Neutral Citation: [2015] IEHC 99

THE HIGH COURT

[2009 No. 10344 P]

BETWEEN

ISABELLE SHEEHAN (AN INFANT) SUING BY HER MOTHER AND NEXT FRIEND, CATHERINE SHEEHAN

PLAINTIFF

AND

DAVID CORR

DEFENDANT

JUDGMENT of Kearns P. delivered on the 27th day of February, 2015

This is an application brought pursuant to Order 99, rule 38 (3) to review the rulings of the Taxing Master as regards the solicitor's instruction fee in this medical negligence case.

The instruction fee claimed was €485,000. A sum of €250,000 was offered and ultimately the sum of €276,000 was allowed on taxation.

It is claimed on behalf of the appellant that the Taxing Master in this case was guilty of a number of errors as follows:-

(a) He failed to appreciate the complexity of the case and the novelty or rarity of the particular medical condition which arose;

(b) He failed to allow for the presence in court throughout the hearing of two senior solicitors, having regard to the high level of responsibility being carried in the particular case, in circumstances where the defendants also had two senior solicitors in attendance;

(c) He failed to have regard to the amount of time devoted to the case by the solicitors;

(d) He adopted the methodology for arriving at his final figure from that offered by the defendants instead of carrying out his own assessment. In this regard it is alleged that he did not properly explain his approach and that his reasoning was "opaque".

(e) He failed to have any or any adequate regard to comparators.

The defendants for their part maintain that the Taxing Master gave very detailed and careful consideration to each and every point raised during the course of submissions and hearings in relation to the taxation; gave full and adequate reasons; had due regard to comparators, and ultimately arrived at a figure that was fair and appropriate and in line with figures accepted by the particular solicitor in similar medical negligence cases thereafter.

The original taxation of the plaintiff's costs commenced on the 11th September, 2012 and continued on the following day when the hearing was concluded. The Taxing Master delivered a written ruling on the 7th November, 2012 ("the Taxation Ruling").

The plaintiff raised objections dated the 27th November, 2012 relating to the sums allowed in respect of the brief and refresher fees for counsel and the solicitor's instructions fee. The objections were heard on the 13th September, 2013, the 3rd October, 2013 and the 24th January, 2014 at which point the Taxing Master reserved his ruling. There was a further brief hearing on the 27th March, 2014 and, ultimately, the Taxing Master gave his ruling on the objections on the 29th May, 2014 ("the Objections Ruling").

A further point emerged during the course of the hearing before this Court, namely, the extent to which the Taxing Master is entitled to take into account in the course of taxation the downturn in the Irish economy which has seen significant reductions in remuneration and fees across a spectrum of employments, including professional services. The Court was invited to give some directions as to whether there should be a methodology to be followed by the Taxing Master in assessing the amount of any appropriate reduction, rather than by the means of some arbitrary reduction.

THE UNDERLYING PROCEEDINGS

The plenary summons in this case issued on the 17th November, 2009. In the proceedings the plaintiff claimed damages against the defendant, a consultant obstetrician, who was carrying out private practice from the Bon Secours Hospital in Cork. It was alleged that the defendant was guilty of negligence in the management of the ante-natal care of the plaintiff's mother. During the course of her pregnancy her general practitioner carried out certain tests, one of which was a blood test for antibodies. On the 17th May, 2004 the general practitioner wrote to the defendant confirming that the plaintiff's mother's blood contained antibodies against Rh (e) and that the strength of the antibodies was 1/128. Further tests were carried out including a test on the 28th October, 2004 which revealed an alarming rise in the titre at 1/2048, the report also noting Rh (c) antibodies in low titre.

Although notified of these developments, the defendant did not act as he should have in monitoring the levels of antibodies in the plaintiff's mother's blood and in failing in various other respects to arrange for proper research of the medical condition in question or for appropriate foetal blood transfusion. As a result, the plaintiff was born in poor condition, ultimately developing cerebral palsy. The plaintiff has been left with profound disability.

A defence was delivered on the 5th November, 2010 wherein negligence was admitted. However, causation remained in issue and thus remained a significant obstacle for the plaintiff to overcome.

The case was set down for hearing on the 18th November, 2010. On the 5th September, 2011 the defendants conceded the issue of causation and an amended defence was delivered on the 12th October, 2011 which rendered the hearing an assessment hearing only.

The briefs for counsel and the booklets for the Court and the defendants were prepared prior to the admission of liability and comprised over 20 bankers' boxes of documentation.

The trial commenced in the High Court (O'Neill J.) on the 19th October, 2011 and ran for five days in total before being settled on an interim basis pending the enactment of legislation governing periodic payment orders.

The amount of the interim settlement was €1.9million. The Court during the course of this hearing was told that the full capital value of the claim, had it been dealt with on that basis, would have been in the order of €8 million.

The week before the trial there were unsuccessful lengthy settlement negotiations, and since the settlement in October 2011 there has been a further hearing before the High Court which provided for a further interim payment after another protracted hearing. The Court is not presently concerned with any aspect of costs in relation to that further hearing which may, unfortunately, be the subject matter of a further taxation process in the absence of any agreement. The Court was given to understand that follow-up applications to court in respect of interim settlements have not yet given rise to taxation reviews by the court.

RELEVANT LEGAL PROVISIONS
Under Order 99, rule 38 (3) of the Rules of the Superior Courts, a party who is dissatisfied with the decision of the Taxing Master as to any items which have been objected to within the taxation process may apply to the court for an order to review the taxation as to the disputed items and the court may thereupon make such order as may seem just.

Section 27(3) of the Courts and Court Officers Act 1995 ("the 1995 Act") also makes provision for the review of the objections ruling.

In *Superquinn v. Bray UDC & Ors.* [2000] IEHC 115, this Court held that s. 27(3) of the 1995 Act introduced a higher onus upon a party challenging the ruling of a taxing master than was the position prior to the enactment of that section. The section provides in relevant part:-

> *"The High Court may review a decision of the taxing master of the High Court … made in the exercise of his or her powers under this section, to allow or disallow any costs, charges, fees or expenses provided only that the High Court is satisfied that the taxing master … has erred as to the amount of the allowance or disallowance so that the decision of the taxing master or the county registrar is unjust."*

There must therefore be an error in amount and an injustice arsing in consequence. In *Bloomer v. The Law Society of Ireland (No. 2)* [2000] 1 I.R. 383 Geoghegan J. further held that in considering whether the taxing master erred, the court must see whether in arriving at his decision he had regard or excessive regard to some factor which he either should not have had any regard to or to which he should have had much less regard. The court then had to consider whether there was some significant factor to which the taxing master ought to have had regard and to which either he had no regard at all or insufficient regard. Geoghegan J. described these errors as errors of principle. He also concluded that the court must also consider whether the taxing master has fallen into error in either law or jurisdiction. Once such an error is established, the court then has to address the second question which is whether the taxation was unjust, something that would be determined by the amount. If after falling into error, the Taxing Master in fact arrives at the correct figure or at figures within a range which it might reasonably have been open to him to have arrived at, the court should not interfere.

This Court has previously identified a differential in the region of 25% or thereabouts as indicative of injustice (by way of analogy to the Supreme Court's approach in determining whether an award of damages was unjust), but other judges have hesitated about adopting this pragmatic formula, preferring that the question of what is just or unjust be viewed on a case by case basis since different factors may be at play (see observations of Peart J. in *Quinn v. South Eastern Health Board* [2005] IEHC 399).

