

AUDITOR OF THE COURT OF SESSION

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COUNSEL'S FEES

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in causa

CH

(FIRST) [REDACTED] (AP) and (SECOND) [REDACTED]  
[REDACTED], Spouses, residing at  
141 Reidvale Street, Glasgow

PURSUERS

against

**GREATER GLASGOW HEALTH BOARD**, a Health Board  
constituted under and in terms of the National Health Service (Scotland)  
Act 1978 and having their principal offices at  
25 Bath Street, Glasgow

DEFENDERS

EDINBURGH. 25th August 1997.

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 Mr. John L. Mitchell, Q.C., and Dr. Helen K. Dougall, Advocate, respectively Senior and Junior Counsel for Mr. Robert Cairns and Mrs. Christine Cairns in respect of their work preparing for and conducting the Proof in an action in the Court of Session based on alleged medical negligence.

The Auditor held a diet of taxation at which Senior and Junior Counsel attended. [REDACTED] and [REDACTED] appeared for the Scottish Legal Aid Board ('the Board').

Grounds of Action

It was claimed that [REDACTED] death was attributable to a failure in one or more of several duties, namely:-

- i) A failure to consider the advisability of re-operating to close a residual ventricular septal defect from the previous operation.
- ii) Failure to consider treatment of a Haemophilus influenzae infection.
- iii) Failure to keep [REDACTED] in the Intensive Care Unit at a time when her condition was showing no improvement, and
- iv) Failure to return [REDACTED] from a general ward to the Intensive Care Unit when she suffered a significant deterioration in her condition on 27th July 1988.

### Background

The Pursuers are husband and wife and parents of [REDACTED]. On 18th December 1989 [REDACTED] raised an action in the Court of Session against Greater Glasgow Health Board in consequence of the death of their daughter Sheree, who was born on 17th October 1987, and who died in the Royal Hospital for Sick Children, Yorkhill, Glasgow on 28th July 1988.

When [REDACTED] was born she was found to have hydrocephalus. She was transferred to Yorkhill on 17th November 1987 where she underwent surgery for insertion of a ventriculoperitoneal "shunt". While in hospital her heart was found to have both an atrial septal defect and a ventricular septal defect. After discussion with the parents an operation to close both defects was carried out on 6th July 1988. Sheree remained in the Intensive Care Unit for a period and was then transferred, on 26th July, to the High Dependency Unit. It was the period from 6th July 1988 until Sheree's death on 28th July 1988 that was the subject of detailed consideration in the litigation.

As [REDACTED] were ignorant of the possible failures in the treatment and care of [REDACTED] these had first to be identified and thereafter required to be

fully investigated. The work involved meticulous consideration of [REDACTED] medical records and thereafter obtaining and considering expert medical reports on different aspects of her treatment. Suitably qualified experts had first to be identified. That having been done, Reports were obtained from a Consultant Cardiothoracic Surgeon, a Consultant Paediatric Cardiologist, a Consultant in Paediatric Pathology, a Professor of Diagnostic Radiology and a Consultant Anaesthetist. In addition the evidence of hospital consultants and staff involved at one time or another in the care of [REDACTED] also had to be carefully considered.

After sundry procedure the Proof began on 22nd February 1994 and continued for two days, and was then adjourned on 24th February to allow [REDACTED] to lodge a Minute of Amendment. The Proof, therefore, did not proceed on 25th February although Counsel had been instructed and prepared for that day.

The Proof resumed on 27th September and continued for four days and adjourned until 4th October on which date it was unable to proceed on account of the illness of the Judge taking the evidence.

The Proof resumed again on 18th April 1995 when the Defenders' case was opened and continued until 21st April. When the case called again on 25th April it could not proceed on account of the illness of the Judge, who subsequently died.

Parties thereafter agreed that the remainder of the Proof be taken by another Judge. The proof resumed on 14th November 1995 and concluded on 23rd November when the Court made avizandum.

Agreement as to the quantum of damages was reached in the course of the Proof and a Joint Minute was lodged on the last day of the Proof leaving the Court to decide on the matter of liability.

On 16th May 1996 the Court, in an Opinion extending to 72 pages, narrated the essence of the expert evidence adduced before it, examined it in meticulous detail and concluded that [REDACTED] medical records, read as a whole, did not reveal a picture of persisting and increasing infection in [REDACTED] as contended for by her parents and consequently the Court did not find the cause of her death and the issue of fault alleged by [REDACTED] to have been established.

