

COURT OF SESSION, SCOTLAND

REPORT

by

AUDITOR OF THE COURT OF SESSION

MG & RG

in the cause

[REDACTED]

Pursuers

against

ROYAL INFIRMARY OF EDINBURGH NHS
TRUST

Defenders

EDINBURGH. 20th October 2005.

This taxation arose out of a dispute between the Scottish Legal Aid Board ("the Board") and Mr Hadjucki Q.C. in relation to fees claimed by Counsel for representing Ms Margaret Gerrard in an action of Medical Negligence in the Court of Session.

At the Diet of Taxation on the 14 September 2005 the Board was represented by [REDACTED] Solicitor. Mr Hadjucki Q.C. who was accompanied by his Clerk, [REDACTED] made his own representations.

Background/

Background.

The pursuers raised an action of medical negligence against the Royal Infirmary of Edinburgh Trust alleging negligence on the part of a Senior Registrar in Obstetrics and Gynaecology who was responsible for the care of the Pursuer during the birth of twins. The first twin was delivered successfully, but the second twin who was delivered by caesarean section had to be resuscitated and died after two days on a life support machine. Post Mortem examination revealed that he had suffered asphyxia during labour and delivery.

Mr Hadjucki Q.C. was instructed to represent the Pursuers. The case proceeded to an eight day proof and the Pursuers were subsequently unsuccessful. The Auditor refers to the Opinion of Lady Paton dated 11 January 2002, which sets out the background to the case in detail.

Senior Counsel had kept no records of his work done in this matter and was unable to deal with the Board's reasonable enquiries. At Taxation the Auditor confirmed that before issuing a decision full consideration of the court process and, in particular, Lady Paton's Opinion would be made. Having carried this out the Auditor is satisfied this was a difficult case and that the prudent solicitor would be entitled to judge this case as of "abnormal magnitude or difficulty" and assess fees at a level "in order to command the services of competent counsel in cases of similar character" (*Caledonian Railway Company v. Greenock Corporation* 1922 S.C. 299 per Lord President Clyde at 311 and *MacNaughton v. MacNaughton*, 1994 SC 42, IH per Lord President Cooper at 46.)

Regulations

The Statutory Framework is set out in Regulation 9 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 "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.”

Regulation 10 (1) states, “Counsel’s fees in relation to proceedings in the Court of Session shall be calculated in accordance with schedule 4.”

Regulation 12 (1) states, “If any question of dispute arises between the Board and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor, or as to the amount of fees allowable to counsel, from the Fund under these Regulations, other than Regulation 11 above, the matter shall be referred for taxation by the Auditor.” A dispute has arisen and the matter is referred to the Auditor for determination.

Authorities

The Auditor is guided by the Lord Justice Clerk’s decision in the case of *Uisdean McKay –v- HMA 1999 SCCR 679*. Although this is concerned with criminal legal aid fees the court’s general direction is that the auditor is required to tax counsel’s fees within a “statutory framework”... “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”. The Statutory Framework is set out in Regulation 9 above. The standard of taxation is set out by Lord Kyllachy in *Hood v. Gordon 1896 23R.675*, “I see no reason to doubt that principle which we must follow in this case is that established in the case of *Walker v. Walker*, and also in the case of the *Wigtown Burghs*. That principle is, that while the taxation as prescribed by the statute be as between agent and client, yet as the expenses in a case like this have to be paid not by the client but by a third party, the principle of taxation, though not indeed identical with that between party and party, must yet be different from that applied in the ordinary case of agent and client”. Then Lord McLaren’s opinion states, “where a statute authorises the taxation of expenses, as between agent and client, what is given is the expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his

account would be taxed." It is generally accepted that expenses awarded on the scale will be nearer to those recoverable on a party and party basis rather than on an agent and client basis.

SLAB's Submissions

██████████ lodged written Points of Objection which are attached for reference.

██████████ submitted that that the onus was on counsel to justify the level of his fees and referred to Schedule 4, Chapter II which sets out the fees. She conceded that this case may justify an increase in the fees from those stipulated in the table. ██████████ explained that the Board had difficulty in assessing Senior Counsel's fees as he had not kept notes in support of his fees. She referred to previous taxation decisions in Court of Session cases concerning Senior Counsel's fees. In ██████████ v. *Grampian Health Board (1994)* the Auditor allowed £850 per day inclusive of preparation and in ██████████ v. *Greater Glasgow Health Board (1997)* the Auditor allowed £1000 per day inclusive of preparation.

██████████ submitted that ██████████ was more lengthy and complex. The proof lasted for 17 days and the Opinion ran to 72 pages.

Senior Counsel had referred to the Auditor's decision in ██████████ as being a comparable case. ██████████ disputed this. In ██████████ the case settled for £650,000. The Auditor's decision dealt with disappointment fees as the case did not proceed to proof. Further, Senior Counsel had prepared a full and detailed note in support of his fees. ██████████ reminded the Auditor that he had to have regard to the Lord Justice Clerk's decision in *Uisdean McKay* and not what is recoverable on agent and client paying basis. This was not a 'special' case. The value of the case was small, £12,000, the same as an ordinary case. The pursuers account by comparison totalled £48,000.