THE SOLICITOR'S INSTRUCTION FEE
Section 27 of the 1995 Act sets out the approach to be adopted in assessing a solicitor's instructions fee as follows:-

> *(1) On a taxation of costs as between party and party by a Taxing Master of the High Court … the Taxing Master … shall have power on such taxation to examine the nature and extent of any work done, or services rendered or provided by … a solicitor … and may tax, assess and determine the value of such work done or service rendered or provided in connection with the measurement, allowance or disallowance of any costs, charges, fees or expenses included in a bill of costs.*
>
> *(2) On a taxation of costs as between party and party by a Taxing Master of the High court … the Taxing Master … shall have power on such taxation to allow in whole or in part, any costs, charges, fees or expenses included in a bill of costs in respect of … a solicitor … as the Taxing Master … considers in his or her discretion to be fair and reasonable in the circumstances of the case, and the Taxing Master shall have power in the exercise of that discretion to disallow any such costs, charges, fees or expenses in whole or in part.*

Order 99, rule 10(2) RSC provides that on taxation there shall be all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed. Order 99, rule 37(22) (ii) RSC sets out the criteria to be applied by the Taxing Master in exercising his discretion with regard to any item. In particular, he must have regard to:

> *'(a) The complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;*
>
> *(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;*
>
> *(c) the number and importance of the documents (however brief) prepared or perused;*
>
> *(d) the place and circumstances in which the business involved is transacted;*
>
> *(e) the importance of the cause or matter to the client;*
>
> *(f) where money or property is involved, its amount or value;*
>
> *(g) any other fees and allowances payable to the solicitor in respect of other items in the same cause or matter but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.'*

In *Superquinn v. Bray UDC & Ors.* [2000] IEHC 115, this Court concluded that the provisions of s. 27 of the 1995 Act impose a duty upon the Taxing Master to examine the nature and extent of the work done in order to assess what he considers to be a fair and reasonable allowance for the work done or the service rendered. While the fee of an opponent is relevant, this does not exonerate the Taxing Master from conducting a "root and branch" examination of a bill on its own merits.

In *C (D) v. The Minister for Health & Anor* [2008] IEHC 299, Herbert J. provided some further guidance to the approach to be adopted by a Taxing Master when he said:-

> *"The learned Taxing Master should have objectively examined each of the separate items in the Bill of Costs which together make up the claim for a General Instructions Fee. He should have ascertained precisely what work was done by the Solicitor's for the Costs, with particular reference to the documentation furnished in support, and by what level of fee-earner it was done. The learned Taxing Master should next have considered whether it involved the exercise of some special skill on the part of the doer and, indicated what he considered that skill was and why he considered its use was necessary in the circumstances. The learned Taxing Master should have indicated what amount of time he considered should reasonably have been devoted to this work, employing as much precision as the nature of the work and the information available to him would permit. The learned Taxing Master should have considered whether the doer of the work bore any special responsibility in the course of carrying out that work and, identified what he considered that to be and, how it arose. The learned Taxing Master should have considered the extent to which the work was proper and necessary for the attainment of justice so as to be allowable on a Party and Party taxation. In my judgment, this is the form of scrutinisation, measurement and evaluation which it is necessary for a Taxing Master to perform in the proper discharge of his or her statutory powers under the provisions of s. 27(2) of the Courts and Court Officers Act 1995. Without such an analysis, his discretion to allow in whole or in part as fair and reasonable or, to disallow, any item in the General Instructions Fee would not be validly exercised."*

A similar approach was adopted by Ryan J. in *Cafolla v. Kilkenny & Ors.* [2010] IEHC 24. In that case, Ryan J. stated:-

> *"So, as Herbert J. pointed out, the 1995 Act and the Rules taken together impose the obligation on the Taxing Master to make a detailed analysis of the work that was done and of the claims for payment in respect of each item of work or, at least, for each category of the work that was done."*

Finally, in *Bourbon v. Ward & Ors.* [2012] IEHC 30, this Court had to deal with an objections ruling in which the then Taxing Master was highly critical of the decisions of the High Court in CD and *Cafolla*. This Court pointed out that the previous Taxing Master was not at liberty to ignore or depart from those decisions, a view similarly taken by Birmingham J. in *Walsh v. HSE & Ors.* [2012].

Further legal considerations will arise during the course of this judgment, but I consider it more appropriate to refer to them in the context of the particular issues as they arise for consideration.

NOVELTY AND COMPLEXITY

It is submitted on behalf of the solicitor that the Taxing Master failed to give sufficient weight to the evidence of Mr. Boylan and Ms. O'Connor, partners in the firm of Messrs. Augustus Cullen, solicitors, as to the novelty and complexity of the plaintiff's case and in respect of which it is submitted there was no contradictory evidence before him. It is submitted that he also ignored the testimony of Mr. Dennis McCullough S.C., in support of this proposition, who gave evidence that it took him 100 hours to familiarise himself with all aspects of his brief, including the unusual medical condition from which the plaintiff's mother suffered in this case. Instead of accepting this evidence, which would amount to 12.5 eight hour working days during which no other work would be attended to by counsel, the Taxing Master relied upon what he described as his own expertise as a cost accountant dealing with taxations of medical negligence proceedings. In particular he attached weight to the early view formed by Mr. Boylan, and expressed in a letter to his client of the 28th October, 2008, that the plaintiff indeed appeared to have a strong case. Having obtained a medical report from Mr. Walkinshaw, an expert in Liverpool who furnished - in Mr Boylan's own words, a "wholly supportive" report, Mr. Boylan was able to so inform the plaintiff on the 30th April, 2009. The defendants also point to the fact that negligence was not in issue in this case and that the most significant obstacle to the plaintiff had thereby been removed at an early stage.

However, causation did of course remain in issue virtually until the end. While there were four witnesses as to fact, some 24 experts in all were consulted, albeit that most of those experts were consulted prior to the year in which the case was heard.

The Court accepts that medical negligence cases are invariably more complex than other personal injury cases. In *Wright v. HSE & Anor* [2013] IEHC 1, Irvine J. stated the following in relation to the complexity inherent in modern clinical negligence litigation:-

> *"14. It is undoubtedly the case that in recent years, clinical negligence litigation has become more complex …*
>
> *15. It is also the case that in clinical negligence proceedings greater numbers of expert witnesses than ever before are being retained to deal with the issues of liability and causation."*

The approach which the Taxing Master took to the issue of complexity was set out by him at the initial taxation in the following manner:-

> *"Accordingly, it seems to me that, while the medical condition of which the next friend was suffering may have been rare, the expert medical opinion was clear and strongly in favour of the plaintiff's case from the beginning. Further, the defendant's defence effectively conceded the negligence issue, while maintaining a denial of causation. In a letter of the 9th November, 2010 addressed to the next friend, the plaintiff's solicitor outlined the position noting that although there was no admission of causation in the defence she was confident that on the balance of probabilities this would be established. Causation was of course admitted at a later stage. I am satisfied that there is little or no basis for the argument advanced on behalf of the plaintiff that there was an element of novelty or uniqueness attaching to this case which should bear on the level of the instructions fee."*

While no complaint is made as to the Taxing Master's approach to the complexity of assessing damages in this case, it is submitted that he failed to have due regard to the problems associated with establishing causation. It is further submitted that as no evidence was called by the defendant to contradict the evidence tendered by Mr. McCullough as to the technical and novel aspects of this case, the Taxing Master was bound to accept and act upon that evidence.

It is worth once more focusing on what is stated to be the "novelty" of the case. Firstly, it involved Rhesus incompatibility disease. Secondly, the plaintiff's claim was that she should have been delivered up to six weeks sooner than she was delivered to avoid brain damage. Thirdly, it was alleged there was inadequate ante-natal care and reference was made to another case (*Quinn v. Mid-Western Health Board* [2005] 4 I.R. 1) which was unsuccessful because the plaintiff was unable to establish causation. Causation is sometimes a major problem for a plaintiff in a case of this sort, even if negligence is conceded.

