SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

REPORT

by

F.M. McCONNELL
Joint Auditor
12 Drumsheugh Gardens
Edinburgh EH3 7QG

in relation to an Advice & Assistance Account incurred by THE SCOTTISH LEGAL AID BOARD

to

MESSRS. ALLAN McDOUGALL
Solicitors
3 Coates Crescent, Edinburgh
acting on behalf of
[redacted]

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EDINBURGH 12th APRIL 2011

The Auditor taxes the fees and outlays at ONE THOUSAND AND EIGHTY FOUR POUNDS AND FORTY SIX PENCE (£1,084.46) to which sum falls to be added the Audit fees, inclusive of VAT, of ONE HUNDRED AND FOURTEEN POUNDS (£114.00) a total of ONE THOUSAND ONE HUNDRED AND NINETY EIGHT POUNDS AND FORTY SIX PENCE (£1,198.46)

JOINT AUDITOR

NOTE:

In this case the Scottish Legal Aid Board was represented by [redacted] and David Nicol, Solicitor appeared for Allan McDougall.

[redacted] advised that what essentially was at issue was the outlays of £616.88 and £29.38 paid to a Consultant surgeon for a medical report. The assisted person claimed she had been the victim

of medical treatment performed negligently and in consequence had suffered loss. In the event the report from the Consultant was wholly negative and the matter did not proceed further.

[redacted] explained the statutory framework which governed procedures in relation to expenses incurred by assisted persons. He referred me to S 4(2) (a) of the Legal Aid (Scotland) Act 1986 which is in these terms:-

> "There shall be paid out of the Fund subject to section 4A (13), such sums as are due, by virtue of this Act or any regulations made thereunder, due out of the Fund to any solicitor or counsel or registered organisation in respect of fees and outlays properly incurred or in respect of payments made in accordance with regulations made under section 33 (3A) of this Act, in connection with the provision, in accordance with this Act, of legal aid or advice and assistance".

Turning to the Regulations made under the 1986 Act *supra* parties directed my attention to a number of provisions viz:-

1. Reg. 12(1) of the Advice and Assistance (Scotland) Regulations 1996 which is in these terms:-

> "where at any time it appears to the solicitor that the cost of giving the advice and assistance is likely to exceed the limit applicable under section 10 of the Act or under paragraph 2 below, he shall apply to the Board for its approval to an increased limit, stating the reasons for the excess, the likely amount, and giving such other information as may enable the Board to consider and determine the application.

2. Para 2.12 of Part III Chapter 2 of Advice and Assistance Application Procedures which provided that where a solicitor believes the cost of the work is likely to exceed the basis limits of £95.00 or £180.00 the solicitor must make an application in the form of a "template" and if certain criteria is met this would allow the Board to grant an increase to

cover the work without having to seek further authorisation. It goes on to say that Templates "allow for a single, substantial increase in authorised expenditure from the outset of the case to allow you to undertake all the work normally needed for the type of case concerned. The templated increase is not a guarantee of a certain payment for all work done up to the templated amount, but only for work assessed as actually, necessarily and reasonably done and outlays actually necessarily and reasonably incurred within the limit of authorised expenditure set by the template".

3. Para 54 of Part III of Chapter 5 deals with medical negligence cases and sets out that the Board will grant an increase to £1,600.00 if the solicitor needs to do certain work including *inter alia* the instructions of an expert on "either Hunter v Hanly liability or causation report"; taking instructions on this report through to a decision whether to discontinue the claim, intimate a claim or seek a further increase in expenditure.

4. Para 5.7 of Part V Chapter 5 deals with what work is covered by an increase in authorised expenditure: when and what work is covered. In particular it provides that a solicitor "should only undertake work envisaged and covered by the increase and should not use any expenditure to a limit authorised for any other purpose. If you cannot demonstrate that the work undertaken falls within the purposes for which the authorised expenditure was granted, we cannot pay you."