Senior Counsel's submissions

Mr Hadjucki did not lodge written submissions, but made representations at the Diet of Taxation. He submitted that this was a complex medical negligence claim and referred to the Opinion of Lady Paton, which extended to 100 paragraphs. Although quantum was agreed at £12,000 a relatively small sum, the case was complex on both negligence and causation.

In support of his fees for the proof Mr Hadjucki submitted that he had not charged for separate preparation, but had charged an all encompassing fee. He had undertaken substantial preparation prior to the proof and at the end of each day he spent approximately 2 hours going through the evidence. There were also telephone attendances with the experts.

Mr Hadjucki explained that the consultation with [REDACTED] and the case conference, telephone call with [REDACTED] included preparation. Both the consultations were complex and dealt with the defenders reports.

The pursuer's solicitors instructed Mr Hadjucki the day prior to the Procedure Roll Hearing. This was his first involvement in the case and he required to prepare for the Hearing. Mr Hadjucki recalls the whole morning was taken up waiting for the Judge. The Auditor observes there is no interlocutor in process, but it is clear from the subsequent interlocutor issued on 10 November 2000, that the parties agreed to a Proof Before Answer.

Mr Hadjucki referred to the Auditor's decision in [REDACTED]. He submitted that this case was of comparable complexity. The fees allowed by the Auditor to Senior Counsel in that case were greater than the fees he was claiming here. His fees by comparison were modest.

Opinion

The Auditor having considered the Opinion of Lady Paton is satisfied that this was a medical negligence claim of significant complexity and which was undoubtedly of great importance to the pursuers who had suffered the death of their child.

In light of the complex nature of the case the Pursuers' request for sanction for the employment of Senior Counsel was authorised by the Board.

In the Auditor's experience he is satisfied that the fees sought by Senior Counsel in this case bear no relation to what he might reasonably expect to charge in an Agent and Client fee paying case. The Auditor having applied the relevant test is satisfied that the fees allowed to Senior Counsel as noted below are "those expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed."

Procedure Roll Hearing

Senior Counsel has charged a fee inclusive of preparation of £1500.00. In the Auditor's experience this is too high. The Auditor considers the appropriate fee to be £900.

Consultations

The Auditor is satisfied that the consultations with the experts on the 19 April and 15 May 2001 are reasonable in the context of the case. Senior Counsel has claimed fees of £500.00 and £450.00 respectively. The Auditor allows these fees as claimed.

Proof

Senior Counsel has charged eight days at £2000.00 per day inclusive of preparation. The Auditor allows these fees as claimed.

Conclusion

The Auditor taxes Senior Counsel's fees at £17,850 plus VAT £3123.75, totalling £20,973.75.

May. Linton.

AUDITOR OF THE COURT OF SESSION

AUDITOR, COURT OF SESSION**POINTS OF OBJECTION**

in the case of

████████████████████
-v- ROYAL INFIRMARY OF EDINBURGH NHS
TRUST

Relating to fees incurred by

MR ANDREW HADJUCKI, QC

This was a medical negligence case in the Court of Session instigated by ██████████ who were represented by Mr Hadjucki QC and Mr Summers, assisting junior counsel. It was alleged that a senior registrar in Obstetrics and Gynaecology at the Royal Infirmary in Edinburgh had been negligent during delivery and care of the pursuer's second twin who had to be delivered by emergency caesarean and died after two days on a life support machine.

In October 2000, senior counsel with assisting junior made a procedural motion to request a jury trial which was refused. In May 2001, the case proceeded to an eight day proof and the case was taken to avizandum. The Opinion of Lady Paton (copy attached) was issued on 11 January 2002. The pursuer's pleas were repelled and the action was unsuccessful.

It had been agreed by Joint Minute that reparation of £12,500 inclusive of interest would have been payable in the event of success on the part of the pursuer. The pursuer's accounts (solicitors and counsel's fees) amounted to approximately £48,000.

In this case there is a dispute between senior counsel and the Scottish Legal Aid Board on the level of senior counsel's fees for conduct of the procedural diet, two consultations and the daily rate for conducting the eight day proof.

Accordingly, the matter has been referred to the Auditor in terms of regulation 12(1) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989.

Counsel's Claim/Amounts in Dispute

5 October 2000	Procedural Roll Diet	£ 1,500
19 April 2001	Consultation	500
15 May 2001	Consultation with expert	450
22 May 2001	Proof 8 days (£2000 per day)	16,000
	Total	<u>£18,450</u>

-2-

Basis of Taxation – Table of Fees (Schedule 4)

The Civil Legal Aid (Scotland) (Fees) Regulations 1989 regulate the fees allowable to counsel from the Fund under the Legal Aid (Scotland) Act 1986, in relation to any taxation in accordance with regulation 12.

