In the Auditor's opinion the additional responsibility fee in this case requires to be substantial to reflect the exceptional amount of responsibility undertaken by the solicitor in the conduct of [REDACTED] case which required and received the utmost care and personal attention of the solicitor throughout a period of four years. The Auditor, therefore, fixes the additional responsibility fee payable to the solicitor at the sum of FIFTEEN THOUSAND POUNDS (£15,000.00) exclusive of Value Added Tax.

Senior Counsel's Fees

The Auditor has been asked to tax the amount of the fees to be allowed to Senior Counsel as proper remuneration for his work as referred to in three Fee Notes in respect of (a) two consultations and (b) the conduct of eleven days of proof and associated work.

Schedule 4 of the Civil Legal Aid (Scotland) Fees in Civil Proceedings Amendment Regulations 1989 contains a Table of Fees, Chapter II of which relates to those payable to senior Counsel.

Item 4 of the relevant Table relates to **Consultations** before proof or trial

necessitated consultations with experts which were held in Aberdour, Liverpool and London. [REDACTED] solicitors had to obtain advice from a wide range of experts as the aetiology of cerebral palsy is the subject of conflicting medical opinion. Among the specialist fields which had to be considered were obstetrics, neonatology and paediatrics, and in turn this involved the acquiring of a good understanding of the workings of the brain, heart, lungs, liver and body chemistry.

[REDACTED] mother is a lady of better than average understanding of medical matters, being a medical editor and consequently she took an immense and informed interest in the case and in the divergent medical views expressed during its preparation and conduct. She herself has, in addition to [REDACTED], two other children with medical problems, has had a pregnancy terminated and has only one child in good health. These facts show how sensitively the solicitors (and Counsel) had to handle the case, not only in dealing with [REDACTED] parents but also in their approach to medical witnesses, some of whom are involved with the continuing medical care of [REDACTED].

Cases such as this are almost invariably complex especially where the ascertainment and interpretation of the facts is difficult. However, further complications arose because, for a variety of reasons, the Counsel engaged in the case, both senior and junior, kept changing. The original senior and junior Counsel became unavailable shortly before the commencement of the Proof and thereafter the solicitor had to instruct no fewer than four other senior Counsel at various stages. The solicitor was, therefore, the clients' only constant legal adviser throughout the case and was, in fact, acting as a junior Counsel in all but name.

The Defenders had the services of eight consultants in addition to the three medical witnesses as to fact. As evidence was led in the course of the Proof, further investigations and medical opinions had to be obtained on behalf of [REDACTED] and the notes of evidence had to be perused and considered carefully.

The consultations with medical experts were long and on occasions lasted until late in the evening. The solicitors were frequently engaged in work on the case outwith normal office hours.

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ADDITIONAL FEE

in causa

██████████ and ██████████

Pursuers

against

██████████
Defenders

EDINBURGH. 27th July 1992.

The Auditor has been asked to fix the amount of the additional responsibility fee awarded by the Court to the solicitor for the Pursuers by interlocutor of 19th December 1991 in terms of Rule of Court 347, sections a, b, c, d, e and f (sic.)

As the Lord Ordinary said at the outset of his Opinion "This is an immensely sad case."

This was an action brought by the parents of ██████████ who was born on 19th May 1984.

Andrew suffers from permanent neurological damage being a palsy which has been described as diplegia of tetraplegic distribution, with certain additional features. ██████████ parents claimed that his condition resulted from brain damage caused during labour and they alleged negligence on the party of the staff employed by the Defenders in the care of ██████████ and his mother during her labour.

The Summons in the action was signetted on 15th May 1987 and the case was concluded on 26th September 1991. The proof in the action took 27 days and was heard in four tranches spread over two years. The notes of evidence ran to 26 volumes totalling some 3,600 pages; copies of documents and productions amounted to around 6,000 sheets. If these few simple facts alone give rise to the anticipation that the case was of some complexity, this surmise is rapidly confirmed when it is learned that it

The Auditor J. Haldane Tait, S.S.C.

Principal Clerk ██████████