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DUNDEE, 27 May 1999. The Sheriff having considered the motion made by the solicitor for Susan Hargreaves or Deans in the application under Section 65 of the Children (Scotland) Act 1995 for an additional fee in terms of paragraphs 5(4)(a), (c) and (e) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 Grants same to the extent of allowing an increase of 30% over and above the fee otherwise recoverable.



**NOTE**

Following the conclusion of the hearing of this application, Mrs. Garvie, the solicitor acting for Susan Hargreaves or Deans, the mother of the child Emma Deans, who was the subject of the application, lodged a motion seeking a percentage increase of fees authorized for payment by the Scottish Legal Aid Board (SLAB) in respect of the proceedings. The matter called before me on 13 May 1999 and I was addressed by Mrs. Garvie on behalf of Mrs. Deans and by Mr. Shearer on behalf of SLAB.

Reference was made to the following, namely: -

- (a) Miller Caldwell -v- Miss Janice Walker, a decision of Sheriff Principal Cox at Airdrie on 1 September 1998 (unreported),
- (b) the case of David Bunting, a decision of Sheriff K.A. Ross at Linlithgow dated 18 December 1997 (unreported),
- (c) Fatal Accident Inquiry decision by Sheriff Principal Nicholson on the deaths of William Callaghan and Anne Halloran dated 5 March 1997 (unreported),
- (d) L Petitioners (3) 1996 (SLT) at page 928,
- (e) Sheriff Court Practice by I.D. McPhail, Second Edition, Chapter 5.

I feel it is appropriate that I set out in the first place the statutory framework.



Regulation 5(4) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 is in the following terms, namely:

“In all Court of Session proceedings a fee, additional to those set out in Schedules 1 or 3, may be allowed at the discretion of the Court to cover the responsibility undertaken by a solicitor in the conduct of the proceedings. In the Sheriff Court, in proceedings of importance or requiring special preparation, the Sheriff may allow a percentage increase in a cause on the Ordinary Roll, not exceeding 50%, and in a cause on the Summary Cause Roll, not exceeding 100% of the fees authorized by the Schedule 2 or 3 to cover the responsibility undertaken by the solicitor in the conduct of the proceedings.

The Sheriff in fixing the amount of a percentage fee increase shall take into account the following factors”. There then follows a list of the factors concerned.

Mr. Shearer argued that the motion was incompetent and referred me to the terms of Regulation 5(4) and indicated that these were not proceedings on the Ordinary Roll. He conceded that the changes in Ordinary Cause Rules in the Sheriff Court may have overtaken the legal aid regulations.

In addressing the authorities Mr. Shearer made particular reference to the case of Caldwell -v- Walker where Sheriff Principal Cox quite clearly stated that in his view a motion of this nature is incompetent. He states “To anyone who has detailed knowledge of the procedure in the Sheriff Court it is apparent that these proceedings could not be described as ‘a cause on the Ordinary Roll’ nor ‘a cause on the Summary Cause Roll’.”

In fairness, Mr. Shearer conceded that it was the historical practice of the Legal Aid Board not to intervene when such motions as this were put forward and increases



had been granted. He also conceded that increases were granted in Fatal Accident Inquiries. On his argument in this case however, a motion in a Fatal Accident Inquiry would be equally incompetent.

Mr. Shearer indicated that he appeared as a solicitor in the case of L Petitioners no. 3 and stated that there was no specific debate in the action about the competency of a motion under Regulation 5(4) but, on a reading of our Lord Hope's judgement at page 932, it could be argued that Regulation 5(4) applies to all proceedings where legal aid was granted. In the case of L Petitioner the Court of Session effectively granted Section 29 legal aid to cover all proceedings which had gone on in the Sheriff Court and indicated that the proceedings were Sheriff Court proceedings for the purpose of legal aid regulations.

The case of L Petitioner involved a number of motions relating inter alia to matters of legal aid. It was a complex action which had been to the Court of Session on numerous occasions. The Sheriff had at some stage granted civil legal aid. Legal aid had been withdrawn. There were questions before the Court as to whether civil legal aid or Section 29 legal aid was appropriate, whether the proceedings were Court of Session or Sheriff Court proceedings and whether suspension of legal aid could be removed and legal aid cover effectively be backdated. At the end of the day the Court decided that the appropriate form of legal aid was under Section 29 and an order to that effect was made and it was to apply to the whole of the proceedings which took place before the Sheriff in what were Sheriff Court proceedings.