This question of novelty seems to have been one of several quite contentious issues during the course of the various taxation hearings, in the course of which Mr. Boylan described the novelty of the case as an "intangible" and the Taxing Master for his part asking Mr. Boylan to identify what "extra work he had carried out as a result of the worry".

This Court has been visited with multiple lever arch folders, rulings on objections and submissions of inordinate length on this and the other issues to which I shall presently refer, but on this particular issue I think there has been some degree of conflation in the minds of the appellant's advisors between the unusual medical condition from which the plaintiff's mother suffered and the notion of complexity in preparing and presenting the case. The fact that a condition is rare and unusual does not necessarily render the case more complex in terms of work or preparation. It simply means that work and research must move in a direction of medical inquiry somewhat different from that more often trodden by solicitors practising in this area.

The Taxing Master found no evidence of additional work being required because of the unusual medical condition suffered by the plaintiff's mother. As a marker or indicator of novelty or complexity, I agree with and accept the defendant's submission that the Taxing Master was entitled to have regard to the fact that Mr. McCullough, having initially marked a brief fee of €125,000 in this case, with additional daily refresher fees of €3,500, later accepted as appropriate a brief fee of €65,000, and that no challenge is made to that figure in this review. Given that the brief fee accepted corresponds with those now regularly allowed for cases without unusual medical features, it is hard, if not impossible, to believe that a reduction of such magnitude would have been accepted if the case had the characteristics of novelty or complexity contended for.

DISALLOWANCE OF COST OF TWO SENIOR SOLICITORS AT TRIAL
It is submitted on behalf of the appellant that the Taxing Master erred in allowing for the attendance in court of one senior solicitor only, treating the claim for a second senior solicitor as a "luxury".

It was pointed out to the Taxing Master, in the objections hearing, that the defendant's representation included two solicitors and a legal executive together with personnel from the State Claims Agency. It was submitted on behalf of the plaintiff that two solicitors and a trainee were required on her behalf given the complexities of the case, the number of witnesses required to be scheduled, the volume of documentation and, rather oddly, "to ensure equality of arms".

The defendants in reply argued that it was well established in law that party and party costs are *de minimis* in nature and that a party seeking his costs is only entitled to the bare essentials required to conduct the litigation. Reference was made to *Dyott v. Reade* 10 ILTR 111 in which Sullivan M.R. stated as follows:-

> *"Costs between Party and Party are not the same as solicitor and client costs. In costs between party and party one does not get full indemnity for costs incurred against the other. The principle to be considered in relation to party and party costs is that you are bound in the conduct of your case to have regard to the fact that your adversary may in the end have to pay your costs. You can not indulge in a 'luxury of payment."*

Likewise, it was submitted, that in *Tobin and Twomey Services Ltd. v. Kerry Foods Ltd (No. 1))* [1999] 1 ILRM 428, the High Court (Kelly J.) endorsed this principle that luxuries are not recoverable on party and party taxation. Similar views were expressed in *Smyth v. Buller* (19 Eq 473) and *Irish Trust Bank v. Central Bank of Ireland* [1976-77] I.L.R.M. 50.

It was pointed out on behalf of the defendants that the case was actually proceeding in court as an assessment of damages only. It had been agreed in advance of the trial that a periodic payments order would be sought and all figures had been adjusted accordingly. The issue of general damages and retrospective care costs had been agreed at a settlement meeting held on the 10th October, 2011. It was further submitted that Ms. Gillian O'Connor, a partner in the solicitors firm, was eminently capable of representing the plaintiff's interests at the hearing of the action without the necessity for assistance by Mr. Boylan, a *fortiori* where the plaintiff was at all times represented by at least two experienced counsel.

The Taxing Master and the defendant acknowledged that it may have been necessary to have an assistant in attendance to coordinate witnesses or organise the documentation and the Taxing Master made an appropriate allowance for a junior solicitor in this regard. It was argued therefore that it was entirely a matter for the plaintiff if she wished to have two senior solicitors attend on a solicitor and own client basis, but the defendants could not be held liable for same.

The plaintiff, in claiming that an equality of arms issue arose, characterised the court room adversarial hearing as a "David v. Goliath" situation. If that were true, some basis for the contention of an inequality of arms might arise.

However, in my view no such inequality of arms may be said to have arisen. The solicitors firm involved on the plaintiff's side of this case is one of the most experienced firms in this jurisdiction in dealing with plaintiff medical negligence litigation. Furthermore, the plaintiff was represented and advised by a very experienced team of senior and junior counsel who are regularly instructed by the same solicitors in medical negligence actions. To the extent that it might be relevant, the defendant was perfectly entitled to instruct two senior solicitors to attend the trial on a solicitor and own client basis, but this did not in fact occur. One of the solicitors, Mr. O'Rourke, was not at all times present for the duration of the trial as he was also attending two other cases that were running in the Four Courts at the same time.

The defendants, on the hearing before this Court, also emphasised the distinction between the solicitors on record for the defendant and the employees of the State Claims Agency who attended the trial. They assert that it is factually incorrect to state that the State Claims Agency's claims managers are all qualified solicitors. Four of the State Claims Agency's staff who deal with clinical malpractice cases are not solicitors and three of them have no legal qualifications. These staff are employed as claims managers and not solicitors.

In any event, I see no substance in this point from the plaintiff's point of view. When litigation moves into the courtroom setting the primary responsibility for the carriage of the proceedings devolves on counsel, and it can scarcely be suggested that in this case the plaintiff's representation was in any way deficient, having regard to Mr. McCullough's considerable experience and expertise in this area. In fact, I think it would be fair to say that he is the foremost senior counsel now practising in this area in this jurisdiction.

While some passing reference was made to the fact that Mr. Boylan might have needed to remove himself from the courtroom for ongoing negotiations and/or discussions with expert witnesses, the Court is satisfied that the Taxing Master was perfectly correct to reach the particular conclusion which he did reach on this issue.

DID THE TAXING MASTER GIVE SUFFICIENT REGARD TO THE AMOUNT OF TIME INVOLVED?
It is clear from the provisions of Order 99, rule 37(22) (ii) that time is a factor which the Taxing Master must take into account in making his assessment of what is reasonable. In *Cafolla v. Kilkenny & Ors.* [2010] IEHC 24, Ryan J. underscored the relevance of this consideration:-

> *"What this comes down to, as I see it, is that the Taxing Master is asked to enquire of the solicitors claiming the costs,*

what work they did, who in the firm did it, how much is charged for it or what was the appropriate rate and how long the work took. Asking what a person did and how long it took are the most elementary inquiries in evaluating work. This is not, of course, to say that getting the answers to these questions is the end of the process, but it does indeed seem to be the beginning of the exercise that is required to be done by the Taxing Master under the section and the rules."

Before embarking further on this issue, it is important for the Court to note the following:-

(a) There was no agreement between the plaintiff and the solicitors to charge fees based on time expended;

(b) There was no agreement between the plaintiff and the solicitors in relation to appropriate hourly rates;

(c) An hourly rate of €375 was introduced by the plaintiff's legal costs accountants when explaining his assessment of the solicitor's instructions fee. It was not a rate suggested or applied by the Taxing Master.

It is a fact in this case that no detailed time records were kept or maintained by the solicitors until 11th August, 2011. Further, no memos were brought into existence in relation to the work done by Ms. O'Connor on discovery. The Taxing Master did not require the solicitors to prepare retrospective schedules, but nonetheless did examine and explore the amount of hours actually expended.

