

AUDITOR OF THE COURT OF SESSION

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

COUNSEL FEES

in causa

[REDACTED] & OTHERS

PURSUERS

against

GRAMPIAN HEALTH BOARD

DEFENDERS

EDINBURGH. 15th September 1994.

The Auditor has been asked in terms of Regulation 12 of the Civil Legal Aid (Scotland)(Fees) Regulations 1989 ('the Regulations') to tax the amount of the fees claimed by Senior and Junior Counsel for [REDACTED] and Others in respect of their work for conducting consultations and preparing for and conducting the Proof in the Cause, which was based on alleged medical negligence.

The Pursuers were respectively (1) the widow of [REDACTED] and their three children of their marriage and (2) two children of a former marriage of the deceased.

The circumstances giving rise to the action as narrated in the pleadings show that on or about 19th October 1986, [REDACTED] became unconscious for a short period of time in consequence of which he was admitted to Dr Gray's Hospital, Elgin, where he was seen by a physician who concluded that [REDACTED] had probably suffered a subarachnoid haemorrhage. After undergoing tests [REDACTED] was transferred to the Department of Neurosurgery, Aberdeen Royal Infirmary, under the care of a consultant there who, after examining [REDACTED] and carrying out tests, diagnosed collapse due to fatigue. On 23rd October [REDACTED] was discharged home without further investigative treatment, or a follow-up consultation. On 26th October 1986 [REDACTED] had a further episode of unconsciousness

and manifested abnormal behaviour resulting in his re-admittance to Dr Gray's Hospital. He was transferred to Aberdeen Royal Infirmary on 30th October where further tests were carried out on him. On 1st November 1986 Mr Stuart's neurological condition deteriorated and he died two days later. A post-mortem examination of [REDACTED] disclosed the presence of two aneurysms, one in the left anterior communicating artery and the second in left middle cerebral artery which had bled into the head causing raised inter-cranial pressure which resulted in [REDACTED] death.

The fault alleged against the consultant in the employ of the Defenders was that he had failed to carry out further appropriate diagnostic investigation such as cerebral angiography.

The Pursuers had the benefit of expert opinion, initially of two, and latterly of three, consultants. Unfortunately their evidence was contradictory in respect of different aspects of the management of the case and their varying views required to be appraised with extreme care so that the most supportive evidence for the Pursuers' case could be identified. To assist in the evaluation of the medical opinions it was necessary to hold consultations with each of the expert witnesses.

A Diet of Proof was originally fixed for 11th February 1992 but some weeks prior to that Diet, the Defenders lodged a Minute of Amendment which required the discharge of the Diet of Proof and further investigative and preparatory work had to be carried out.

The Proof in the action commenced on 27th October 1992 and lasted nine days. At the conclusion of the Proof the Court made avizandum and on 11th February 1993, in an Opinion extending to 47 pages, assoilzied the Defenders.

The Court, in its Opinion, narrated the essence of the expert evidence adduced before it and examined it in meticulous detail. The Court observed that the consultant's prognosis of fatigue following upon [REDACTED] first admission to Aberdeen Royal Infirmary was a speculative one and that a substantial body of the expert evidence was to the effect that, in 1986 no neurosurgeon acting with ordinary care and faced with [REDACTED]



██████ case would have taken the same approach as the consultant did in that case. The Court observed that the experts differed in some respect from each other but saw no reason for there not being different views in neurosurgery as in other fields of medicine. However the Court concluded that, as the experts adduced by the Pursuer, could not bring themselves to say that what was done was something that no consultant neurosurgeon of ordinary skill would have done if he had acted with ordinary care, the consultant could not be considered to have failed the legally accepted standard of care.

Having narrated briefly the circumstances of the case, the Auditor, before turning to the consideration of the increased fees claimed by Counsel, considers it appropriate to refer to the statutory scheme relating to fees for Senior Counsel in legally-aided cases in the Court of Session.

