

Auditor of the Court of Session

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KG

[REDACTED]
Advocates' Clerk-
Faculty Services Ltd.

30th June 2004

Dear Madam,

[REDACTED] v. HMA
Diet of Taxation: 14th June 2004

I refer to the above case and now enclose the Auditor's Report.

Yours faithfully,

Aune Wright

P.P. Principal Clerk
Enc.

The Auditor
Neil J. Crichton, W.S.

Principal Clerk
Mrs. Cynthia Cameron

COURT OF SESSION, SCOTLAND

REPORT

by the

AUDITOR OF COURT

in the cause

[REDACTED]

Appellant

Against

HER MAJESTY'S ADVOCATE

Respondent

EDINBURGH. 30 JUNE 2004

1. This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Margaret E Scott, Advocate (leading junior) and Shelagh McCall, Advocate in relation to fees claimed by counsel for representing [REDACTED] in her Appeal against Conviction under Section 110 of the Criminal Procedure (Scotland) Act 1995 (or section 19 of the Prisoners and Criminal Proceedings (Scotland) Act 1993). The Hearing lasted 7 days.
2. At the taxation on 31 May 2004, Ms. Shelagh McCall, Advocate, was in attendance with her Clerk, [REDACTED] The Scottish Legal Aid Board (hereafter referred to as "the Board") was represented by [REDACTED] Solicitor.

3. Faculty Services Ltd., on behalf of Counsel, issued Fee Notes as follows:

Leading Junior

08.02.2000 -- 26.06.2001 Appeal against Conviction	£250
08.02.2000 -- Consultation at Corntonvale Prison	£250 [†]
01.04.2000 - Consultation at Corntonvale Prison	£250
24.04.2000 -- Draft Grounds of Appeal	
24.04.2000 -- Application for Extension of Time	
24.04.2000 -- Opinion (2 days)	£1500
08.08.2000 -- Opinion and Preparation Procedural Hearing	
08.08.2000 -- Draft Petition to the Nobile Officium	£750
23.08.2000 -- Note on Preparation for Appeal	£90
07.09.2000 -- Procedural Hearing -- Arguments re Prejudicial Publicity (Novel Point -- Media represented in Opposition)	£1000
05.11.2000 -- Summary and Note on Ground 3 -- preparation for Consultation (1/2 day Preparation)	£ 300
06.11.2000 -- Consultation Dr Baird, Leverndale Hospital Glasgow	£500
24.12.2000 -- Note re Evidence from Experts and Preparation for Appeal	£300
18.02.2001 -- Note re Expert from England	£90
11.03.2001 -- Note re Psychiatric Information	£90
14.03.2001 -- Revisals of Juniors Note to Expert	£150
28.05.2001 -- Consultation Corntonvale Prison	£250
29.05.2001 -- Note re obtaining information from press re GR 1	£90
01.06.2001 -- First Written Submission	£600
04.06.2001 -- Appeal Hearing	£1250
05.06.2001 -- Appeal Hearing	£1250

06.06.2001 -- Appeal Hearing	£1250
07.06.2001 -- Appeal Hearing	£1250
18.06.2001 -- Final written submission -- amended for 5 judge	£300
19.06.2001 -- Appeal Hearing 5 Judges	£1750
20.06.2001 -- Appeal Hearing 5 Judges	£1750
21.06.2001 -- Appeal Hearing 5 Judges	£1750
General preparation -- for hearings 21 days @ 6hrs	£12600

Junior Counsel

03.08.2000 -- Consultation at Corntonvale with Senior	£168.50
01.09.2000-- Note re press coverage	£46.50
07.09.2000-- Procedural Hearing with Senior	£580
06.11.2000-- Consultation in Glasgow with Dr Baird & Senior	£316
16.02.2001 -- Consultation in Edinburgh with solicitors & Senior	£55
07.03.2001 -- Consultation in Edinburgh with solicitors & Senior	£55
14.03.2001 -- Note for Expert (Bastman)	£200
19.04.2001 -- Consultation at Corntonvale (Junior alone)	£215
28.05.2001 -- Consultation corntonvale with Senior	£168.50
30.05.2001 -- Note re publicity & articles	£46.50
04.06.2001 -- Appeal Hearing (4 days) @ £725 per day	£2900
19.06.2001 -- Appeal Hearing (5 Judges) with Senior @ £1015	£3045
General preparation 9.5 days at £350 per day	£3150

Prior to taxation, all fees were negotiated and agreed with the exception of the fees claimed by Ms M E Scott for an opinion and an attendance at a consultation

on the 5 November 2000 and the fees for both counsel preparing for and conducting the appeal.