The basis of taxation is set out in regulation 9 of the regulations namely: "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."

Regulation 10 states that "counsel's fees in relation to proceedings in the Court of Session shall be calculated in accordance with Schedule 4".

Schedule 4 Chapter II prescribes a consultation fee of £116.40 before a proof or trial or otherwise involving a significant degree of preparation or lengthy discussion and prescribes a fee of £343.50 for a day in court (Outer House – per day).

A fee for preparation work, as such, is not an item separately provided for in the Table of Fees for counsel but should be taken into account when fixing the proper fee for reasonable remuneration for a day in court.

The fees set out within this Table must form the starting point for counsel's fees.

Schedule 4 paragraph 4 states that: "The auditor shall have power to increase any fee set out in the Table of Fees in this Schedule where it is satisfied that because of the particular complexities or difficulty of the work or any other particular circumstances such an increase is necessary to provide reasonable remuneration for the work".

The Board accepts that this case may well justify an increased fee from those stipulated in the Table. However, on the information submitted to the Board to date and considering previous Auditor's decisions in similar cases the Board cannot conclude that this case merits such increased fees as claimed by senior counsel.

There is no apparent relationship between the fees set out in the Table of Fees and the fees claimed by counsel. The onus is on counsel by reference to the circumstances of the case to satisfy the Auditor that an enhanced fee and, indeed, the level of that enhanced fee, is reasonable (*Uisdean McKay –v- HMA 1999 S.C.C.R 679*).

Daily Rate for Proof (22.5.01 onwards)

It is understood that senior counsel for the defenders were paid £2,000 per proof day. The fees of senior counsel for the defender are not referable to the Table of Fees and are therefore an inappropriate basis for justifying an additional fee. The extent to which this has been relied on by senior counsel for the pursuer in setting his fees at the level claimed is an irrelevant consideration.

-3-

This cannot be a proper basis of assessment of the appropriate fees for the pursuer's senior counsel. The opponent was not a legally assisted party. Determination of the reasonable fee for the pursuer's counsel must be in terms of the legal aid regulations as outlined above and subject to "the prudent man of business" test.

It is submitted by the Board that £2000 per day is excessive and does not reflect a reasonable fee in the particular circumstances of this case. It is understood that counsel's clerk is suggesting that counsel was engaged in four to five days preparation but the Board, to date, has not received any information/evidence by way of clarification or vouching. It is understood, however, that Mr Hadjucki may be on holiday at the time of writing these Points of Objection. Even four or five days preparation could be subsumed within eight days proof at a considerably lower daily rate than that claimed here. The prescribed fees subsume an element of preparation.

Assisting junior counsel in this case accepted a daily rate for the proof of £750 which subsumed all pre proof preparation and preparation during the currency of the proof.

In [REDACTED] -v- *Grampian Health Board (1994)* the Auditor allowed £850 per day (inclusive of preparation) to senior counsel and in [REDACTED] -v- *Greater Glasgow Health Board (1997)* the Auditor allowed £1000 per day (inclusive of preparation) to senior counsel.

Procedural Roll Diet (5.10.00)

Senior counsel is claiming £1500 for this diet. It appears from the solicitor's account that this hearing lasted less than two hours. The solicitor charged three hours 15 minutes waiting time from 9.45 to 1 pm and then charged two hours qualified for between 2 pm and 4 pm for:

"Thereafter attendance at court for calling of case – engaged to include waiting for case to call later in afternoon – engaged 2.00 – 4.00 – 2 hrs qualified".

In the absence of further information regarding the length of the actual hearing, any preparation carried out and any legal complexities in the substance of the argument for a jury trial the Board cannot justify the enhancement of the fee claimed to £1500.

Consultations

19/4/01 Counsel is claiming £500 for this consultation. It appears from the solicitor's account that this consultation with a [REDACTED] lasted two hours. At present the Board has no other details and cannot justify the enhancement to the fee claimed.

15/5/01 Counsel is claiming £450 for what appears to be 'a meeting and not a consultation as such. It appears from the solicitor's account that this consultation referred to as a "Case Conference" lasted 2½ hours. The solicitor's entry states: "Attendance at Case Conference conducted by telephone with counsel and [REDACTED] discussing matters in detail and noting points raised". Again the Board has no other details here and cannot therefore justify the enhancement to the fee claimed.

-4-

IN RESPECT WHEREOF



Solicitor
Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh
Solicitor for the Scottish Legal Aid Board

List of Papers Attached

1. Opinion of Lady Paton dated 11.1.02.
2. *Uisdean McKay -v- HMA 1999 S.C.C.R 679*).
3. Decision of Auditor of the Court of Session dated 15 September 1994 in the case of [REDACTED] -v- *Grampian Health Board*.
3. Decision of Auditor of Court of Session dated 25 August 1997 in the case of [REDACTED] -v- *Greater Glasgow Health Board*.