### Counsel's Fees - General

Having narrated briefly the circumstances of the case, the Auditor, before giving consideration to the increased fees claimed by Counsel, considers it appropriate to refer firstly to the relevant parts of the Regulations relating to fees for Counsel in legally-aided cases in the Court of Session. These are as follows:-

#### **"Fees allowable to counsel**

9. Subject to the provisions of regulation 10 regarding calculation of fees, counsel may be allowed such fees as are reasonable for conducting the proceedings in a proper manner, as between solicitor and client, third party paying.

10. (1) Counsel's fees in relation to proceedings in the Court of Session shall be calculated in accordance with Schedule 4."

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

At the beginning of the Schedule there are a number of notes.

Note 2 is in the following terms:-

"Where the Table of Fees in this Schedule does not prescribe a fee for any class of proceedings or any item of work, the auditor shall allow such fee as appears to him appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general levels of fees in the said Table of Fees." and

Note 4 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.”

Item 5 of the Table contained in ‘Chapter II - Senior Counsel’ of the Table of Fees states a fee of £311.50 (1994) and £320.80 (1995) for a Day in Court in the Outer House.

**Fees Claimed**

The fees claimed by Senior Counsel for preparation for and conduct of the Proof are as follows:-

	<u>Number of Days</u>	<u>Court Days</u>	<u>Fee Claimed per Day</u>	<u>Fee Offered per Day</u>
<u>1994</u> Feb	3	<u>*Actual</u> 22-24 Feb	£1,000	£750
Feb	1	<u>Commitment</u> 25 Feb and 1st and 2nd March	{£1,000 {	NIL
Sept	4	<u>*Actual</u> 27-30 Sept	£1,000	£750
Oct	4	<u>Commitment</u> 4-7 Oct and	£320	NIL
	4	11-14 Oct	£320	NIL
<u>1995</u> April	4	<u>*Actual</u> 18-21 April	£1,000	£750
April	4	<u>Commitment</u> 25-28 April	£320	NIL
		<u>Commitment</u> 2nd - 5th May	NIL	-
Nov	4	<u>*Actual</u> 14-17 Nov	£1,000	£750
Nov	1	<u>Preparation</u> 21 Nov	£1,000	NIL
Nov	$\frac{2}{17}$	<u>*Actual</u> 22-23 Nov	£1,000	£750
	$\frac{1}{14}$			

As will be seen from the foregoing the fees claimed fall into three separate categories, namely (i) Court days, (ii) commitment and standby days, and (iii) an additional preparation day. The Auditor now considers each of these as follows:-

**(i) Court Days**

In this case there were 17 Court days as noted and starred.

Counsel submitted that the fee of £1,000 claimed for each of these days was reasonable having regard to the complexity of the cause and in support of these fees the Auditor, and the Board's representatives, were handed at the diet of taxation a Supplementary Note by Junior Counsel in amplification of a Note dated 22nd January 1997 by Senior Counsel, a copy of which had earlier been submitted to the Board. Both Notes set out the difficulties encountered in the case. The fuller Supplementary Note was in the following terms:-

"4. The evidence led in support of the pursuers' case was primarily medical (apart from the evidence of the pursuers themselves) and covered a number of areas, namely:-

cardiac surgery  
cardiology  
radiology  
pathology  
anaesthetics and the blood chemistry of ventilation and acid-base balance  
bacteriology (*This item added at diet of taxation*)

5. Five expert witnesses were called by the pursuers to speak to the various areas of the case, and a great deal of time required to be taken by counsel in preparing to lead such complex medical evidence. this evidence included, for example, the displaying of a series of x-rays and interpreting them for the Court, as well as dealing with the specifics of congenital cardiac defects, paediatric cardiac surgery, the extremely complex relationship of acid and alkali balance in the blood as it relates to oxygenation of the blood, and the finer points of histological examination of lung tissue and bacteriology results. Considerable time was devoted to going through the intensive care records for the child, each sheet requiring to be dealt with in detail and the vast amount of information present on each sheet needing to be interpreted, put to the expert and explained to the court.

6. The defenders called seven medical witnesses and one nurse. Her evidence required to be taken on commission in Ayrshire - this necessitated the allowance of one court day to deal with the matter. The seven medical witnesses included those who had treated [REDACTED], along with experts of a similar standing to the pursuers' experts. These witnesses again required to be taken through the vast amount of documentary and x-ray evidence, and to have all the various elements of the pursuers' case put to them.