In this regard it was noted that the 490 hours claimed in this case involved a degree of double charging for certain hours, which required to be corrected. At p. 20 of his second ruling the Taxing Master states as follows:-

"It is an undisputed fact that the plaintiff's legal costs accountant both introduced and relied upon an hourly rate of €375 in his assessment of the instructions fee herein. I certainly did not do so but use this and other hourly rates as a test against my own assessment of the fee. Ultimately I decided that the fee must be assessed on the basis of the matters referred to in the relevant statutory provisions: section 27 of the Courts and Court Officers Act 1995 and in Order 99, rule 37 (22) (ii) RSC. Of course, time spent, is an important factor to be considered. It is but one factor. It would, in my view, be wholly wrong, for the purpose of assessing a solicitor's instruction fee to ascribe an hourly rate or a number or rates to specified hours. This can only be used as a test (unless the parties otherwise agree as occurred in Minister for Finance v. Goodman). To apply such methodology in the circumstances of the instant case would be to ignore all the other factors which it is statutorily mandatory to apply and accordingly, this is impermissible. Neither has a Taxing Master any role to play in fixing solicitor's hourly rates or in deciding which hourly rate should be applied."

At a later point in his ruling, the Taxing Master stated:-

"The onus of proof rests with the claimant party and estimated time must be considered with particular vigilance. Recorded time should be backed by appropriately informative attendance notes by way of explanation of the nature and the necessity for the work in question. There should also be proof of concurrent recording of the time and the methodology adopted. In the absence of regulation, the system of recording time utilised by solicitors (and other professionals) is not satisfactory. There may be little in the way of preservation of proof of time recorded an explanation of work done with specific reference to the length of time involved, specific tasks addressed, or dates work carried out."

The Taxing Master expressly stated on numerous occasions in his rulings that time was only one of the factors to be considered and that his approach would be informed by his consideration of the nature and extent of the work, the submissions made on taxation and the working papers and documentation submitted. In this respect, the Court accepts the defendant's contention that the Taxing Master did in fact test and cross-check his assessment against the time records and time estimates made available to him. This seems an eminently suitable approach to have adopted in circumstances where the time records adduced were not accurate and the majority of time expended went unrecorded. Rather than engage in a full recital of the Taxing Master's reasoning, the Court has appended the relevant pages of the Taxing Master's second ruling on this issue at the end of this judgment. I agree with the approach adopted by the Taxing Master as therein detailed, which has due regard to all of the relevant criteria.

Apart from the time records adduced in relation to the last few months of the proceedings, the plaintiff did not provide any breakdown of the time expended by the solicitors on the various aspects of the file. Instead, they provided an unhelpful estimate of between 1,000 and 1,200 hours expended on the file, failing to break the estimate down with regard to specific pieces of work. It is hard therefore to criticise the Taxing Master for a supposed failure to indicate what amount of time he considered should reasonably have been devoted to various aspects of the work. In the absence of any attempt to break down the time estimates in this way, the Taxing Master was required to factor the time expended by the solicitor into his assessment based upon his examination of the solicitor's file. As stressed by Ryan J. in the *Cafolla* case, if there is a difficulty in calculating the time spent, that is a problem for the claimant's solicitor.

To re-clarify the factual position in this case, the plaintiff made submissions on taxation in relation to the time expended prior to the delivery of the Taxing Master's first ruling. The time records were introduced and a rough estimate of the time was referred to (1,000 hours) and an appropriate hourly rate of €375 was suggested.

As already noted, time records started to be kept from the beginning of August 2011. The time records adduced in relation to the period from August until October 2011 indicate that the solicitors expended approximately 490 hours broken down as follows:-

	Name	Hours
a)	Gillian O'Connor, Consultant Solicitor	300
b)	Michael Boylan, Partner	85
c)	Emer Buckley, Trainee Solicitor	52
d)	Catriona Bray, Trainee Solicitor	6
e)	Marie Hynes	29
f)	Theresa Wood, Legal Secretary	17.5
	Total	490

As already noted, 51 hours of double entries alone were noted on taxation and accepted by the plaintiff. However, no reduction on

the figure claimed took place given that the sum of €485,000 was claimed in the bill of costs.

Having initially submitted that a total of 1,000 hours were expended on the file, the plaintiff later submitted that the estimate could be revised upwards to 1,200 hours. The Court finds this discrepancy between the two estimates to be both significant and unacceptable. A measure of exactitude is essential in this context, and a plaintiff must be in a position to justify and identify what work was done, who in the firm carried out the work, how long it took and what was the appropriate rate to be charged having regard to the nature of the work, as not all work can be charged at the highest rate.

Given that the Court, like the Taxing Master, believes the plaintiff's estimates are unreliable, the Court is satisfied that the Taxing Master was in such circumstances not obliged to attribute his assessment entirely to those estimates, but rather was entitled to use the estimates and records of time expended to test or cross-check his own assessment, which the Court in turn is satisfied was based upon a root and branch examination of the nature and extent of the actual work carried out by the solicitor. This ground of appeal is also rejected.

Ultimately what the Taxing Master chose to do in the present case was to break down the instruction fee into discrete elements and/or time periods, and the Court is satisfied that the Taxing Master may adopt such a methodology, having done so on numerous occasions and in accordance with the established jurisprudence of the High Court (*Cafolla v. Kilkenny & Ors.* [2010] IEHC 24; *CD v. Minister for Health and Children & Anor.* [2008] IEHC 299).

The Court is satisfied, particularly by reference to pp. 63-75 of the Taxing Master's second ruling that his breakdown and assessment of the work of the solicitor as set out in his rulings is fair and reasonable. The Taxing Master provides a detailed summary of the work carried out by the solicitor during each relevant period with reference to the bill of costs, the solicitor's file, the submissions made on taxation and the limited time records produced.

Another point might perhaps usefully be mentioned in concluding this section of the judgment. At one stage in the Taxing Master's Ruling, there was a suggestion that the plaintiff's solicitors were, in effect, seeking to recover "superprofits" in the figures advanced for taxation in this and other cases. To the extent that this suggestion is based solely on the fact that the plaintiff's firm specialises in medical negligence work and for that reason has had a significant number of cases in the last ten years, some of which have proceeded to taxation and in respect of which substantial sums have been awarded in costs, the Court rejects it. The fact that a particular firm has expertise and is frequently instructed on that basis should not lead to any such characterisation of the solicitor's work, and the Court was glad to note during the course of the hearing that counsel on behalf of the defendant expressly withdrew any such inference or contention.

METHODOLOGY

Against a background where it is accepted that the plaintiff's calculation of time invested in this case is inaccurate, it is somewhat surprising that it is alleged that the Taxing Master "displayed an excessive and unacceptably uncritical regard to the submissions made by the defendant's cost accountant". Reliance for this proposition is, mistakenly in the Court's view, placed on observations made by Herbert J. in *C(D) v. The Minister for Health & Anor.* [2008] IEHC 299 and to the following passage in the judgment:-

> *"The learned Taxing Master had an altogether excessive and unacceptably uncritical regard to the assertions made by the legal costs accountant for the solicitors for the costs in his oral submissions. He had insufficient regard to the task of objectively assessing and forming an independent judgement as to what work was in fact done by the solicitors for the costs and whether it was properly allowable, in whole or in part, on a party and party taxation. By reason of this failure there is no sufficient material available to this Court to enable it to arrive at a figure which it would consider to be proper to allow to the solicitors for the costs as a general instructions fee."*

First of all, this passage goes nowhere near as far as saying that the Taxing Master is not entitled to consider different methodologies for assessing the value of the solicitors work, and it makes obvious sense that, in a particular case, he should adopt a methodology which offers the greatest reliability in the particular circumstances of the case.

