

AUDITOR OF THE COURT OF SESSION

PARLIAMENT HOUSE, EDINBURGH, EH1 1RQ
RUTLAND EXCHANGE No. 304
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NOTE

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ADDITIONAL FEE

in causa

JF

PURSUER

against LHB

DEFENDERS

EDINBURGH. 11th October 1993. The Auditor has been asked to fix the amount of the additional responsibility fee awarded to the solicitor of [REDACTED] by Interlocutor dated 24th March 1993 in terms of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 under heads (a), (b) and (e) of section 5 of said Regulations.

1. [REDACTED] raised an action in the Court of Session on 14th May 1990 in which she alleged that in the course of carrying out a procedure in November 1987 for termination of pregnancy the surgeon, while Mrs [REDACTED] was under anaesthetic, negligently damaged the uterus as a result of which it was decided that [REDACTED] had to undergo a total abdominal hysterectomy.
2. [REDACTED] was extremely distressed when she subsequently learned of her hysterectomy, following upon which she suffered considerable pain and discomfort and as a consequence was unable to resume her former employment as an accordionist in a band.
3. The method of carrying out the original limited medical procedure required to be fully investigated on behalf of [REDACTED] and that

involved her solicitors in obtaining the services of several experts in the fields of gynaecology and pathology.

4. The solicitors had to understand the medical terminology used to identify parts of anatomy, which the Court found "not to be precise". They then had to give careful consideration to the various medical procedures which might have been adopted to minimise the risk of harm to their client. That the solicitors were confronted with difficulty in evaluating the conflicting medical opinions was recognised by one of the expert gynaecologists who in his Report stated:

"I appreciate that it is difficult for a non-medical person to follow the technical minutiae of surgical procedure ..."

5. Matters were further complicated when [REDACTED], during the course of the action, suffered severe internal pains. This development had to be investigated with especial care to see if the symptoms were to any extent associated with similar surgery previously undergone by their client earlier in 1987.
6. The Auditor has had fully explained to him the amount of preparation the solicitors required to undertake which was augmented by their client being in constant contact with them. She was much aggrieved by the mishap which had befallen her and the action taken while she was under anaesthetic and she wanted justice for a perceived injustice.
7. [REDACTED] was unsuccessful in her action as the Court was of opinion, having carefully valuated the medical evidence that the recognised procedures had been carried through and that the unfortunate outcome was due to the minimal deviation of the uterus which could reasonably have been discovered on examination.
8. The Auditor has considered the Process, read the thirteen page Opinion and perused a number of the medical reports in this case, and has taken account of the solicitor's and the Board's submissions on the amount of the additional responsibility fee. The Auditor recognises the amount



of time expended by the solicitors in advancing their client's complex and the specialised knowledge required of them and fixed the additional responsibility fee at the sum of TWO THOUSAND EIGHT HUNDRED POUNDS (£2,800.00) Sterling.

Supplementary Matters

There were two supplementary matters raised before the Auditor at the diet of taxation. One was in respect of the expenses of the solicitors attending at the diet of taxation in connection with the fixing of the additional fee, and the other related to the level of fee charged by a pathologist [REDACTED]. The Auditor deals with these seriatim.

Attendance at Taxation

The basic fees and outlays had been agreed between the solicitors and the Board prior to the diet of taxation but it was necessary for parties to attend before the Auditor to address him on the level of the additional fee to be fixed in this case.

The Board's copy of the Account of Expenses was made available to the Auditor for reference and there was therefore no requirement on the solicitors to make an additional copy.

It was submitted to the Auditor that the solicitors should be allowed fees for preparation for the taxation in addition to the time attending the taxation, and travelling time.

So far as the charge for preparation is concerned the Auditor notes that the solicitors would have to prepare and instruct Counsel for the motion to the Court for an additional responsibility fee and he would expect that the same information which would have to be placed before the Court to assist it in considering whether or not to allow an additional responsibility fee, would be required for presentation to the Auditor. The Auditor understands that the solicitors have been or will be paid for that earlier preparation and Court attendance and, therefore, does not consider that an additional charge for preparation for the appearance before him is justifiable.



With regard to travelling time the Auditor notes that there is no provision in The Civil Legal Aid (Scotland) (Fees) Regulations 1989, as amended, for such a charge and it is specifically stated in the Board's Taxation Guidelines (April 1992) Item 2.31 no charge for travelling time or expenses will be allowed for appearance at Court of an Edinburgh Solicitor. The Auditor therefore makes no award in respect of travelling time.

The Auditor is of opinion that the solicitors are entitled to be paid for their necessary attendance at the diet of taxation and that a charge for one hour is reasonable in this case.

Cost of Pathologist's Report

The Auditor was also asked to consider the charge of £266.66 by a [REDACTED], Pathologist, for a medical report and opinion.

The Auditor has seen the letter of instruction to [REDACTED] and considered his very detailed Report, (dated 22nd August 1991) with substantial and illustrated appendices, which considerably assisted in the understanding of his crucial Report of November 1987. The 1991 Report was particularly valuable to the solicitors as [REDACTED] was resident in Abu Dhabi and not conveniently available for consultation.

It appears that [REDACTED] was requested to review his 1987 Report in the light of averments made by the Defenders in the case, that inter alia:

"It is possible that as a result of earlier pregnancies there was a relatively minor deviation in the canal which induced a small digression of the dilator which would not have been felt...."

[REDACTED] apparently spent some ten hours in fulfilling the request which necessitated research into medical literature. His fee is charged at the modest rate of £25.00 per hour, making £250.00, with outlays for a courier service of £16.66.



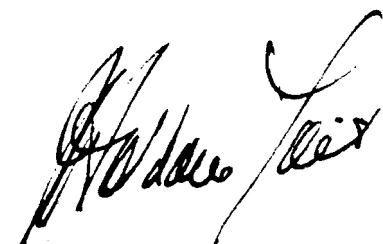
The Scottish Legal Aid Board had offered £156.00 in payment having regard to the **recommended only** (emphasis added) rates published by the British Medical Association (June 1990). The Association recognises that higher fees may be chargeable in special circumstances.

It was explained to the Auditor that the Board in considering requests for the sanctioning of experts has regard to the fees recommended in the British Medical Association's but occasionally is prepared to sanction payment of a higher fee.

The Board's Taxation Guidelines emphasises that a solicitor ought to check with the Board in advance what fee they are prepared to sanction. That this would not appear to have been done would not appear to be significant in this case since the solicitors had no alternative but to obtain from ■■■■■ the necessary explanatory Report on his previous Report of the examination of the Pursuer's uterus, which was no longer available for examination by another pathologist. The solicitors had to pay ■■■■■ his reasonable fee for fulfilling the request. ■■■■■ very thoroughly endeavoured to assist in the understanding of a crucial issue in the case and in so doing did not take an unreasonable amount of time to gather the supporting literature and prepare his Report.

In the course of the Proof the parties entered into a Joint Minute in which they inter alia agreed that the Report by ■■■■■ 'accurately recorded the condition of the Pursuer's uterus and cervix upon pathological examination by ■■■■■. That ■■■■■ legal advisers were subsequently able to enter into the Joint Minute undoubtedly saved time and the expense of ■■■■■ attendance at Court.

The Auditor considers that the fee charged by ■■■■■ is reasonable in the special circumstances of this case and should be paid as claimed.


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