

Auditor of the Court of Session

Your Ref: SL/1237751020
Our Ref: 33657

[REDACTED]
Solicitor,
Scottish Legal Aid Board,
LP 2
EDINBURGH 7

30th August 2004

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Dear Sir,

HMA v. [REDACTED]

I refer to the diet of taxation on 9th August. The Auditor has now framed his Report and it is enclosed herewith.

Yours faithfully,



Principal Clerk
Enc.

The Auditor
Neil J. Crichton, W.S.

Principal Clerk
Mrs. Cynthia Cameron

COURT OF SESSION, SCOTLAND

REPORT

by

AUDITOR OF COURT

in the cause

HER MAJESTY'S ADVOCATE

against



EDINBURGH. 30th August 2004.

1. This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Matthew Jackson, Advocate, in relation to fees claimed by counsel for representing [REDACTED] at Trial in the High Court, Edinburgh, on a charge of Murder.
2. In attendance at the Taxation on the 9 August 2004, were Matt Jackson, Esq., Advocate, and his clerk, [REDACTED] Solicitor, on behalf of the Board.
3. The Fees issued by Faculty Services Ltd., in dispute are as follows:

05.04.02 – Consultation – Saughton - £167

16.04.02 – Consultation – Saughton - £200

25.04.02 – Hearing on Minute of Postponement - £75

30.04.02 – Consultation – Saughton - £167

- 10.05.02 – Consultation with expert - £350
- 16.05.02 – Consultation – Saughton - £200

- 16.05.02 – Joint note - £100
- 24.05.02 – Preliminary diet - £333
- 24.06.02 – Consultation - £200
- 29.07.02 – Consultation – Saughton £250
- 01.08.02 – Petition for examination of Crown x-rays - £475
- 07.08.02 – Consultation with experts - £267
- 08.08.02 - Consultation with experts – 2 charges combined - £553
- 10.08.02 – Consultation at Carstairs - £333
- 12.08.02 – Consultation Crown experts £333
- 12.08.02 – Consultation experts - £267
- 12.08.02 – Consultation – agents - £100
- 14.08.02 – Consultation with client - £300
- 19.08.02 – Consultation with Crown experts & note - £600
- 21.08.02 – Consultation with experts - £400
- 22.08.02 – Consultation with client - £200
- 23.08.02 – 2 Consultations with expert and client, plus note - £342
- 25.08.02 – Consultation – Saughton - £200
- 26.08.02 – Trial diet - £333
- 18.09.02 – Examine productions – Edinburgh - £100
- 26.09.02 – Trial diet – adjourned – £333
- 28.10.02 – Consultation with expert - £200
- 03.11.02 – Consultation – Saughton - £250
- 04.11.02 – Consultation – New Senior - £100
- 07.11.02 – Evening consultation with client - £200
- 18.12.02 – Consultation – Saughton - £267
- 07.01.03 – Consultation with Dr Boyle (agent's failed to attend) - £267
- 10.01.03 – Consultation with experts - £267
- 13.01.03 – Consultation with experts - £267

16.01.03 – 11 Trial days @ £1000 - £11000

10 days preparation @ £667 - £6670

In his submissions counsel explains that he accepts that it is not the norm for junior counsel to paid 2/3rds of the rates paid to senior. He sets out his reasons for seeking to be paid at 2/3rds as follows:

- The subject of “shaken baby” syndrome is a hotly disputed debate in the medical profession. A few guilty verdicts in other cases have been overturned.
- Counsel was instructed in spring 2002 and the trial concluded early in 2003
- Throughout that period 3 separate senior counsel were involved, 2 of which were required to withdraw
- In addition to full instructions from the Agents, Counsel was required to brief the ‘new’ senior counsel as fully as possible
- Junior counsel was the only counsel who was constant throughout
- He had to familiarise himself with all the various factors including neuropsychology, neurosurgery, paediatric neurosurgery, radiology, ophthalmology, neurophthalmolgy, paediatric pathology and clinical biochemistry
- He attended all the consultations for fear that another senior counsel would require to withdraw
- He developed a very intimate understanding of ‘shaken baby syndrome’
- There was a psychological/psychiatric angle to the case due to the profound head injury from which is client suffered
- Counsel attended approximately 15 consultations with various experts
- Counsel spent a great deal of time reading into the various subjects – there was no charge to SLAB for this work

- Counsel was asked by the solicitor instructing him to take the role of leading junior when senior counsel required to withdraw
- In the course of the trial counsel was able to assist senior counsel and was instrumental in the development of a strategy for defending the accused

4. [REDACTED] had lodged points of objection as follows:

This was a murder case in Edinburgh High Court and involved issues surrounding “shaken baby” syndrome. The panel was the father charged with the murder of his son. The panel, who apparently had a very low IQ, ultimately plead guilty to culpable homicide on the grounds of diminished responsibility caused by a brain injury and was sentenced to 11 years imprisonment.