Schedule 4 of the Regulations contains a Table of Fees, Chapter II of which relates to those payable to Senior Counsel.

Item 4 of that Chapter states a fee of £113.00 for **Consultations** before proof or trial or otherwise involving a significant degree of preparation or lengthy discussion.

Item 5 thereof states a fee of £311.50 for a **Day in Court** in the Outer House.

Note 4 at the beginning of the Schedule is in the following terms:

"The Auditor shall have power to increase any fee set out in the Table of Fees in this 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."

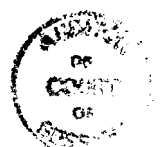
In giving consideration to the proper fee to be allowed to Counsel in this case, the Auditor has also in mind the opinion expressed by Lord Mackintosh in Elas v. Scottish Motor Traction Company Limited 1950 S.L.T. 397 where he said:



"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. 299, 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."

The Faculty of Advocates has not propounded fees in any type of cause for many years now. The Auditor is, however, of opinion that the fees for Counsel as contained in the above-mentioned Table are intended to be fees for what can be termed 'ordinary' or 'run-of-the-mill' cases and requiring only limited preparation. In the Auditor's opinion [REDACTED] case was clearly one of difficulty and complexity and requiring considerable preparation and was recognised as such by the Court in awarding an additional responsibility fee to the Pursuers' solicitors.

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 Senior Counsel, as to the extent of his work in respect of which the fees have been claimed. Counsel found it necessary to have many ad hoc discussions with the solicitors throughout the proof and also with the expert witnesses immediately prior to their giving evidence so that adjustments could be made to the conduct of the proof in light of the course it was taking. Furthermore in consequence of negotiations between Counsel, damages were agreed which shortened the proof.



The Auditor now turns to consider the increased fees claimed by R A Dunlop, Q.C..

A. CONSULTATIONS

	<u>Fee Claimed</u>	<u>Table Fee</u>	<u>Fee Offered</u>
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23rd October 1992

Consultation with two sets of agents to discuss:

- | | | | |
|--------------------------------|---------|-----------|--|
| 1. Joint Representation | | | |
| 2. Final Preparation for Proof | | | |
| 3. Medical Evidence to be led | £150.00 | (£113.00) | |

The Auditor, appreciated that this consultation was an important one, the consequence of which was that Senior Counsel's responsibility was increased since he was now to represent the interests of all the Pursuers. The Auditor is of opinion that the Board's agreement to an increased fee of £150.00 is reasonable.

26th October 1992

Consultation with two medical experts:

	<u>Fee Claimed</u>	<u>Table Fee</u>	<u>Fee Offered</u>
a. Mr Harris) 3 hours			
) (say) £250.00		(£113.00)	
b. Mr Steers) in all			
) (say) £250.00	£500.00	(£113.00)	£350.00

28th October 1992

Consultation with medical expert, Mr Hide - 2 hours	£300.00	(£113.00)	£225.00
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The Auditor is of opinion that the proper fee for the consultation on 26th October with the medical experts, Mr Harris and Mr Steers, lasting in all three hours, is £450.00. Counsel had to explore and appreciate the difference in views of these experts and reconcile them with the standard of proof required of the Pursuer. The fee for the consultation with Mr Hide two days later, lasting some two hours, is in the Auditor's Opinion, properly claimed at the sum of £300.00,



especially having regard to the fact that Counsel had to understand and appreciate the separate views of Mr Hide and explore these fully with him, and relate them to the already expressed views of the other two medical experts.