At page 932 Lord President Hope then turned to the motion on behalf of the Petitioners for an additional fee in terms of Regulation 5(4). He says "Here there is no complication about the distinction between civil legal aid and legal aid which has been



made available under Section 29 of the 1968 Act.” The only issue was whether the proceedings before the Sheriff fell to be regarded as Court of Session proceedings or Sheriff Court proceedings for the purposes of the regulation. In the opinion of the Court the proceedings before the Sheriff were proceedings in the Sheriff Court for the purposes of Regulation 5(4).

He then goes on to say between paragraphs (E) and (F) “Counsel for the first and second petitioners pointed out that, as proceedings under part III of the Social Work (Scotland) Act 1968 are sui generis they could not with complete accuracy be described as proceedings in a cause on the Ordinary Roll. She suggested that it was unclear how the provisions of Regulation 5(4) were to be applied in this case. In our opinion these proceedings are sufficiently similar to proceedings on the Ordinary Roll for it to be appropriate for 50% to be regarded as the maximum percentage increase which the Sheriff may allow.”

Mr. Shearer quite fairly said that if the Inner House was making a blanket statement, then the motion before me was clearly competent and Sheriff Principal Cox in Caldwell -v- Walker was wrong. He however went on to say that the case of L Petitioner was quite extraordinary and that he did not regard that case as an authority on the question of whether Regulation 5(4) applied to a case of this sort. It could be distinguished, especially in the circumstances that Their Lordships did not address the particular issue which was argued before Sheriff Principal Cox and they were not directed to the particular argument which the Legal Aid Board advanced before him, which, as I understand his decision to be broadly the same as the argument before me.

The next point raised by Mr. Shearer was “What does the Ordinary Roll mean?” and he suggested that it was those cases subject to the Ordinary Cause Rules

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There is no separate table of legal aid fees for Section 29 legal aid. The civil legal aid fees regulations have been made to fit other proceedings such as Children's Hearings and Fatal Accident Inquiries. Mr. Shearer argued that simply because of that it does not automatically mean that Regulation 5(4) applies to any proceedings to which the fees tables are being used, and one must look specifically at what is the definition of the Ordinary Roll following the 1993 Rules.

In response Mrs. Garvie for the applicant felt that the decision of Sheriff Principal Cox in Caldwell -v- Walker could be distinguished because the learned Sheriff Principal did not start from first principles. She stated it was not enough to say that we all know what an Ordinary Cause is and that we must look at the meaning of the Ordinary Court in terms of the 1993 Rules.

I was referred to the Second Edition of McPhail at page 173 and in particular to paragraphs 5.01 and 5.02.

The author states "The Ordinary Court is the tribunal in which the Sheriff exercises his civil jurisdiction. In strict theory every civil proceeding proceeds in the Ordinary Court, although certain stages of its procedure, and in some cases all the stages, may not take place in the public court room." The author then lists a number of proceedings competent in the Ordinary Court and these include "Miscellaneous statutory appeals and applications". He does however say that "in modern practice the



term Ordinary Court is usually reserved for those causes which are governed by the Ordinary Cause Rules 1993." Proceedings such as these must, in terms of Section 93(5) of the 1995 Act, be heard in chambers.

The 1989 legal aid regulations referred to "Ordinary Roll". Prior to the coming into force of the 1993 Ordinary Cause Rules, the rolls of court were an important element of procedure in ordinary causes. There were a number of rolls, some of which were removed by the 1993 Rules, the general thrust of which was to make provision for fixed diets when certain steps of procedure had to take place. Mrs. Garvie argued that while there is a clear lacuna between the 1989 Regulations and the Ordinary Cause Rules, it would be open to me to interpret the meaning of Ordinary Roll in the 1989 regulations as equaling the Ordinary Court in the 1993 Rules. She felt that these parts were not fully addressed by the learned Sheriff Principal in Caldwell -v- Walker and I could accordingly distinguish that case from the current case.