4. 'Senior' Counsel's note, lodged with the Auditor is as follows:

"Senior Counsel respectfully requests the Auditor to fix an appropriate fee for the work necessarily done in respect of the above appeal hearing regard to the following:

- (1) The fees payable fall to be paid in accordance with regulation 10(1) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 and must therefore represent reasonable remuneration calculated in accordance with Schedule 2 – for the work actually and reasonably done, with regard being had to economy.
- (2) The area of dispute is whether the fee offered of £1000 per day for presentation of the appeal is sufficient remuneration to (a) reflect the novelty, importance and complexity of the case and (b) is appropriate for both the 3 judge and 5 judge bench hearings. Preparation is agreed at two thirds of the daily rate for the hearing.
- (3) In addition to allowing a reasonable fee for preparation it is submitted that the daily rate for counsel acting as Senior conducting the appeal falls, in terms of the Regulations, to be increased to take account of the unique features of this appeal including the following:

- a) The first appeal -- before 3 judges (4th -- 7th June 2001) involved ~~three distinct and individually difficult grounds of appeal (see grounds attached);~~
- b) The first ground concerned prejudicial publicity in respect of defence counsel at the time which prevented a fair trial. This was a unique and complex situation which involved ECHR issues
- c) The second ground was that no reasonable jury would have convicted on the basis of the expert evidence in terms of S106(3)(b) of the 1995 Act which basis of appeal was relatively new and as yet undefined -- there being only prior authority
- d) The main ground --which was the subject of the remit to the full bench hearing -- concerned the law on the plea of diminished responsibility and sought to extend its definition and application. In particular to allow it on the grounds of "battered woman's syndrome", a psychological as opposed to psychiatric basis which submission involved challenging the legal basis of the plea since 1923
- e) The case was remitted to 5 judges because of the importance of the issues and this importance was also reflected in the fact that the remit was heard within the month i.e. at unprecedented speed
- f) The complexity of the case was reflected in the extensive preparation and reading necessary which included case law from the 18 century and cases from other jurisdictions; from the necessity of background study of psychiatric and psychological

reference material (implied in opinion at para 52); and from the volume of evidence and expert reports (all available)

- g) The complexity is revealed in the detailed written “summary” submissions ‘Origins of the Doctrine of Diminished Responsibility’.
- h) The complexity and import of the case is further reflected in the “very comprehensive” opinion delivered by the court (2001 SCCR at 557D & see commentary on case at page 575.
- i) The court required to be addressed upon and consider the history of the plea of diminished responsibility and hear complex argument of the alleged mistaken development taken from 1923 in the approach of the courts. Finally in addition it had to consider what in modern terms the plea should consist of and how it could apply complex issues of fact.
- j) The public interest and import of the case was shown by extent of the media reportage it received; in the attention given to the case by academics (eg SLT articles) and finally in the attention given to it by the Scottish Law Commission
- k) This case is widely perceived as the most important development in 50 years
- l) The production of written submissions was commented upon by the Lord Justice General as “extremely helpful” at the full bench hearing. It is undoubtedly reduced the time taken in presentation of the appeal by at least a day. The case was allocated from 19-22 June for the full bench but lasted only until the 21st
- m) Counsel acting as senior was personally congratulated in court by the Lord Justice General for the comprehensive and capable presentation of the case.

- n) The importance to the client who was convicted of murder and had her conviction quashed with the order of a re-trial (a plea to culpable homicide was subsequently accepted by the Crown and the importance to all other murder cases
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- o) The decision has transformed not only legal practice in murder cases but expert practice in opinions on the requirements of the plea.
- p) It is notable that the then Solicitor General was instructed to represent the Crown as the full bench hearing

(4) The Auditor is respectfully referred to the following:

- a) The written summary submission prepared by acting senior counsel
- b) The opinion of the court -- 2001 SCCR 551
- c) The volumes of authorities lodged
- d) The case papers including the transcripts and expert reports

(5) The Auditor is respectfully referred to the following for assistance

- (a) In [REDACTED] --v- *HMA*, which was the first case to go to the Judicial Committee of the Privy Council, senior counsel's fees consisted of a preparation or brief fee of £13000 and a daily rate for the hearing of £1500. Here it is submitted that the hearing before 5 judges of the supreme court is comparable to a Privy Council hearing.

- (b) In this case senior counsel was paid £1300 (plus preparation) per day for the re-trial. It is submitted that the complex work was actually done in the appeal which ought to consist of, at least a comparable fee.