5. Finally I was referred to para 1.3 of Part V Chapter 1 which narrates:-

"Section 4 of the 1986 Act provides that only such sums as are due in respect of fees and outlays properly incurred by a solicitor or counsel, by virtue of the Act or regulations, can be paid out of the Fund. The regulations prescribe Tables of Fees and generally regulate the fees and outlays allowable to solicitors from the Fund for both advice and assistance and ABWOR under the Act".

Mr. Haggarty explained that the templates were introduced some years ago; a wholly procedural vehicle to make applications in an agreed or prescribed form to facilitate the processing of such applications. There was an obligation on solicitors utilising the Template 54 to confirm they had done certain work and go on to specify what further work was necessary. Essentially the solicitor has had to meet the client, take instructions and establish that the claim was in excess of £3,000.00. In those circumstances the solicitor could apply for the "1st Report", a copy of which is annexed hereto and referred to for its whole terms. It will be observed that this report incorporates a number of "bullet points". The form is issued by the Board and may be downloaded from their website. Unfortunately the bullet points are out of alignment and do not exactly correspond with the printed paragraphs. For example the bullet point which comes before "instructing expert" should be on the following line preceding "further correspondence----------"

[redacted] submitted this was not a matter of discretion. The solicitors had failed to obtain the necessary authorisation to instruct an expert report and it followed that the outlays to the Consultant should be abated in full. The starting point was section 4 of the 1986 Act. The outlays to the Consultant could only be paid if authorised by the Act and regulations. Only if the outlays were incurred within the context of the scheme could they be paid; it was not a question of whether a particular outlay was reasonably incurred. In his submission the critical provisions were paras 12(1) 12(2) and 12(2)(b) *supra* which enabled the Board to impose certain conditions. He also referred to Part V Chapter I and Part V Chapter 5 *supra* and in particular paras 5.10 and 5.11.

In response Mr. Nicol placed reliance on the above guidelines which he submitted should be construed in his favour.

In particular para 2.12 met the criteria in so far as it was self evident that the work done, including the outlay to the consultant was necessarily and reasonably incurred and in so far as the limit of £1,600.000 authorised had not been exceeded I should allow the outlays to the consultant.

He referred me to the template scheme. Para 5.1 sets out the rationale for the scheme. For cases such as medical negligence a solicitor would resort to the template application seeking an increase for additional work, including the employment of medical experts.

I was referred to the 6th bullet point and leaving aside its placement reads:-

> "further correspondence, including correspondence with client to advice, correspondence with authorities expert and holders of medical records and detailed letters of instruction to expert on either Hunter v Hanley liability report or causation report".

In his view "additional expenditure" must mean in this instance the whole of the work done, including the consultants fees. The total amount is well within the cap of £1,600.00; and ought to be sustained. He had made a template application for an increase for a 1st report and this was granted. The acceptance of the application expressly provided for additional work covered by the template including the employment of a medical expert. The acceptance also provided for work to be done in discussing the terms of this report with the client. Because of the terms of the Consultant's report it was decided to take the matter no further. It was manifestly necessary and reasonable the the report be commissioned. He also pointed out that the Board were not objecting to the outlay of £50.00 for recovering medical records and seemed to be taking a selective approach. He could not see how, on principle, there was any difference between the outlays.

Having given further consideration to the whole matter I think there is merit in the submissions of the solicitor for the assisted person and subject to my abating certain entries, I taxed the account to include the consultant's fees. It seemed to me that the Board's position was predicated on the construction of

the regulations, their own guidelines and the form and content of Template 54. Looking objectively at the scheme in relation to medical negligence cases I could understand why the solicitor who made the template application thought she was covered for the medical report. There is, I think, an obligation on the Board, where they seek to limit expenditure in particular circumstances, to set out with clarity and plain language what the restrictions are so that a solicitor is left in no doubt as to the extent of the cover. In this case it was not surprising that the solicitor considered she was covered for all her fees and the cost of the medical report up to a limit of £1,600.00. Because of this lack of clarity it seems to me that the Board would be well advised to revisit their own guidelines to achieve greater clarity, particularly the terms of the 1st Report and how the application is framed so far as it relates to the employment of an expert.