

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

REPORT

BY

FRANCIS M. McCONNELL SSC
Joint Auditor
12 Drumsheugh Gardens
Edinburgh

on the
ACCOUNT OF EXPENSES
incurred by

THE SCOTTISH LEGAL AID
BOARD

to

ANDERSON STRATHERN WS
acting on behalf of

ID

EDINBURGH

11th August 2000

The Auditor taxes the remuneration payable to the said Solicitors, exclusive of VAT at NINETEEN THOUSAND SIX HUNDRED AND NINE POUNDS AND TWENTY PENCE (£19,609.20) to which sum falls to be added miscellaneous outlays of TWO HUNDRED AND THIRTEEN POUNDS AND TWENTY SIX PENCE (£213.26) and the Audit fees (exclusive of VAT) of EIGHT HUNDRED AND FIFTY EIGHT POUNDS (£858.00)

F. M. McCONNELL

JOINT AUDITOR

NOTE:

This Account relates to the cost of legal representation at a Fatal Accident Inquiry afforded to the mother of [REDACTED] who died in tragic circumstances following on being treated at a dental practice in Edinburgh.

At the taxation [REDACTED] was represented by her Solicitor, Robert Carr and the Scottish Legal Aid Board by [REDACTED]. I am indebted to both of them for their careful and well prepared submissions in support of their respective positions.

I was provided with a copy on the Submissions made by Anne Smith Q.C. on behalf of the family and a copy of the Determination issued by Sheriff Morrison on 23rd February 2000.

It is beyond doubt that this was a major Inquiry which had far reaching repercussions affecting the operations, particularly in relation to the use of general anaesthetics, of every dental practice in the United Kingdom. It also brought into question procedures relating to the registration of certain categories of medical practitioners, their training and apparent deficiencies in the complaints procedure operated by The General Medical Council and The General Dental Council. While the focus properly was on the catastrophic death of Darren it was a very wide ranging Inquiry, necessary for the public interest and this is reflected in the Sheriff's findings and recommendations.

It is therefore against this background and in the context of these particular proceedings that the Account falls to be taxed.

At the outset [REDACTED] referred me to the Civil Legal Aid (Scotland) Fees Regulations 1989 and submitted that the basis of taxation was Agent/Client/third party paying always with regard to the prescribed Table and whether the fees charged are reasonable for conducting the proceedings in a proper manner.

He then developed a number of general objections which, for convenience, I have summarised together with the responses and my determination.

1. MEDIA

There were a number of entries relating to the solicitors involvement with various branches of the media. This was outwith the scope of the legal aid certificate which was for legal representation at the FAI and all work incidental thereto. In his submission these particular charges could not be regarded as incidental to the FAI proceedings.

RESPONSE

Mr. Carr argued that this was a Public Inquiry which had to determine issues of considerable public importance. It was an Inquiry which from the outset attracted enormous media interest. Indeed Mr. Carr, who has wide experience in this area of practice, said that, with the exception of the E. Coli proceedings, he could not remember being involved in such a high profile case which generated such attention. Senior Counsel thought it imperative that the media was properly managed and that the [REDACTED] be adequately briefed on what they could or could not say. Although the Inquiry would be before a Sheriff sitting on his own and he would be well able to deal with any issues of prejudice it was important that proceedings did not degenerate into a media circus which might have the unwanted effect of influencing what witnesses would say in evidence. It was therefore absolutely vital that a tight rein was kept on the media and to ensure, so far as possible, that the coverage was within responsible parameters. In the interest of justice it needed a responsible approach and the fees to achieve these aims could be justified. In any event the media, having generated a great deal of public interest, would often pass on information which was pertinent to the issues under inquiry. Examples of the kind of information were given to me. This information had to be considered and evaluated. In the event it was often helpful and was utilised at the FAI.

I have to say that in the normal run of litigation I would need a great deal of persuasion to allow such charges on a party and party account. But in proceedings such as these where the account is on an Agent/Client basis (albeit 3rd party paying) I advised at the taxation that I considered certain of the "media" charges could be justified and parties were content to leave me to analyse each entry and determine whether the particular charge was a good charge against the Board. I have given effect to that request but by way of explanation in approaching this area of activity. I considered that it was necessary that I be satisfied that the entry was incidental to the proceedings so far as these affected the interests of the [REDACTED] family, the circumstances surrounding the death of her son and the wider interests of the Inquiry. I considered there was a distinction to be drawn between those entries and some others where, for wholly understanding and commendable reasons, [REDACTED] was enlisting the assistance of the media to help bring about changes in the system which would help ensure that what happened to her son did not happen to anyone else.

2. EMPLOYMENT OF TWO AGENTS

It was submitted that it was neither reasonable or necessary to utilise the services of two solicitors to represent the interest of the [REDACTED] family.

RESPONSE

Robert Carr explained that he had delegated some of the work to his qualified assistant Andrew Lothian. There was no question of duplication. Mr. Lothian greatly assisted in the preparation for this Inquiry. If he had not been involved Mr. Carr would have had to do the work. Though Mr. Carr accepted there were occasions where Mr. Lothian attended consultations with him and I agreed to look at each entry and decide whether the charge was reasonable. Mr. Carr also reminded me that Senior Counsel was conducting the proceedings without the assistance of Junior Counsel and in effect Mr. Carr had to assume that role during the course of the Inquiry. It was therefore absolutely essential that Mr. Lothian was familiar with the case and could, if Mr. Carr was otherwise occupied, react quickly to developments as they arose.

For my part I was persuaded that it was necessary to engage the services of two Solicitors in the circumstances of this case subject of course to my deciding whether any charges relating to Mr. Lothian were reasonable for the purposes of conducting these proceedings.