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

The fee prescribed by Schedule 2 of the Criminal Fees Regulations for junior counsel in respect of “Trial per day” for junior is £172.

The offer made by the Board to Mr Jackson was in line with senior and equated to £628 per Trial day (£7908 in total) and a total of £4190 for preparation. The total fee paid, therefore, equates to almost £1010 per day between the daily fee and separate preparation. Consultations etc were also paid on a *pro rata* basis.

Counsel is seeking payment on a two-thirds basis rather than the *pro rata* basis of 54% set out in Schedule 2 on the reasoning that his efforts and involvement justify it. Counsel is therefore seeking two-thirds “across the board”.

A list of the fees claimed and offered are attached to these points of objection.

It is considered that the fees offered to counsel are reasonable and in line with the observations made by the court and the principles set out by the Lord Justice Clerk in *HMA –v- Uisdean McKay 1999 SCCR 679*.

Counsel is seeking to be paid at 2/3rds of the rate allowed to senior counsel. Payment has been offered on the basis of the same percentage uplift to junior as *agreed* by senior. An elements of “swings and roundabouts” has therefore been applied to allow a flat enhanced rate to junior rather than over complicating the payment offer (e.g. potentially increase the enhancement for those items where junior has acted alone and decrease those items where the greater responsibility has been discharged by senior – in particular where senior has been in attendance and been involved more heavily at the trial diets).

In any event there is no 2/3rds rule. In this regard we would refer to Lord Johnston (then Dean of Faculty) letter of 17 August 1992 to the Director of Legal Aid.

“There is no substance in the assertion that junior counsel’s fees is entitled to two-thirds of senior counsel’s fees and indeed on a number of cases I have adjudicated to the contrary. The remuneration of junior counsel is commensurate with experience and input although, of course, in the matter of legal aid, the Table rules”.

In arriving at his decision the Auditor is satisfied that this was a complex, difficult and high profile case attracting a great deal of media coverage. The Auditor is in no doubt as to the responsibility placed on junior counsel who remained the constant 'thread' throughout the course of this case, under difficult circumstances. Two of the senior counsel instructed had to withdraw for different reasons. This left junior counsel in the position of having to brief the 'new' senior counsel on each occasion. Junior counsel was clearly of great assistance to senior due to the knowledge and expertise he had amassed during the course of the case after having consulted with numerous experts and the time he had spent reading into the various subjects. He ensured a degree of continuity for an extremely vulnerable client to whom the outcome of the trial was of great importance.

Having considered all the information before him and in applying the test 'due regard to economy' the Auditor is satisfied that junior counsel is entitled to be remunerated at a rate commensurate with the responsibility placed on him having regard to the unique circumstances of this particular case and its far reaching ramifications. Accordingly the Auditor taxes junior counsel's fees in dispute at the sum of £20,732, plus VAT.

A handwritten signature in black ink, reading "Henry G. Gibson". The signature is written in a cursive style and is underlined with a single horizontal line.

AUDITOR OF THE COURT OF SESSION

AUDITOR, COURT OF SESSION

POINTS OF OBJECTION

in the case of

HMA -V- [REDACTED]

regarding the fees of

Matthew Jackson, Advocate

This was a murder case in Edinburgh High Court and involved issues surrounding "shaken baby" syndrome. The pannel was the father charged with the murder of his son. The pannel, who apparently had a very low IQ, ultimately pled guilty to culpable homicide on the grounds of diminished responsibility caused by a brain injury and was sentenced to 11 years imprisonment.

The fees are prescribed in the Criminal Legal Aid (Scotland) Fees Regulations 1989 regulation 10 (1) which provides that counsel shall be "allowed such fee as appears to the Auditor to represent reasonable remuneration, calculating the cost of Schedule 2, for work actually and reasonably done, due regard being had to economy".

The fee prescribed by Schedule 2 in respect of a "Trial per day" for junior with senior is £172.


The offer made by the Board to Mr Jackson was in line with senior and equated to £628 per Trial day (£7,908 in total) and a total of £4,190 for preparation. The total fee paid, therefore, equates to almost £1,010 per day between the daily fee and separate preparation. Consultations etc were also paid on a *pro rata* basis.

Counsel is seeking payment on a two-thirds basis rather than the *pro rata* basis of 54% set out in Schedule 2 on the reasoning that his efforts and involvement justify it. Counsel is therefore seeking two-thirds "across the board".

A list of the fees claimed and offered are attached to these Points of Objection.

It is considered that the fees offered counsel are reasonable and in line with the observations made by the court in *HMA -v- Uisdean McKay 1999 SCCR 679*.