What the Taxing Master did in this case was to break down the instruction fee into discrete elements and time periods. That is not to invent a new wheel. In his ruling the Taxing Master provides a detailed summary of the work carried out by the solicitor during each relevant period, with reference to the bill of costs, the solicitors file, the submissions made on taxation and the limited time records produced. He also made reference to the various hourly rates proposed by the plaintiff as a way of testing his allowances. Again referring to pp. 63-75 of the Taxing Master's second ruling, it seems to this Court that the reasoning is cogent and demonstrates that his allowances are entirely reasonable. For example, the Taxing Master made an allowance that is €26,000 greater than the defendant's legal costs accountant's assessment and further he dismissed all of the defendant's objections in relation to the witness expenses at taxation, a clear demonstration that he only accepted the defendant's submissions where he thought they were correct. In any event, even if the Taxing Master agreed with the assessment of the defendant's legal costs accountant in its entirety, that was something he was perfectly entitled to do where his analysis of the nature and the extent of the work led him to that conclusion. As was stated by Kinlen J. in *Gaspari v. Iarnród Éireann & Ors.* (Unreported, High Court, 30th July, 1996), the Taxing Master is entitled to prefer one view over another.

The Court also rejects suggestions that the Taxing Master failed to address the issue of specialist skills possessed by Ms. Gillian O'Connor as the solicitor primarily involved with this case. At p.28 of his first ruling and at p.40 of the second ruling, the Taxing Master clearly states that the solicitor had exercised specialist skills while working on the file. He concluded, as he was entitled to do, that there was no evidence of the exercise of special skills by the solicitors over and above such skills one would have expected to be applied by solicitors of like competence, and no indication of additional work carried out using such skill.

It was also submitted during the course of the hearing before this Court that some allowance should be made for the fact that the case was brought on a "no foal, no fee arrangement" basis. The amount of a solicitor's work and his responsibilities and duties are the same, whether he is retained on such a basis or otherwise. The plaintiff has not made reference to any legal principle or authority for an uplift of his fees on this basis. It may be unnecessary to add further that the plaintiff has not demonstrated how that factor in any way altered or affected the nature and extent of the work required of the solicitor or how it should affect the level of the instruction fee. The Court is satisfied that a paying party should not be expected to subsidise the solicitor's business model or indemnify them against risks voluntarily entered into.

While it was not an error of any great magnitude, the Court is satisfied that the Taxing Master's comments in his first ruling (i.e., that it was inconceivable that the plaintiff's solicitor's overheads were comparable with firms with the highest overheads in Dublin), were exaggerated. The Court is satisfied that there was no evidence to support any such conclusion which, incidentally, was one strenuously contested by the plaintiff's solicitors. However, the particular comment was made in the context of a discussion in

relation to a high commercial rate of €375 per hour applied by the High Court in certain other cases. There is nothing in the ruling to suggest that the rate per hour ultimately applied by the Taxing Master resulted from any finding that the solicitor's overheads might have been lower. It is clear from the Taxing Master's ruling that the reason why he used a lower hourly rate when testing his assessment is because not every piece of work carried out by a solicitor will attract the maximum hourly rate on a party and party basis, for example, routine correspondence. This approach is fully consistent with the comments of Ryan J. in the *Cafolla* case.

Equally on the topic of "intangibles" the Court sees no reason for an uplift in the solicitor's fee for this reason. Effectively the plaintiff's solicitors are seeking an extra €100,000 by reference to intangibles. However, where hourly rates are fixed for professional fees, it must be assumed that considerations of this nature are reflected in the rate arrived at. They are in the case of professionals in other disciplines. Even if I am mistaken in this view, I am nonetheless satisfied that the Taxing Master had regard to this consideration, factored it in to his considerations, and the Court sees no reason to interfere with his findings on this ground.

Finally, on this aspect of the case, and notwithstanding that the Taxing Master opted for the defendant's methodology for assessing the instruction fee, the Court is satisfied that no real alternative to that methodology was provided by the plaintiff's solicitors.

THE ROLE OF COMPARATORS IN MODERN TIMES

It goes without saying that comparators historically have played an important role when assessing costs, be they solicitors' instructions fees or counsels' fees. In times of economic stability it makes perfect sense to have regard to sums allowed on taxation in similar cases and to sums agreed by way of fees between the parties to litigation.

The plaintiff complains in this case that, while the Taxing Master ostensibly took comparator cases into account, he failed to have adequate regard to a number of fairly recent cases where sums significantly in excess of that allowed in the instant case were measured or agreed.

The first of these was *Murphy v. HSE*, a medical negligence case which was taxed at the end of 2011 and in which the plaintiff's solicitor retrospectively estimated their time records at the request of the defence. In that matter the instructions fee was allowed at €400,000 and no objections were brought.

Another comparator was *Lennon v. HSE*, a medical negligence case where liability was withdrawn on the first day of the trial and where the instructions fee was allowed at €455,000. Also mentioned was the case of Luke Miggan, another 2011 case, which involved a periodic payment and which was an assessment only and wherein the instructions fee on the main action was agreed at €380,000.

It was submitted on behalf of the appellant that these allowances by way of instructions fee, occurring as they did in the aftermath of the economic downturn, suggested either that the instruction fee sought by the plaintiff's solicitor in the instant case was not unreasonable, or, in the alternative, that the fee actually allowed was far too low. It was urged upon the Court that the Taxing Master failed to have regard to these relevant comparators.

The defendants for their part pointed to pp.53-4 of the Taxing Master's second ruling, including the cases of *Martin, Hynes, Breen, Scanlon* and *Flood*. At p.55 of his ruling, the Taxing Master adverted to the case of *Martin v. Coombe Hospital*, where the settlement was €4 million and where an instruction fee of €337,000 was agreed, even though quantum and liability were in issue. In two of these five cases the plaintiff's firm in the present case settled their fees at this rate. While all were settled after the original ruling in the present case, the defendants argued that they provide relevant comparators for the Court to consider on the hearing of this appeal. They argue that the "proof of the pudding is in the eating", in that the plaintiff's firm were content in these recent cases to accept a figure in line with the figure assessed in the present case. The plaintiff solicitor's counter-argument on this point is that he was influenced in agreeing to those figures by the chilling effect of the ruling delivered by the Taxing Master in the present case.

In light of the express obligation on the Taxing Master to base his assessment upon the nature and extent of the work done by the solicitor and/or counsel, the Taxing Master is not obliged to slavishly follow allowances made in comparator cases which he regards as erroneous or calculated by reference to outdated or incorrect principles. The use of comparators can not be a substitute for a root and branch examination of the actual work carried out by the solicitor.

It was submitted before this Court on behalf of the defendant that any comparators adduced by the plaintiff must be considered in the light of current economic conditions and allowances which heretofore may have been the norm are not now justifiable. It was further submitted that previous allowances, particularly in the area of medical negligence and high value personal injury claims, were too heavily influenced by the amount of damages awarded or agreed. The value of a case is, however, only one of the factors to be weighed in the balance when assessing the fee of the solicitor. As Hardiman J. commented in *B.D. v. J.D.* [2004] IESC 101:-

> *"Those charging instruction fees or brief fees must bear in mind that they are to be related to the work done and not directly to the asset value in a case. Obviously the latter will affect the complexity and the level of responsibility involved in the case but these are not the sole determining factors."*

In times of financial and economic stability, it seems to the Court that comparators have a far more important role to play than in times of economic and financial turbulence. Comparators are in effect "a hall of mirrors" whereby fees allowed in past cases influence, if not determine, those to be allowed in a particular case under review. This model of self replication is totally unsuited for circumstances where a major financial and economic catastrophe has affected the national finances. Comfortable assumptions that the calculation of fees for legal services should simply continue as heretofore, without the slightest regard to the privations experienced by citizens, including those rendering professional services, does not in the Court's view serve the interests of justice. In the next section of this judgment I will advance some thoughts on how concerns in this regard, shared I am sure by the legal profession itself, might be addressed and alleviated.