(c) In ~~██████████ v- HMA~~ the fee paid for the appeal hearing was £1250 per day (plus preparation @£800 for each day being 6 hours). In that case the complexity arose from an argument seeking to overturn a particular authority. In *Arthur v- HMA* the £1000 was paid to reflect novelty and complexity. In *Arthur* the unique situation consisted of the failure of the Crown to move for sentence in a murder case. It is submitted that this case is significantly more complex than either of these examples. Not least in that *inter alia* it successfully revised a host of prior authorities over a period of 80 years. There is hardly any comparison in respect of the factors of complexity, responsibility and importance, yet the same level of fee is offered

(d) There are a number of cases at first instance level where an enhanced fee for complexity at trial has resulted in payments of around and above £1000 per day -- eg *HMA v- ██████████* (£1150 per day plus preparation); *HMA v- ██████████* (£1000); *HMA v- ██████████* (1050); *HMA v- Gauson* (£1000). It is submitted that any hearing before the supreme court, especially a hearing before a full bench court, must attract a significantly higher rate than at first instance.

Miss Shelagh McCall, Advocate, submitted that legal issues in this case were more complex than those in *Campbell and Steel*. The Appellant's Counsel sought to overturn

the Court's interpretation of the law of diminished responsibility over the preceding 80 years. This required a detailed analysis showing what the law should have been and what it should be now. The development in psychiatric medicine required to be explored and that development clarified and explained to the Court. In this case, there were three medical experts and five civilian witnesses who spoke to [REDACTED] relationship with her husband. That evidence required careful analysis and presentation. Very careful consideration had to be given to Mr. D.R. Findlay, Q.C.'s conduct. He had attached his credibility to that of [REDACTED] which was not appropriate particularly in view of Mr. Findlay's conduct on another occasion unrelated to this Trial. Detailed consideration of English, American, European and Commonwealth law had to be carried out and text books, articles and written material given careful consideration. The result was that the law had to be changed and a new test for diminished responsibility promulgated by the Court. Whilst the Crown had abandoned its opposition to the Appeal at the five Judge hearing, the presentation of the Appeal had been no simpler because the Court had taken the place of the Crown and tested Counsel's submissions fully.

5. [REDACTED] had lodged Points of Objection as follows:

Case Background and Nature of Dispute

The appellant [REDACTED] was found guilty of the murder of her Husband after trial in June 1999. This is the appeal against verdict. She Appealed on three distinct grounds.

1. That the publicity during the trial regarding her senior counsel Donald Findlay QC and his extra professional life had an impact on proceedings.
2. That on the available evidence, no reasonable jury would have rejected a defence of diminished responsibility.
3. That the trial Judge misdirected the jury when he told them that [REDACTED] would have to be suffering from a mental illness before they could sustain a plea of diminished responsibility.

Counsel has indicated that the result of this appeal was arguably the most important legal development in criminal law in the last 50 years and changed the law that was established in 1923. The appeal was successful in that a re-trial was ordered so that the diminished responsibility element could be considered again.

The Lord Justice General sought to deal with the case personally and allocated 3 or 4 days each hearing. Counsel has indicated that the duration of the hearings was significantly shortened because of the written submissions provided.

“The fees are prescribed by the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 Regulation 10 (1) which provides that counsel shall be “allowed such fees as appears to the Auditor to represent reasonable remuneration, calculated in accordance with Schedule 2 for work actually and reasonably done, due regard to economy”.

The fee prescribed for junior by Schedule 2 for hearing an appeal against conviction -- per day -- is £242.50. The fee subsumes an element of preparation. There are also prescribed fees for Junior acting alone with Senior (172) which form approximately 54 % of the prescribed fee set down for Senior.

These fees are capable of being enhanced because of the particular complexity or difficulty of the work or any other particular circumstances all in terms of paragraph 3 to the Schedule.

Margaret Scott, Advocate acting as leading junior, has charged £1000 for the procedural hearing on the arguments regarding prejudicial publicity, £1250 per day for the first appeal hearing and £1750 per day for the last appeal hearing before 5 judges. She has also charged £12600 to cover preparation over and above which is broken down by charging 21 days at £600 per day. We have offered £1000 per day for the appeal hearings throughout to include all preparation. - no, but offer was £1000 + £11970 prep.

Junior counsel has charged £725 per day for the first appeal hearings and £1015 per day for the final hearings. She has also charged £3150 (9.5 days at £350 per day) in respect of preparation. We have offered £560 per day across the board.

It is considered that the fees offered reasonably subsume preparation. It is understood that all other matters have been agreed".