3. INVOLVEMENT IN RELATION TO GMC PROCEDURES/INVESTIGATIONS

It was submitted that the work charged under this heading was not justified in the context of the legal aid certificate for representing the interest of the Denholm family at the FAI.

RESPONSE

Mr. Carr argued that in the context of the particular case and how the Inquiry developed it was necessary to have careful regard to the policies and practices of the professional bodies involved. In the event the actings of four professional men had been the subject of scathing criticism by the Sheriff. Had the anaesthetist been struck off at an earlier stage [REDACTED] would not have died. On any view the charges were justified.

I agreed with the submissions of Mr. Carr.

4. POST AVIZANDUM WORK IN GENERAL

I was asked to look at the charges in relation to this work and come to a view as to whether they are reasonable in the context of these proceedings. For example it would not do to charge for work which essentially was for services which might feature as work preparatory to the family taking separate proceedings for damages or where [REDACTED] was continuing her campaign against the practices complained of.

RESPONSE

Mr. Carr indicated that he was happy to leave such charges to my discretion.

5. TRAVELLING TIME

It was observed that Mr. Carr was charging for his time in travelling to and from the Court. These charges could not be justified on an Account of this kind and were contrary to established practice and to Legal Aid "Guidelines". I should not allow them.

RESPONSE

Mr. Carr submitted that it was reasonable to include claims for travelling time on an Agent/Client third party paying account. Such travelling time, he said, was now allowed by the Auditor of the Court of Session on party and party accounts and a *fortiori* it ought to be allowed here. It was necessary for him to take large boxes of papers to and from the Inquiry. He had not charged any outlays - taxis and the like. His charges were restricted to time.

I have to say that as Auditor I was aware that on party and party accounts there was a reluctance to allow a local agent travelling time between his office and the Court. This was on the basis that most Court procurators would be in Court to deal with a number of pieces of business. However that approach has not been so strictly enforced of late and it is, I think, within the Auditors discretion to look at each case on its merits. A different test of course applies to an Agent/Client account third party paying. I did not find much assistance in the Guidelines published by SLAB which essentially deal with the problem of out of town Solicitors travelling to Court. Having further considered the matter I think in the context of these particular proceedings these charges are reasonable.

6. TRANSCRIPTION OF 1) NOTES OF EVIDENCE 2) FILE NOTES 3) CONSULTATION NOTES.

Objection was taken to these charges on the basis these were neither necessary or reasonable.

RESPONSE

Mr. Carr conceded that the transcribing of the notes following a consultation probably came within the doubtful category and would leave the issue to my discretion. The same applied to file notes. However he strongly submitted that it was reasonable to transcribe his notes on evidence, particularly in relation to evidence given under cross, for his and Counsel's benefit. Senior Counsel was on her own. He was, in effect, acting as her junior. It was/

was absolutely essential that Counsel had access to legible and accurate notes of evidence which, at the end of the day, greatly assisted her in framing written submissions to the Court after the hearing of evidence was concluded. This was the cheaper option than having notes of evidence officially extended. This was an exceptional case of great importance with ramifications which extended beyond the particular subject matter of the Inquiry. I should allow these charges.

I agreed with Mr. Carr's submissions on the question of the transcription of notes of evidence.

7. "PRECOGNITION" OF CROWN WITNESSES

I was advised that the Crown would not provide copies of their witness precognitions. They agreed to agents having sight of these precognitions, make their own notes and thereafter depart to make up their own statements. The charges in the circumstances ought to be abated.

RESPONSE

Mr. Carr indicated that he had in fact not charged these entries at precognition rates. He had applied a lesser charge which reflected his input into this particular task of gathering evidence.

Having considered the matter I am of the view that the method of approach to charging for this work was in the particular circumstances fair and reasonable and I allowed them.

8. FAILURE TO OBTAIN SANCTION FOR EMPLOYMENT OF EXPERT WITNESS

It was observed that some work was done by the Solicitor a) to ensure that Mrs. Anne Smith Q.C. would be available to act before she was sanctioned by SLAB and that a report by an expert predated the decision sanctioning him.

I took the view that the incidental work done in securing the services of Mrs. Anne Smith Q.C. were justified and reasonable and could be included in the general preparatory work for this Inquiry. I agree that the expert's report and the work done in obtaining it predated the Board authorising the expenditure. However, I allowed it. It seemed to me that the object of the Board having a veto on agents employing experts is to maintain stringent controls on expenditure. Is it seriously to be suggested this was breached? Upon being given sanction I suppose the agent could have said to the expert "sorry I cannot pay for your report of 15th September. Could you tear up that report and issue another one dated 23rd September". That, it seemed to me, would be an affront to common sense. In the event the employment of the expert was sanctioned and I repelled the objection. The fact is that the Board are being asked to pay for a report which they sanctioned. I have to say, again in the context of these proceedings, there was a duty on the Solicitors to make adequate preparations for a major Inquiry of this kind and to ensure that the Court had before it all relevant evidence which might assist in coming to a determination. Obtaining a report in the above circumstances was always at the Solicitor's risk. Had sanction not been granted he would have been left with the liability for payment but in this case I think he was justified in taking that risk.

COUNSELS FEES AND VAT

Parties were agreed that for the purposes of this taxation Counsels fees should not be included. These fees will, in due course, be subjected to further representations. Similarly parties will discuss the question of the applicability of VAT and I have not taken this into account.

2000 Feb	24	Brought Forward	£	26430.06	12898.40
		Add 50% authorised increase in fees			13941.49
					6970.75
					6449.20
					19347.60
		Add Outlays	£	26430.06	20912.24
		Total	£		26430.06
					47342.30

Fees as taxed 19347.60
 Add
 fee attending diet
 of taxation including
 50% uplift (4 hours) 264.60
19609.20