Ultimately, the plaintiff's objections on this aspect of the case must be rejected. The defence have pointed to a number of cases where, subsequent to the ruling made by the Taxing Master in this case, the plaintiff's solicitor has accepted similar figures and has not sought any review by the High Court. It was perfectly open to him to have brought such an appeal and the Court was informed that interim payments of costs by defendants can and do occur in situations of this nature, so no plea of financial need or economic necessity can explain away the solicitors willingness to accept the kind of figures for instructions fees which were ultimately determined by the Taxing Master in this case.

It is argued, I have to say somewhat unconvincingly, that the plaintiff's solicitor was "driven" into accepting these lower fees by the "chilling effect" of the taxation in the instant case. The Court rejects any such presumed reticence on the part of the solicitor, whose reputation for fearlessly advancing his cases is will known and well founded. When the "David and Goliath" metaphor was offered by way of illustration of some supposed inequality of arms between the two sides in this case, the Court wondered which side was David

and which Goliath.

The Court would reject the appeal on this ground also.

THE ECONOMIC DOWNTURN
Both sides in this case accept that there has been a severe downward correction in the nation's finances since 2007, not merely across the public services sector, but extending into the private and professional sector also, frequently resulting in marked reductions in professional fees and remuneration.

It would be extremely damaging to the status and authority of the Taxing Master if, in performing his statutory functions, he was to bury his head ostrich-like in the sand, oblivious to the harsh financial realities being experienced by the majority of Irish citizens. Not only would it be a disservice to his own important office, but would have profoundly damaging implications for the legal profession. While this can only be a personal observation, I would be of the view that the custodians of both branches of the legal profession are acutely aware that the best interests of the profession are served by sharing in the same way as other professionals in some realistic and proportionate readjustment to the expectations which might have been the norm before the financial difficulties began.

I expressed these views in the *Bourbon* case when, in concluding my judgment. I stated:-

> *"The Constitution guarantees the right of access for all citizens to our courts. It seems to the Court that this right is threatened when the cost of going to court – be it for plaintiffs or defendants – becomes or remains prohibitive. Levels of costs allowed during years of prosperity may no longer be appropriate in times of grave hardship. It is not clear to me that the current extreme financial crisis in this country is factored into the taxation process. There would appear to be a strong case for arguing that it should."*

While there has been some levelling off or even reductions in legal costs in recent years, it seems to this Court that the Taxing Master can best give effect to this particular consideration with some measure of precision which would satisfy practitioners, perhaps the public also, and most importantly, serve the interests of justice and transparency.

This issue was addressed by the High Court (Kelly J.) in *Missford Ltd. v. Companies Act* [2010] IEHC 240. In that case Kelly J. had to deal with an application to fix the remuneration of the former interim examiner of Missford Ltd.

While that was an application made to the court under s.29 of the Companies (Amendment) Act 1990, it is a decision which has considerable relevance to the point under consideration.

Section 29 of the Companies (Amendment) Act 1990 provides:-

> *"The court may from time to time make such orders as it thinks proper for payment of the remuneration and costs of, and reasonable expenses properly incurred by, an examiner."*

At the outset, Kelly J. made clear that the court is not "a cipher to rubber stamp claims made by an examiner", but on the contrary must carry out "vigilant scrutiny" so that the court can ensure that the examiner is remunerated only for work which falls properly within his remit.

The question ultimately which the court had to consider was whether or not it should sanction a charge-out rate of €425 per hour which had remained unchanged for work of the sort performed by the examiner in this case since it was first introduced in January 2007.

This Court finds the following passage at p.5 of the judgment particularly instructive:-

> *"There is no doubt but that the economic climate which obtains in 2010 bears little resemblance to that of early 2007. With one or two notable exceptions, it is common knowledge that professional fees have been substantially reduced across the board. Anecdotally and from personal experience one can discern that professional fees have been reduced in the order of one third from what they were in 2007. That such a reduction was necessary is borne out by the August 2009 Competitiveness Report produced by Forfás (The National Competitiveness Council). It stated:-*
>
> > *'Recent price falls in Ireland are a cyclical response to the downturn nationally and internationally (e.g. falling interest rates, international fuel and food prices) rather than structural changes in the Irish economy or changes in the provision of State provided goods and services … in order for the economy to make the necessary transition from a reliance on domestic demand to sustainable export led growth in the medium term, policies need to facilitate the convergence of Irish costs, charges, professional fees, rents and income/wages towards the level of our trading partners. Ultimately, a quick adjustment in the price level is preferable to a gradual decline over several years. While painful and deflationary in the short term, the alternative is a prolonged period of weak or negative growth, high unemployment and emigration of highly educated young Irish people.'*
>
> *In the private sector, wages and salaries have reduced by a substantial amount and that is so also in the public service. With such a downward pressure, it is difficult to conceive of clients accepting without demur a fee rate struck in January 2007.*
>
> *Whilst I accept that current economic circumstances have given rise to an increase in the amount of insolvency work available, that, of itself, would be no justification for maintaining a January 2007 hourly charge-out rate.*
>
> *Anecdote or personal experience can not be used as a benchmark to set an appropriate level of hourly rate charge. A comparator must be sought.*
>
> *It is difficult to obtain a direct comparator particularly since there was no legitimus contradictor to this application. What has to be sought is a comparable professional doing work of similar importance and complexity operating in the current economic climate and in respect of whom there is no reduction in workload. A part of the legal profession provides a guide in this regard. There is no point in looking, for example, to that part of the profession that deals with conveyancing transactions. That area of practice is in acute distress because of lack of work. But another area of legal work is much more akin to the case in suit.*

Just as there is no shortage of insolvency work, neither is there any shortage of criminal work available to members of the legal profession. Much of this is provided for by way of State payment. Since 2007, fees paid by the State in respect of both prosecution and defence work have been reduced by at least 16% (2 reductions of 8% each). There is an argument that in fact the reductions amounted to more than 16% but there is no dispute of this being the minimum. That is reflective of a general trend in professional fees with few exceptions. I believe it appropriate that the court ought to recognise this and apply a similar reduction in the hourly charge-out rate in this case. I therefore propose to reduce the charge-out rate in respect of all of the personnel involved in the examination by 16%. That equates much more to the realities of life in 2010 than fees struck three years ago."

I fully accept and agree with these views, having applied them in my own Court in the context of various insurance and credit union examinerships and where, in a number of instances, the professional providing the service volunteered a reduction in fees prior to demand being made to that effect. This approach has been sensible and reassuring and consistent with the obvious public policy requirement that the respect and esteem which professional service providers have historically enjoyed should continue. Indeed I suspect that cuts of even greater magnitude than those outlined by Kelly J. have been sustained in the years since that decision.

I see absolutely no reason why a similar approach should not inform the approach adopted by the Taxing Master to claims for professional fees which he has to consider. In this regard, historic comparators will be of limited value as noted in an earlier part of this judgment.

The Court would regard as appropriate and desirable a practice whereby the Taxing Master, perhaps once a year, sought the views of an economist whose report could inform him of the extent of cuts in remuneration for professionals providing services across a range of different disciplines. The conclusions might not bind the facts of every case, but they would constitute guidelines of which practitioners could be made aware prior to the commencement of the taxation process. A report of this nature, if commissioned say on a yearly basis could, in appropriate instances, also result in an uplift in fees where economic or financial changes so warrant it.