7. Because of the procedural difficulties in the case (to which further reference is made below) the notes of evidence required to be extended, such that there were eventually 11 volumes of evidence which required to be summarised by counsel prior to making submissions in the case. (Senior and junior counsel divided the summation of the evidence between them). This took up a considerable period of time.

8. The pursuers' agents recovered what they were told were the principal medical records prior to the proof, and lodged these in process. Although they were photocopies, they were informed by the defenders that they were the only copies available. On the morning of the proof the defenders proceeded to lodge the principal medical records, which counsel for the pursuers and the experts had not had an opportunity to peruse. These records were also arranged in a different fashion from the pursuers' copies and the numbering of the records was different. This causes immense difficulties because counsel for both sides had each prepared their cases using their own parties' copies of the notes. As a result, junior counsel required to spend considerable time preparing a cross reference of the pages between the different copies. She also cross-referenced the notes of evidence for senior counsel to allow submissions to be made to the Court using both references."

It was submitted that the case had been made uniquely more complex because of the failing health, and untimely death, of the Lord Ordinary who had heard the initial evidence in the cause, being the evidence of the pursuers and their witnesses, and part of the defenders' evidence.

The history of the Proof (quoting from Supplementary Note) was as follows:-

"1. The case originally commenced in February 1994, when it was set down for 6 days. After three days of evidence, it was apparent that the proof was not going to conclude in 6 days and a minor pleading point was raised by the defenders which resulted in a brief Minute of Amendment being drafted on behalf of the pursuers. As a result of this Minute, the defenders moved for an adjournment of the proof and the case to be

continued to a date to be fixed. Counsel rendered fees for four days at the enhanced rate to take account of the three days during which the Court sat, and the disappointment element in not sitting for a further three days, which had been in the diary and prevented any other work being instructed for the following week after the adjournment.

2. Discussions took place between parties thereafter and it was agreed that 12 further Court days would be required to hear the evidence. The proof recommenced on 27th September 1994. The pursuers' case continued that week and the evidence on behalf of the pursuers was completed by the end of the first allocated week. The defenders' case was due to commence on 4th October 1994. However, counsel were informed that Lord Morton was unable to sit that day, but they were to remain available to proceed with the case on the following day. Lord Morton did not sit at all that week, but counsel required to hold themselves available to sit, should he be well enough to hear the case. No other court work could be undertaken by counsel over this period. Similarly, for the week commencing 11th October 1994 counsel were informed on the preceding Friday that Lord Morton hoped to sit that week. However, he was once more unable to sit, but counsel had again to remain available and were not able to undertake any other court appearances. It was not until the Thursday of that week that counsel were informed that Lord Morton would not be able to hear any further evidence in the case during that sitting.

3. Lord Morton was by this time terminally ill. However, he expressed a wish to complete the case and a further diet of proof, for 12 days was set down to commence in the last week of the Easter vacation in 1995. (12 days were again allocated to allow for any shortened days which may require to occur because of Lord Morton's poor health). The proof recommenced on 18th April 1995, and the evidence for the defenders was led for four days. On Monday 24th April counsel were first informed that Lord Morton would be sitting during that week, and later in the day were informed that he would not. Lord Morton in fact died during the course of this week. Senior and junior counsel did not receive any other instructions for Court during this or the following week, and instead spent the week of 24th April working on the case. The fee charged reflects not only the work done that week, but also the disappointment element in having eight days marked out of the diary for a Court appearance which did not take place.

4. After Lord Morton's death the matter was remitted to the Inner House and a direction given that the case was to proceed from the point where it left off with Lord Prosser taking Lord Morton's place. Another 12 days were allocated for the continued proof, to allow for the fact that matters would probably proceed more slowly because Lord Prosser had not previously been involved in the case.



5. Prior to the continued proof date of 7th November 1995, discussions took place between Lord Prosser and counsel. Lord Prosser indicated that he wished to take the first week set down for the proof to read in to the case and then commence the proof in the second allocated week. He did have discussion with junior counsel for both sides during this week, to clarify various procedural and other matters which arose during his study of the case. During this week a commission was also held in Ayrshire to take the evidence of the nurse involved in [REDACTED] care. With travel this required an entire day to be marked out of the diaries, and a court day has been charged accordingly. No offer of any payment for this day appears in the Board's letter to counsel of 2nd April. The remainder of this week was spent in preparing for the continued diet and reading into the extensive notes of evidence which had been amassed by that time.