██████████ expanded his submissions as follows. He doubted the relevance of the information produced by ██████████ on the level of the fees in other cases. Each case should be dealt with on its own merits. The simple fact was that Miss Scott was a Junior Counsel at the time of the Appeal and her fees for that work were governed by Chapter 1 of Schedule 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989. It is not within the power of the Board to prescribe a fee for Leading Junior as no such category is covered in Chapters 1 or 2. He referred to *Uisdean McKay v. H.M. Advocate* 1999 SCCR

p. 680 per the Lord Justice Clerk at p. 685. "It is important, in our view, to bear in mind that the allowance of fees at a taxation in a legal aid case requires to be carried out within a statutory framework, in the present case that set out in Schedule 2. The rules bind the Auditor, and they bind counsel who are to be taken as having accepted instructions to act in return for fees determined in accordance with them." He noted [REDACTED] concession that the proposed fee of £1750.00 per day was a very high fee in 2001. No attempt was made to relate the level of that fee to the fees in Schedule 2 of the said regulations and accordingly it was irrelevant. Because of the novelty, complexity and importance of the case, the Board had taken as the starting point the figure midway between the fees in Chapter 1 and Chapter 2 and had applied an increase of 400% and allowed a further payment for preparation. This case did not bear too close a comparison with *Campbell and Steel v. H.M.A.*. In that case there were voluminous notes of evidence to be read and digested from the trial which took place many years before the Appeal Hearing. In the course of the Appeal, legislation changed and Counsel had to readdress the consequences of this. Whilst this was undoubtedly an anxious and complicated matter it deal with one facet of the law, namely, diminished responsibility and by the time the hearing in front of the five Judge Court was heard the Crown had dropped their opposition to the Appeal. The Board accepted the importance in the re-trial where the Crown accepted a plea to culpable homicide. The Board's approach was a reasonable one in terms of Regulation 10 (1) where the test for Counsel's fees in "work actually and reasonably done, due regard being had to economy. As is clear from the Board's offer it was satisfied that fees should be allowed under sections 2 and 3 of

Schedule 2 of the said Regulations. The Board had acted reasonably and the fees tendered were reasonable.

6. In the Auditor's experience this case is novel. The appellant was convicted of murdering her husband who was a police officer. She had proceeded to trial on the basis that her mental state had been affected due to having been [REDACTED] over a number of years by her husband. She was convicted.

Counsel undoubtedly had to undertake a substantial amount of preparation including extensive research in order to conduct the appeal properly, which was difficult, complex and novel. As counsel in the Appeal proceedings did not represent the Appellant at the trial this necessitated in counsel being required to consider the original transcripts of evidence together with the Crown Productions and precognitions, but more significantly the lengthy and complex evidence presented by the psychologist and psychiatrist. Counsel had to persuade the court that the view of the defence experts was correct. As the Law stood at that time the Appellant's defence did not meet the requirement in law to be acquitted of murder. This was the main ground of appeal. The other grounds of appeal focused on the publicity of the personal non-professional conduct of the defence counsel and whether this prevented a fair trial; and the ground that no reasonable jury would have convicted on the basis of expert evidence.

The Auditor is satisfied that having given consideration to the voluminous papers produced by counsel and having heard submissions on behalf of counsel at taxation that this case is of such complexity, novelty and importance that counsel should be remunerated at a fee relevant, which reflects the work done.

In reaching a view as to a reasonable fee for each of the counsel involved in this case, ~~the Auditor must have regard to the fees prescribed in the table, and to the Court's~~ Opinion in *Uisdean McKay* (supra). With respect to Ms. Connarty those fees prescribed in the table must be the starting point not the fees which she generously conceded as being very high. In terms of paragraph 2 of Schedule 2 the Auditor may allow "such fee as appears to him appropriate to provide reasonable remuneration for work with regard to all circumstances, including the general levels of fees in the said Table of Fees", where the Table of Fees in Chapter II does not provide a fee for any item of work. Paragraph 3 of Schedule 2 gives the Auditor power to increase fees in Chapter II "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". Mr. Haggarty conceded, very fairly, that Counsels' fees should reflect these elements.

The Auditor is bound to conclude that Ms Scott is not a Senior Counsel, and for the purpose of this case was the 'leading' junior and therefore cannot be remunerated at the same rate as a senior counsel. However, it is appropriate that the fees in Chapter 1 be increased to reflect her status as senior junior. Bearing in mind all these factors, the Auditor taxes the fees in dispute at £20,425.00 and £7,050.00 (plus VAT) respectively as follows.

Senior Junior

Attendance conducting the appeal:	7 days at £1115.00 per day
Preparation:	20 days at £560 -- per day
Opinion:	2 days at £560 -- per day
Consultation:	5/11/00 - £300

Junior/

Junior

Attendance conducting the appeal: 7 days at £600 per day

Preparation: 9.5 days at £300 per day

All other fees having been agreed between Junior Counsel and the Board.

A handwritten signature in black ink, appearing to read "Mary Gillan". The signature is written in a cursive style with a horizontal line under the name.

AUDITOR OF THE COURT OF SESSION