Neither side in the proceedings before this Court voiced or expressed any objection to the Taxing Master seeking to avail of such advices which renders it unnecessary for the Court to go further than to commend some such strategy as likely to produce better outcomes and greater efficiencies.

CONCLUSION

The Court cannot recall any previous case where the process of taxation was canvassed to such extraordinary lengths and in such exhaustive detail. It is impossible in this judgment to address every detail of every argument, every document and every piece of evidence tendered in the hearings before the Taxing Master.

The Court has identified some errors made by the Taxing Master but none are such, in the opinion of the Court, to warrant any interference in the allowance made in respect of the solicitor's instructions fee in this case.

The Court will accordingly dismiss the appeal.

APPENDIX

Assessment of the Instructions Fee

All figures relating to the Plaintiff's Solicitors' assessment of the instructions fee as set out in the template at p. 22 of the submissions are "*based on the hours spent @ €375 per hour for illustration*". The template also provides separate schedules showing the Taxing Master's allowance on a year by year basis and the sums proposed on behalf of the Defendant.

With respect, the Plaintiff's insertion of this rate 'for illustration' is not tenable. The 'time spent' must either be definite or a calculation by way of reasonable estimate. The 'illustration' presented results in an instructions fee amounting to exactly the sum claimed in the bill of costs namely €485,000. If different hourly rates are applied, as shown below, the time actually estimated to have been spent on each task must be correspondingly altered:

e.g. (2nd period)	60,000 ÷ €500 per hour	= 120
	60,000 ÷ €375 per hour	= 160

Taking this as an example, the Plaintiff's position appears to be that the time spent can be reasonably estimated at either 160 or 120 hours. This is wholly unsatisfactory and impermissible.

This situation is even more transparently evident in reference to the fifth and final period of work which it is said runs from part August to part October 2011. This element of the time has been recorded. It should amount to 440 hours as asserted in the Defendant's submissions at p. 20.

The Solicitors' time ledger in fact shows the cumulative time expended by 7 individuals at 488 hours. It is common case that 51 hours had mistakenly been entered in the ledger. Accordingly the correct total is 437. This is as near to the total of 440 hours referred to above, as makes little difference.

However, the Solicitors argue that all relevant time had not been recorded and additional time should be taken into account. I can see no sense in this. The Solicitors have put forward an explanation as to how the exact amount of the instructions fee may be broken down into various periods of work, without reference to any additional 'time'.

In my view a confused and unreliable assessment, based on time expended, has been presented on behalf of the Plaintiff and I am satisfied that the manner in which I assessed the fee, based on the nature and extent of the work, with time being but one of the factors taken into account was the correct and only way to arrive at a just allowance as between party and party. The relevant Statutory provisions are not permissive of any other methodology.

In any event, as noted at p. 33 of my original ruling Mr. McMahon assessed the instructions fee at €375 per hour. However, in addition, it is suggested that a sum to cover the intangibles must be taken into account and added (see Transcript 24 January 2014 at p. 17). Even if such a method of calculation of an instructions fee were permissible at law, the addition of a sum to cater for the intangible factors outlined at Order 99 Rule 37 (22) (ii) is impermissible as held by Laffoy J. in Goodman and cited at p. 34 of my said ruling and also cited by Mr. McEvoy (Transcript 24 January 2014 at p. 48).

The Plaintiff's Solicitors set out at pp. 22 to 47 of their submissions, details of the work undertaken. This is largely a repetition of the matters referred to in the preamble to the instructions fee and no issue was raised by the Defendant concerning its general accuracy. This work is referred to in the time ledger but it is said that the ledger does not reflect all work. The activities in the time/diary report are not apparently completely accurate. Not only is this unsatisfactory and confusing, but it appears the Plaintiffs Solicitors call into question the accuracy of their own records, such that they, in fact, may amount to no more than estimates. Neither the paying party nor a Taxing Master should be required to spend considerable time trawling through Solicitors' time records in order to try to make sense of them. That is a matter for the Claimant Solicitors.

In the absence of any form of Statutory regulation in regard to either time recording or its interpretation it seems to me that a commonsense approach and the avoidance of confusion and obfuscation is what is required. The onus of proof rests with the Plaintiff at all times.

The instructions fee is broken down, at p. 22, into the years in which work was carried out from 2008 to 2011.

Year 2008 (from 22 September)

I had assessed €5000 as an appropriate sum to cover taking instructions on 22 September 2008, and conducting the online research already described herein (which the Plaintiff's submissions refer to as extensive and in respect of which I have, both in my original ruling and this ruling, provided the factual position). Having considered the research, the available medical records together with the narrative 'Isabelle's Story' and two letters from Dr Tangney, Consultant Neonatologist, all documents were submitted to Mr. Stephen Walkinshaw. Further medical records and instructions were sought and obtained. Preliminary instructions were sent to three other experts. Mr. Walkinshaw agreed to advise on 19 November 2008 and records were sent to him on 26 November and 17 December.

Mr. Boylan agreed in evidence that an estimate of 20 hours for this period would be reasonable. This appears to be the only area of agreement in relation to time expended.

My allowance of €5000 for this period was not related only to time expended but to the nature and extent of the work carried out. I consider this to be a reasonable sum. The case was at the preliminary stage. No experts' reports had been obtained. The sum of €10,000 assessed by the Solicitor/legal costs accountant, if tested against the hourly rate suggested at €500 would indicate 20 hours. A rate of €475 per hour, indicates 21 hours and €425 per hour gives 23.5 hours. The rate at €375, which was actually put forward at the taxation, indicates 26.66 hours. I am satisfied, for reasons already explained that it is legally impermissible to assess the fees solely on such a basis.

I accept that any reference to an hourly rate in the Solicitor's s. 68 letter was an error and that no hourly rate was ever intended to be specified to the client.

Essentially it comes down to the application of balanced judgement as to the appropriate allowable sum, based on the work carried out. I might reasonably have allowed a little less or a little more. There is no 'correct fee'. In my view the sum assessed by me is probably correct. That is the function which I believe the law empowers me to perform having factored in the matters referred to at Order 99 Rule 37 (22) (ii) RSC. I approached all subsequent periods of time in a similar manner.

2009

The work undertaken in the year 2009 is again faithfully recorded in the Plaintiff's submissions at pp. 24-28 and for which €60,000 has been assessed, whereas I assessed the value of the same work, as between party and party at €20,000. In this regard as with the previous assessment I was in agreement with the Defendant's assessment. Clearly, the nature of the work in this period encompasses consideration of both the liability and quantum issues involving the finalisation of the gathering in of medical records, receipt and consideration of Mr. Walkinshaw's report; submission of instructions to two experts on the causation issue namely Professors Alan Hill and Peter Fleming. Their reports were received in November and December 2009. The bill of costs, the submissions and my initial ruling set out the chronology of the work.

Quite clearly, quantum was addressed in terms of seeking expert reports as to the infant's current condition, her immediate and long term care needs including nursing care, assistive technology and educational aspects.

The letter to the Defendant intimating the claim, dated 17 July 2009, is very detailed and it is clear that much of such detail was, understandably, taken from Mr. Walkinshaw's report.

The Defendant's response already adverted to, did not cause great concern. Rather, it was viewed as improving the prospects of success (letter 4 August 2009 to client) See also letter of 10 August to Counsel.

While experts' reports as to causation and quantum had been sought, they had not been received at date of issue of the Personal Injury Summons on 17 November 2009. The reports of Professors Hill and Fleming and of Ms. Margot Barnes and Ms. Pauline Frizelle were received later in November and in December 2009.