6. The proof was then heard over the seven days from 14th November 1995 (L. Williamson acted as junior counsel on 17th November because junior counsel had to attend a family funeral.) These days have been charged at the enhanced rate, with no charge being made for the last day the proof was set down for, 24th November 1995."

#### Submissions by the Board

It was submitted on behalf of the Board that the increased fees offered for 17 days in Court, namely £750.00 per day for Senior Counsel and £500.00 per day for Junior Counsel, 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.

The letter from the Board to Counsel's clerk of 2nd April 1997, which was referred to in Counsel's Supplementary Note, concluded in the following terms:-

"The offer would therefore be 17 days at £750 for senior and 17 days at £500 for junior. This offer should reflect the preparation and the non-proof days."

The Board in support of the fees offered stated that they had not got "the feel", from the information available to them, that the preparation of the cause, which it was accepted justified increased fees, merited such increased fees as claimed.

The Auditor noted that the Board, prior to making its above-mentioned offer on 2nd April had received a copy of a Note from Senior Counsel dated 22nd January 1997, extending to five pages, and to which reference has already been made. That Note gave the substance of what was contained in the Supplementary Note presented at the diet of taxation. The Board had already seen and adjusted the solicitors' legal aid Accounts and had at various stages in the course of the cause, sanctioned the engagement of a number of expert medical witnesses required by the Pursuers in support of their case. The Board in taxing the solicitors' Accounts would have access to the various expert reports obtained, and the

tranches of extended Notes of Evidence. The Auditor has perused the experts' reports and the Process.

In giving consideration to the proper fee to be allowed to Counsel in this case, the Auditor has 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, at page 311, "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 considerations to which the Auditor is required to give attention when considering what is a 'proper fee' of 'competent counsel' were adverted to in the Opinion of Lord President Cooper in *Macnaughton v Macnaughton* 1949 S.C.42 at page 46 where he stated:-

"..... 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 specialities, and this second approximation may yield a **substantially** (*emphasis added - Auditor*) higher figure."

The Auditor notes that a fee for preparation work, as such, is not an item separately provided for in the Table of Fees for Counsel, 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 in *Geddes v Lothian Health Board* 17th February 1993 (partially reported in 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."

That the case was not a 'run-of-the-mill case' was recognised by the Court, which considered it appropriate to award the solicitors for the Pursuers an additional fee.

The Auditor is fully satisfied as to the extreme complexity and novelty of the matters raised in the cause in respect of which Counsel had to prepare, and the consequent trouble and preparation, which must have been very considerable, requiring, as it did, consideration of a variety of medical specialisms. It would be essential for Counsel to have discussions with the solicitors throughout the proof and also with the expert witnesses immediately prior to their giving evidence and thereafter 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 is consequently of opinion that the fees charged by Counsel for preparation and conduct of the seventeen days of Proof are reasonable, more especially having regard to the fact that the Proof which, for the tragic reasons already mentioned, required to be taken in tranches over an unusually extended period of time.

**(ii) Commitment Days**

The Auditor now turns to the prescribed "Day in Court" fees claimed by Counsel in respect of:

- a) 25th February and 1st and 2nd March 1994,
- b) 4th to 7th October 1994,
- c) 11th to 14th October 1994, and
- d) 25th to 28th April 1995

on which days Counsel did not appear in Court, and fees for which are described as "disappointment fees" by Counsel in the Supplementary Note.

In respect of these fees the Board drew to the Auditor's attention the decision in *Gorrie v Ciba Geigy Ltd* 26th June 1996 - 1996 G.W.D. 28-1685, where the Court there observed -when considering the taxation of a party and party account - that no fee is payable to Counsel for "the deprivation of counsel of the opportunity of conducting some other cause."

The Board submitted that there was no provision for paying Counsel fees for such days, however unfortunate that might be in the circumstances which had occurred. Reference was made to *H M Advocate v Birrell* -1994 S.L.T. 480. The Court in that case, however, considered (page 484 B-C):-

"that it is not helpful to attempt to draw a parallel with fees payable in civil business. *Mackie v Gibb* was a case in which counsel were instructed for a jury trial but the case was settled on the morning of the

day fixed for the trial. The auditor refused to allow the pursuers, who had been found entitled to expenses, to recover fees paid to their counsel for the trial day. The court held that such fees were recoverable and the Lord Justice Clerk observed, at p 43: "When counsel are instructed, they have to prepare, and they have practically to give up all other work. Whether the trial goes on or not their professional day is gone."