IN RESPECT WHEREOF


Solicitor
Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh

FEES CLAIMED BY M.D. JACKSON

Date	Head of Work	Claim (£)	Offer (£)	Outstanding (£)
05-04-02	Consultation - Saughton	167.00	93.00	74.00
12-04-02	Viewing video tapes	300.00	300.00	<i>agreed</i>
15-04-02	Joint note	50.00	50.00	<i>agreed</i>
16-04-02	Consultation - Saughton	200.00	135.00	65.00
19-04-02	Drafting minute of postponement	75.00	75.00	<i>agreed</i>
25-04-02	Hearing on MOP	333.00	246.00	87.00
30-04-02	Consultation - Saughton	167.00	113.00	54.00
10-05-02	Consultation with expert (2hrs+)	350.00	300.00	50.00
16-05-02	Consultation - Saughton	200.00	113.00	87.00
16-05-02	Drafting minute of postponement	75.00	75.00	<i>agreed</i>
16-05-02	Joint note	100.00	75.00	25.00
24-05-02	Preliminary diet	333.00	246.00	87.00
24-06-02	Consultation	200.00	140.00	60.00
08-07-02	Joint note	100.00	100.00	<i>agreed</i>
25-07-02	Drafting petition for examination of Crown x-rays	100.00	100.00	<i>agreed</i>
29-07-02	Consultation - Saughton (1.5hrs)	250.00	210.00	40.00
01-08-02	Petition for examination of Crown x-rays - initially opposed (3 mins)	475.00	398.00	77.00
05-08-02	Attendance at Manchester and Liverpool with experts (sanction)	850.00	850.00	<i>agreed</i>
06-08-02	As above - further consultations with experts (sanction)	850.00	850.00	<i>agreed</i>
07-08-02	As above - further consultations with experts (sanction)	850.00	850.00	<i>agreed</i>
07-08-02	Consultation with experts	267.00	197.00	70.00
08-08-02	Consultation with experts (multiple consultations with experts) - 2 separate charges combined here.	553.00	351.00	202.00
08-08-02	Joint note	100.00	100.00	<i>agreed</i>
10-08-02	Consultation at Carstairs	333.00	162.00	171.00
12-08-02	Consultation Crown experts	333.00	140.00	193.00
12-08-02	Consultation experts	267.00	113.00	154.00
12-08-02	Consultation - agents	100.00	55.00	45.00
12-08-02	Joint note	100.00	100.00	<i>agreed</i>
14-08-02	Consultation - client (2.5hrs)	300.00	167.00	133.00
19-08-02	Consultation Crown experts Note charged separately on fee notes (£333 + £267)	600.00	378.00	222.00
21-08-02	Consultation experts	400.00	216.00	184.00
22-08-02	Consultation - client	200.00	113.00	87.00
23-08-02	2 Consultation expert and client Note charged separately on fee notes (£267 + £75)	342.00	168.00	174.00
25-08-02	Consultation - client Saughton	200.00	113.00	87.00
26-08-02	Trial diet	333.00	246.00	87.00
18-09-02	Examine productions -Edin	100.00	55.00	45.00
26-09-02	Trial diet - adj	333.00	246.00	87.00
28-10-02	Consultation - expert	200.00	113.00	87.00

FEES CLAIMED BY M.D. JACKSON

03-11-02	Consultation client - Saughton	250.00	210.00	40.00
04-11-02	Consultation – new senior	100.00	70.00	30.00
07-11-02	Evening consultation client	200.00	150.00	50.00
18-12-02	Consultation client Saughton (2hr)	267.00	113.00	154.00
07-01-03	Consultation Dr Doyle – agents fail to attend	267.00	113.00	154.00
10-01-03	Consultation - experts	267.00	113.00	154.00
13-01-03	Consultation - experts	267.00	113.00	154.00
16-01-03	11 trial days @ £1,000	11000.00	6908.00	4092.00
	10 days preparation @ £667	6670.00	4190.00	2480.00
	TOTAL	19921.00	12394.00	7527.00

The uplift is having regard to the principles of Lord Justice Clerk in the case of *Uisdean McKay –v- H.M.A. 1999 SCCR 679*.

Counsel is seeking to be paid at 2/3rds of the rate allowed to senior Counsel. Payment has been offered on the basis of the same percentage uplift to junior as *agreed* by Senior. An elements of “swings and roundabouts” has therefore been applied to allow a flat enhanced rate to junior rather than over complicating the payment offer (e.g. potentially increase the enhancement for those items where junior has acted alone and decrease those items where the greater responsibility has been discharged by Senior – in particular where senior has been in attendance and been involved more heavily at the trial diets).

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[REDACTED]

[REDACTED]

[REDACTED] we have got agreement on this one now.

The auditor has stripped out the cases that had been agreed and this has confused us as normally he taxes the full account. He does not provide any explanation as to what fees he has increased and what fees he has left the same as what we had offered and in line with his normal practice he has taxed the "fees in dispute" at a global sum.

Counsel wanted more than what we offered and the auditor has given him £3,450 more but this still leaves an abatement of £6,300 or so.

Did we win or lose ?!

I suppose we lost if you take it that counsel has received more than the same percentage uplift that senior agreed to. He has made no finding of expenses which suggests we weren't that far out.

[REDACTED]