B. PREPARATION FOR AND CONDUCT OF THE PROOF

27th October 1992

The fees claimed for preparation for and conducting the Proof including miscellaneous meetings and advisings are as follows:

	<u>Fee Claimed</u>	<u>Table Fee</u>	<u>Fee Offered</u>
Each of 9 Proof Days	£800.00	(£311.50)	£600.00
Each of 3 (Non-Proof) Days	£310.00	(£311.50)	£200.00

The non-proof days fees claimed are in respect of Friday 30th October, at which time the Defenders' allegedly negligent Consultant, was still in the course of being examined-in-chief in the Pursuers' case, but was unable to return to Court to continue his evidence on that day. There being no other witnesses available on that day the Court adjourned until Tuesday 3rd November. The evidence in the Pursuers' case was concluded on Thursday 5th November. As the Defenders had no witnesses available to call on the following day, Friday, 6th November, the case was adjourned until Tuesday, 10th November, when it was further adjourned to 11th November, for the same reason.

Senior Counsel who spoke for himself and his Junior Counsel, Miss Laura J Dunlop at the diet of taxation explained to the Auditor that full use of these three days had been made in preparation of the Pursuers' case (30th November) having partly examined-in-chief the Defenders' Consultant and reviewed the evidence thus far in the light of the various opinions of the Pursuers' experts. On 6th and 10th November Counsel continued preparation for the cross-examination of witnesses in the Defenders' case, having completed examination of the Defenders' Consultant and led the evidence of the three expert medical witnesses for the Pursuers. The Defenders had lodged late, on 28th October, an Inventory of Productions containing the



medical literature to which their expert might refer in the course of his evidence. All that had to be read and understood by Counsel in a very short period of time before the proof commenced.

It was submitted on behalf of the Scottish Legal Aid Board that the increased fees offered were reasonable having regard to the circumstances of the case, which was accepted as being complex, and having regard to fees previously allowed in similar cases.

A fee for preparation, as such, is not an item separately provided for in the Table of Fees, but is nevertheless an integral and crucially important item of the work to be taken into account when fixing the proper fee for reasonable remuneration for a Day in Court. As was said by the Court in Geddes v. Lothian Health Board 1993 G.W.D. 11-76:

"As soon as one leaves the world of the run of the mill case, covered by the Table itself, I can see no basis for expecting the fee for a day or days in Court (inclusive of preparation) in one case to bear any relationship at all to the fee for that same item in another."

The Auditor considers that it is required of him in a case such as this, to take account of such necessary preparation when considering the fees claimed by Counsel for the Days of Proof.

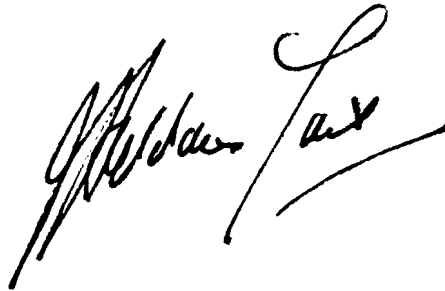
The Auditor notes however that Counsel, in order to demonstrate the additional preparation over three days, have identified it separately in their Fee Notes, and in the case of Senior Counsel has claimed in respect of it a fee of £310.00 for each day. It might have been more easily understood if the fee claimed had not superficially approximated to that shown in the Table for a Day in Court, which it was not.

The Auditor having taken account of the whole circumstances of the case as outlined above and being satisfied as to its difficulty and complexity increases the fee for a Day in Court (inclusive of preparation) to £850.00.



JUNIOR COUNSEL'S FEE

Miss Laura J Dunlop, Advocate was Junior Counsel for the Pursuers in the cause and the Auditor increases the fees for her, in respect of her similar involvement in the Consultations and the Days in Court, to sums equivalent to two-thirds of the increased fees for Senior Counsel, there having been no submissions for a departure from the customary proportion for a Junior Counsel.

A handwritten signature in black ink, appearing to read 'G. Alder Law', written in a cursive style.