The Court went on to say, at page 484 L:-

"It seems to me, however, that in considering what is reasonable remuneration for waiting days, the auditor would be entitled to have regard to the actual circumstances rather than to any hypotheses drawn from the table of fees. Accordingly, in my view, in a case in which there is a dispute, the auditor requires to make a judgment as to what is reasonable remuneration for the waiting days, having regard to the actual circumstances, such as the time involved and the cost incurred in attendance at the court, wherever it may be held. That may well not be an easy task for the auditor to perform, but in the absence of any clearer basis in the regulations or the table of fees for establishing the correct remuneration for a waiting day, it seems to me that there is no alternative but to leave the matter to the judgment of the auditor, to be exercised in the manner which I have endeavoured to describe."

The Auditor endeavoured at taxation, but without success, to ascertain the component parts of the fees offered by the Board for days in Court and said to "reflect the preparation and non-Court days" in the Board's letter of 2nd April 1997. It became apparent, however, that it was the Board's view that non-Court days fell to be disregarded.

The submission to the Court in *Gorrie* that fees which had been claimed for preparation in that case, if not justifiable under that head, were nevertheless allowable as "disappointment fees" appears to have been made more as an ultimate crie de coeur and not out of the stated reasons for which the Auditor had allowed the disputed fees. In any event if what the Auditor considers was said by way of obiter in *Gorrie* is relevant to this cause, in which the fees fall to be taxed as between solicitor and client, third party paying, the issue becomes more complicated because, following upon the decision in *Gorrie*, the Practice Note dated 26th September 1996 was promulgated. That requires the Auditor to have consideration to the factors specified in Paragraph 5.12 of the *Guide to the*

*Professional Conduct of Advocates* (June 1988) when considering the reasonableness of a fee such as has been claimed by Senior Counsel.

Paragraph 5.12 is in the following terms:-

"5.12 *Fees for settled or discharged cases.* Normally, a fee is only chargeable when instructions have been given and accepted. Where instructions have been given and accepted, an advocate is entitled to charge the full fee for the work instructed even if the case is subsequently settled or the diet is discharged. In addition, where the solicitor knows, or ought in the circumstances reasonably to be aware, that counsel, in order to comply with his obligations under paragraphs 4.6.1-8 above, has kept himself free from other commitments, a fee appropriate to the circumstances may be charged. Relevant circumstances will include time spent in preparation and the extent to which counsel has been unable to accept other instructions. Counsel may also charge a fee for negotiating a settlement."

The status of a Practice Note vis a vis a decision of a Court has not so far been determined but the Auditor is required to take account of it. However, the Auditor, for the above reasons, being of opinion that the views expressed by the Court in *Gorrie* were not necessary for its decision on the matter before it, namely "preparation fees", and having regard to the terms of the subsequent Practice Note which makes specific reference to the decision in *Gorrie*, and further having regard to the terms of Rule of Court 42.10(1), the Auditor considers that it was necessary for [REDACTED] solicitors in discharge of their professional responsibility to their clients, to instruct Counsel to conduct the Proof sufficiently in advance of the date of the Proof to enable Counsel to prepare adequately for that Proof and that, therefore, it would be reasonable for the clients to expect to be able to recover, on success, that expense which was necessarily incurred for the conduct of the cause, and that it would be unreasonable to expect the commitment of a Counsel to a case which resulted in

his or her inability to accept other competing instructions, or in receiving no similar work for the "vacated period", to be a gratuitous commitment. The incurring of such an expense is an expense to which a party has been put for the conduct of the cause in a proper manner. It is axiomatic that no Counsel can properly conduct a proof without receiving and accepting instructions in advance of the hearing (and sometimes substantially in advance of the hearing) and the acceptance of those instructions inevitably means that Counsel cannot make himself, or herself, available to any other party for court work during that period. However the Auditor recognises that any fee for such engagement would reasonably require to be reduced to the extent that such Counsel could reasonably be expected to obtain alternative court work, although that reflects in the *quantum* but not the principle of the matter.

The circumstances of this case were, as already fully explained, quite unique.

The Auditor, therefore, is of opinion that what may be described more accurately as "commitment fees" are appropriate in this case in respect of each of the days for which Counsel was committed to the conduct of the proof and was on standby to do so whenever the Court was ready to proceed on any of the allocated days, and in any event was committed to these days, and thereby could not undertake any other work in respect of these days and furthermore received no other like work in respect of the final eight days of the second tranche allocated for the proof, i.e. 25th to 28th April and 2nd to 5th May - for the last four of which days Counsel does not seek a fee.