She also agreed that the case of L Petitioners was unclear as to whether it referred to that case only or to proceedings in general when the learned Lord President stated that Regulation 5(4) should apply.

In response Mr. Shearer felt that Mrs. Garvie's definition of civil proceedings was too wide, that we were here dealing with an unusual form of proceedings which had specific statutory procedure of its own. He also indicated that in the view of McPhail statutory appeals should not be part of the Ordinary Roll which could on any view be construed as comprising only Ordinary Causes raised by means of initial writ.

It is quite clear from the authorities produced to me that there is considerable doubt as to whether a motion of this kind has statutory authority. It would seem a

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logical interpretation of the Lord President's judgement in L Petitioners that Regulation 5(4) should apply to such proceedings as these.

There is an illogicality about Mr. Shearer's argument that the regulations have a precision and cannot apply to cases of this type while, on his view, the statement in L Petitioners that regulation 5(4) ought to be applied only to L Petitioners because it was an exceptional case which suggests a scope for discretion which would not be permitted in a precise situation. If there is precision there should be no room for exceptional cases. Accordingly, I would take the view that the statement of the Lord President is a general statement and that I am bound by the decision in L Petitioners and will grant the increase. There is nothing in the report of the case to indicate that Lord President Hope meant anything other than the general rather than the specific. I do not have the benefit of the arguments and must interpret the decision as reported.

Having said that, I have to say that like others who have considered this question I agree that there is room for doubt about the competency of the motion. Legal Aid is available for these proceedings in terms of Section 29 of the Legal Aid (Scotland) Act 1986 and this type of legal aid is distinct from legal aid for civil or criminal proceedings which are dealt with in different parts of the Act. Each is also governed by different rules which have been made in respect of each type of legal aid.

While it may seem clear that proceedings relating to children in terms of Part 3 of the 1995 Act are not causes on either the Ordinary or Summary Cause Roll, the view of the Lord President in L Petitioners casts doubt on that proposition. He says "...these proceedings are sufficiently similar to proceedings on the ordinary roll for it to be appropriate for 50% to be regarded as the maximum percentage increase which the

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sheriff may allow". He then remitted the matter of the increase to the sheriff for his determination.

The 1989 Legal Aid Regulations appear to be based on the Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1989 in terms of which, by regulation 5(b) which is in similar terms to regulation 5(4) of the Legal Aid Regulations, a similar percentage increase is permitted. The 1989 Act of Sederunt was revoked by the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993. Paragraph 4 of Schedule 1 of the 1993 Act applies the fees specified therein to work done under the Social Work (Scotland) Act 1968. Paragraph 5 deals with applications for percentage increases in fees but contains no reference to Ordinary or Summary Cause Rolls. It follows therefore that increases apply to all types of work within the scope of the 1993 Act which will include work done under the 1995 Act.

Accordingly, even if I interpret the case of L Petitioners wrongly, I feel it is arguable that any doubts which I may have had can be satisfied by the application of the 1993 Act of Sederunt to work done under the 1995 Act and the fact that in the past, by concession, SLAB has appeared to be content to pay increased fees in proceedings of this sort and Fatal Accident Inquiries and will clearly have done so on the basis it is acting within the authority of the whole statutory framework.

Turning to the merits of the motion. The factors detailed in Regulation 5(4) are quite clear and Mrs. Garvie sought an increase in terms of subsections (a), (c) and (e). I was quite satisfied that these were proceedings of importance and justified the application of regulation 5(4). The grounds of referral included allegations of sexual interference. There were a number of medical issues addressed. Mrs Deans as the mother of the child regarded the issues as serious and important. There was a degree






of responsibility on Mrs Garvie in her conduct of the proceedings standing the nature of the allegations. Accordingly I am satisfied that factors (a),(c) and (e) applied to varying extents. I do not feel that a full increase would be warranted in this case; hence I have awarded an increase of 30% which I feel is the appropriate amount.