AUDITOR OF THE COURT OF SESSION

ACULTY SERVICES LIMITED



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F.S. REF. A205/ST920117/02
DATE OF ISSUE 24-NOV-92
SOLICITORS REF. JAW/SMC0681
SOL. LEGAL AID CODE

Please quote Faculty Services Ref. on all correspondence

CASE [REDACTED] V GRAMPIAN HEALTH CIVIL - LEGAL AID.
CLIENT [REDACTED] BOARD L.A. CERT No.
CORRESPONDENT [REDACTED] ISSUE DATE NOT KNOWN
ADVOCATE MISS LAURA J. DUNLOP, B26 VAT REG. No. 553 3483 40

Item Date	Details	Item Amount
26-OCT-92	CONSULTATION WITH MEDICAL EXPERTS, <i>L.A. SCALE OFFER</i> MR. HARRIS & MR. STEERS (3 HOURS) <i>43.00</i> <i>200.00</i> 250	333.00/
28-OCT-92	CONSULTATION WITH MEDICAL EXPERT, MR. HIDE (2 HOURS) <i>43.00</i> <i>150.00</i> 165	200.00/
27-OCT-92	PREPARATION FOR & CONDUCTING OF PROOF INCLUSIVE OF ALL MISCELLANEOUS MEETINGS & ADVISINGS 27.10.92 - 30.10.92, 03.11.92 - 06.11.92, 10.11.92 - 13.11.92 <i>9 DAYS @ 540.00 & 3 DAYS @ 210.00</i> (SEE SUPPLEMENTARY NOTE ATTACHED) <i>177.60</i> <i>3400.00</i> PER DAY	5490.00/
	*** LEGAL AID *** <i>9 x £350</i> <i>3 x £150</i>	TOTAL 6023.00
	TOTAL VAT AT 17.50	1054.03
		7077.03

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F.S. REF. A205/ST920117/03
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CASE [REDACTED] V GRAMPIAN HEALTH CIVIL - LEGAL AID.

CLIENT BOARD L.A. CERT No. [REDACTED]
 CORRESPONDENT ISSUE DATE NOT KNOWN

ADVOCATE R.A. DUNLOP, ESQ., Q.C. D13 VAT REG. No. 345 0566 62

Item Date	Details	Item Amount
23-OCT-92	CONSULTATION WITH TWO SETS OF AGENTS TO DISCUSS 1. JOINT REPRESENTATION 2. FINAL REPRESENTATIONS FOR PROOF 3. MEDICAL EVIDENCE TO BE LED	150.00 ✓
26-OCT-92	CONSULTATION WITH MEDICAL EXPERTS MR. HARRIS & MR. STEERS (3HOURS)	500.00 ✓
28-OCT-92	CONSULTATION WITH MEDICAL EXPERT MR. HIDE (2 HOURS)	300.00 ✓
27-OCT-92	PREPARATION FOR & CONDUCTING OF PROOF INCLUSIVE OF ALL CONTD./	
*** LEGAL AID ***		
		TOTAL 950.00
		TOTAL VAT AT 17.50 166.25
		1116.25

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F.S. REF. A205/ST920117/04
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CASE [REDACTED] V GRAMPIAN HEALTH CIVIL - LEGAL AID.
 CLIENT BOARD L.A. CERT No.
 CORRESPONDENT [REDACTED] ISSUE DATE NOT KNOWN
 ADVOCATE R.A. DUNLOP, ESQ., Q.C. D13 VAT REG. No. 345 0566 62

Item Date	Details	Item Amount
	MISCELLANEOUS MEETINGS & ADVISINGS - <i>L.Aid Offer</i> 27.10.92 - 30.10.92, 03.11.92 - 06.11.92 10.11.92 - 13.11.92 - <u>9 DAYS @ 800.00</u> 311.50 <i>9 x 500 600</i> <u>3 DAYS @ 310.00</u> (SEE SUPPLEMENTARY NOTE <i>PER DAY</i> ATTACHED) <i>3 x 200</i> <i>CANCELLED DAYS.</i> *** LEGAL AID ***	8130.00 6000.00
	TOTAL	8130.00
	TOTAL VAT AT 17.50	1422.75
		9552.75

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