The foregoing view appears to be consonant with the opinion of Lord Trayner in *Mackie v Gibb* 2 F 42 at page 44:

"The Auditor has struck off part of the fees sent to counsel - fees quite warranted by the practice and the decisions of the Court - because the case was settled by the parties before the jury were empanelled, and the counsel were accordingly not engaged on the case for the whole day as had been expected. But the Auditor overlooks or disregards the fact that counsel had arranged to devote their day to the case, and in all probability had

given up other engagements to enable them to do so. There is no principle to justify what the Auditor has done."

The Auditor has noted that *Birrell* was concerned with the provisions of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, Regulation 10 of which refers to Counsel being remunerated "for work actually (*emphasis added - Auditor*) and reasonably done." There is, however, significantly no analogous provision in the Civil Legal Aid (Scotland) (Fees) Regulations. The Auditor considers that, having regard to the terms of Regulation 9 of the Regulations (Civil) referred to at the beginning of this Note, the fee claimed for each of the "commitment" days is reasonable to ensure that the proceedings could be conducted in a proper manner as between solicitor and client, third party paying. Counsel continuously awaited the Court's calling for them to proceed with the conduct of the Proof. They could accept no other work which would conflict with that obligation.

A comparable situation arose in *Independent Pension Trustees Limited v L.A.W. Construction Co Ltd (No. 2)* 17th December 1996 - 1997 G.W.D. 8-336 where the Court observed, in awarding the Pursuers' full expenses:-

"The By Order appearances referred to by Mr Sellar were occasions on which matters could not proceed as a result of commitments I was obliged to discharge in the High Court of Justiciary. In my view, that circumstance does not justify any special disposal of those expenses *inter partes*. "

As already mentioned, the procedural circumstances in this cause fall to be regarded as unique. Counsel were committed to the cause and were obliged to hold themselves available on a day-to-day basis, to continue with the conduct of the Proof whenever the Judge considered himself fit to proceed with it as was his known wish to do so as expeditiously as possible. Counsel could accept no other work that would conflict with that obligation.

As to the level of the fees claimed, namely the prescribed day in court fee, it was

submitted by the Board that, if the Auditor were to be disposed to allow fees in respect of these days, then as the fee is considered to contain an element of preparation work, the daily fee allowed should be somewhat less than the prescribed fee. The Auditor is of opinion that in the unique circumstances of this cause, as Counsel had to keep continuously in the forefront of their minds the mass of medical detail, the full prescribed fee claimed is reasonable.

As the Court noted in *White v Grieve* 1867 5 S.L.R.77 "it is impossible that any Counsel can carry in his mind the details of a case, even if it is well known to him at the time".

(iii) Additional Preparation Day

Finally the Auditor considers the fee claimed for Tuesday, 21st November 1995. That day would normally have been the first day for speeches and submissions by parties on the evidence. The Court itself, in taking account of the availability of the week-end and Monday for preparation prior to what would be the usual commencement on Tuesday, recognised that an additional day for preparation of submissions was reasonably required by Counsel for both parties having regard to the complexity of the cause and to assist the Court to the fullest extent in its consideration of the evidence, particularly as the Lord Ordinary who concluded the cause had not personally heard any of the Pursuers' evidence and had thereby been denied the usual opportunity both to ask questions of witnesses to clarify their evidence and to assess the credibility of these witnesses.

The Auditor considers the preparation fee of £1,000 claimed for that day, when considered along with the increased fees allowed for the proof days, to be reasonable for all the necessary preparation and conduct of the cause in Court.

The Auditor considers the aggregate remuneration allowed to Counsel for his work in the complex cause to be reasonable, particularly when account is taken of the circumstances which bore upon its presentation. As was noted in *Gunn v*



*Muirhead 2 F 10*, the detail in the cause was everything and Counsel could not be expected to carry in their heads the details of the evidence over an extended period of time.

**JUNIOR COUNSEL'S FEE**

Dr. Helen K. Dougall, Advocate, was Junior Counsel for the Pursuers in the cause and the Auditor allows her fees as claimed in respect of her similar involvement.

A handwritten signature in black ink, appearing to read "Helen K. Dougall", written over a horizontal line.

AUDITOR OF THE COURT OF SESSION