Like several of the Sheriffs and Sheriffs Principal who have been asked to decide a motion on a matter such as this, I would strongly urge that a review of the Legal Aid Regulations be carried out so that they are brought in line with the current regulations and wording in relation to Ordinary and Summary Causes within the Sheriff Court. The situation needs clarification. That proceedings of this sort can have serious consequences is beyond doubt. Equally it is beyond doubt that SLAB have made increased payments in such cases thus recognising their seriousness. It is also clear that the Legal Aid regulations no longer mirror the 1993 Act of Sederunt which they did up to the 1989 regulations. I trust that my concerns will be brought to the attention of the Board so that it might consider what steps need to be taken to make what should be a straight forward but urgently required amendment to the 1989 Regulations.

I was not addressed on the question of the expenses of the motion and in the circumstances will make no award either way.



# SENDING CONFIRMATION

DATE : 10-MAY-2001 THU 09:56  
NAME : SLAB/SUPPORT UNIT  
TEL :

PHONE : 01414208258  
PAGES : 1/1  
START TIME : 10-MAY 09:55  
ELAPSED TIME : 00' 31"  
MODE : ECM  
RESULTS : OK

FIRST PAGE OF RECENT DOCUMENT TRANSMITTED...

At the meeting of the Accounts Committee on 14 October 1991, it was agreed that enquiry should be made as to whether this case had appeared on either the ordinary roll or the summary cause roll, and that the matter should be remitted back to the Legal Services Group to consider further the question of *vires* and whether the regulation should be amended.

Enquiry of the Sheriff Clerk's office at Aberdeen has confirmed that the Fatal Accident Inquiry was not specifically listed in any roll. Enquiries of other courts have tended to confirm that the practice of maintaining rolls varies from court to court, and in some courts ordinary and summary cause rolls are not made up.

During discussion by the Legal Services Group, it was noted there was no statutory definition of 'ordinary roll' and no specification of actions which required to be dealt with on the ordinary roll. The preparation of rolls of cases is no more than an administrative mechanism for the orderly and efficient arrangement of the business of the court, and the need for and form of any roll will vary according to the volume and nature of the business in any particular court. There is no logical reason why the solicitor's fee in any case should be geared to the court's internal arrangements for disposing of its business.

So far as *vires* is concerned, the essential question is whether the Board would have a good defence to an action for payment of the additional fee. The Legal Services Group considers that not succeed. The purpose of the regulation is clearly to trigger enhanced remuneration in an exceptional case, but to limit the enhancement to 50%, except for a summary cause where the particular low normal fees justify an enhancement of up to 100%. It is essentially irrelevant for the purpose whether the case was on any particular court roll; what is important is whether the case was procedurally dealt with under the ordinary procedure, which would attract a 50% increase, or under the special, simplified procedure of a summary cause, which would attract a 100% increase. The Legal Services Group considers the Board has *vires* to implement the Sheriff's award of a 50% increase in this case.

The Legal Services Group also considers that, although the regulation has been correctly applied, the terms should be amended to avoid any further misconception. It is suggested the regulation should provide for an increase not exceeding 50% in any Sheriff court case, except that, where the case is dealt with as a summary cause or where the Sheriff orders that the expenses should be those appropriate to a summary cause, the increase should not exceed 100%. It is so RECOMMENDED.

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REPORT BY BOARD SOLICITOR

ACCOUNTS COMMITTEE

SCOTTISH LEGAL AID BOARD

ACCS/91/35

10/05/01



**Iain Baptie**

**To:** Steven Carrie  
**Subject:** 5(4) MOTIONS

Steven, you will recall that I spoke to you on Wednesday re motions for uplifts in children's proceedings. Well strangely enough, the very next day Annemarie brought to my attention a Sheriff's note (copy attached) in respect of a case heard in Dundee last May which was included in the relevant account. Philip was in attendance opposing the motion but was ultimately unsuccessful. The Sheriff granted an uplift in fees of 30%.

This obviously post dates the 'test' case in Airdrie and I wonder how this affects our position, if at all. Also, should I know about this case as it certainly doesn't ring any bells?

Cheers

**Iain**

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of responsibility on Mrs Garvie in her conduct of the proceedings standing the nature of the allegations. Accordingly I am satisfied that factors (a),(c) and (e) applied to varying extents. I do not feel that a full increase would be warranted in this case; hence I have awarded an increase of 30% which I feel is the appropriate amount.

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