I fundamentally disagree with the Plaintiffs Solicitors' valuation of the work for this period at €60,000. In my view the work undertaken is fairly measured at €20,000. This sum, in my view, properly and adequately reflects such work both as to its nature and extent. Undeniably the Plaintiffs Solicitors, as highly experienced professionals in this field, undertook their work with care and attention. Such experience enabled them to identify the relevant experts and provide them with detailed instructions whereas less experienced Solicitors might have had difficulty and as a matter of probability would not have advanced the case to this stage as quickly. Other specialist Solicitors on the other hand would, I am satisfied from my own experience, have advanced the case to this stage in the same manner.

The Plaintiff's Solicitor asserts that the overall estimate of time expended for the entire period for which no time records are available could be between 1,000 and 1,200 hours. There is significant variance between the two figures. If converted into values based on the rates per hour proffered on behalf of the Plaintiff during the Objections hearing the additional sums involved are between €100,000 at its highest and €75,000 at the lower end.

In relation to the period under consideration I now know that the valuation is put at €60,000. This sum, if it were appropriate to test against the various hourly rates now suggested by the Plaintiff's Solicitor would indicate time expended as follows:

a)	@ €500 per hour:	120 hours

b)	@ €475 per hour:	126 hours
c)	@ €425 per hour:	141 hours
d)	@ €375 per hour	160 hours

Of course, in any event, it would not be reasonable, by way of test, to allocate all of these hours, at any such rates, to the entirety of the work and in addition certain 'reading in' time would have been necessary by Ms. O'Connor, which must be discounted. It is not possible to be precise concerning her time expended in this regard. Ms. O'Connor's evidence confirms that all documents were carefully read and considered by her and I accept this.

I assessed the allowance of €20,000 based upon the extent of the work, the submissions of the parties and the period of time involved, not the number of hours, during which the work was carried out.

Consideration of my ruling in Fee v HSE which is adverted to in the Defendant's submissions, perhaps puts some perspective on my allowance for this period of work. In that fatal injury case, although of much lower value, the Plaintiff's Solicitor was also engaged in some medical research and carried out professional work which I duly recognised in my ruling, as involving some special skills. The action was ultimately settled for €70,000 and costs on 22 June 2011.

The taxation of the costs was approached in similar fashion to the instant case save that there was no evidence of the number of hours spent on the case. Rather the value of the work was broken down into various identifiable periods.

The instructions fee attributable to the entire action, from beginning to end, was assessed at €49,000. Included in that sum was €7000 to cover 'pre proceedings work'. My assessment in the instant case is just under three times that amount, plus the earlier €5000 assessed for the year 2008. I am satisfied that I have sufficiently taken into account 'the intangibles' referred to at Order 99 Rule 37 (22) (ii).

2010

The work is described in the bill of costs and the plaintiff's submissions. It is also referred to in my original ruling.

The principal features include, instructing Counsel to update particulars and furnishing him with copies of Ms. Barnes' and Ms. Fleming's reports; arranging a medical examination of the Plaintiff by Dr. Alan Hill at the Four Courts and on the same day (25 January 2010) Ms. O'Connor had a lengthy three hour consultation with the infant's parents (at the end of which Mr. Boylan also briefly attended). This was a very detailed consultation and all aspects of the Plaintiff's condition were discussed. The parents were advised that the Plaintiff had a very good case on liability but there was no guarantee of success and there was further advice that causation would have to be 'stitched up'.

Reports were requested from three experts in January 2010: Mr. P. Kiely, Orthopaedic Surgeon, Dr. G. O'Connor, Opthalmic Surgeon and Dr. Elise Rivlin, Neuropsychologist.

Subsequently, in February at a further meeting with the parents the 'no win no fee' arrangement was explained and the agreement to charge the party and party costs only was put in place (subject to a reservation concerning outlays).

A report was sought from FKL Architects. In April the Defendant sought voluntary discovery of documents, as already described. The Defendant's Notice for Particulars of 10 May 2010 was replied to on 27 May with further clarification thereof on 28 May. It is claimed that the work relating to a Motion for Judgement is included but such costs must be excluded as they were separately allowed in the bill of costs.

The Defence was received on 5 November 2010: it admitted breach of duty of care but denied liability and damages. Accordingly causation was still in issue. Immediately thereafter the action was set down for trial.

In a letter to the client of 9 November the Solicitor advised concerning the nature of the defence and expressed confidence, even if causation was not ultimately admitted, that, on the balance of probabilities, this would be established.

A reminder letter was received from the Defendant's Solicitors in relation to discovery and expanding the request to include school records. I have earlier referred to all of this.

The Plaintiff's Solicitor puts a value of €70,000 on the work undertaken during this period. I had assessed it at €30,000 and in this regard was in agreement with the Defendant's assessment.

The matters already referred to by me as to assessment of time spent in relation to the earlier periods of work, are of course relevant to all periods.

The Solicitor's file and the evidence of work disclosed in it relating to this period together with the reports and documents considered by the Solicitor simply cannot justify the suggested fee. The fee which I have allowed at €30,000 in fact equates to allowances which are frequently made (and less) in respect of Solicitor's instructions fees encompassing all work conducted for the taking of instructions through to briefing Counsel for the hearing of a fully fought personal injury action involving expert medical, actuarial and engineering evidence. This reflects the importance which I attached to the preparations undertaken by the Plaintiff's Solicitor up to this stage.

2011

No issue was raised on behalf of the Defendant during the course of the original taxation hearing or at the Objections stage concerning the accuracy of the description of the work described in the bill of costs and repeated in the Plaintiff's Submissions (although such submissions do note that the Taxing Master indicated that there was no need to so repeat same). The matters for consideration relate to a) the nature and extent of the work and b) its valuation.

Agreement was reached in regard to the extent of discovery to be provided. This has earlier been alluded to.

Work continued in formulating the quantum of the Plaintiff's claim with reports sought and obtained from Mr. R. Leonard, Occupational Therapist; Ms Elise Rivlin, Neurosurgeon, Dr. O'Connor, Eye Surgeon, and Ms. Pearson, Consultant Neurophysiotherapist. By letter of 7

March 2011 the Defendant's Solicitors confirmed that causation was still in issue and did not agree that the action could be called on for hearing. Work continued in formulating the Affidavit of Discovery. Counsel prepared updated particulars of injuries (based on recent reports of Drs. Rivlin and O'Connor) and details of special damages.

Detailed instructions were submitted to Dr. McConachie, Consultant Radiologist, as earlier described, in reference to the causation issue. Enquiries were made of all experts as to their availability for a trial date in October 2011.

Particulars of injuries and special damages were updated as of 20 April 2011 and instructions were issued to Senior Counsel, Mr. Holland to apply on 4 May to fix the hearing date for 18 October 2011. In correspondence with the Defendant's Solicitors the possibility of a successful mediation was questioned while causation was still in issue but the Plaintiff's Solicitors were happy that the case was a suitable one for a Periodic Payments Order. Mr. McCullough, Senior Counsel was, in fact, later briefed with the relevant correspondence to facilitate the application to fix the hearing date. The application was successful and the hearing date was fixed to commence on 18 October.

Further updated particulars of injuries and special damages were furnished on 29 June 2011 in reference to a report received from Mr. Kiely, Consultant Paediatric Orthopaedic Surgeon. Instructions were furnished to Prof. Hill and Dr. David Coughlan for reports on current condition and prognosis - some 50 hours are stated to have been spent in reviewing the medical records to send to Dr. Coughlan. I dealt with this at p. 32 of my original ruling. The time was relevant to preparation of the brief for Counsel also. Mr. Reid, Consultant Educational Psychologist carried out an assessment.

The work as outlined in the bill of costs was carried out. Work on the compilation of the brief for Counsel was commenced on or about 24 July 2011. The case was prepared on the basis that a full hearing would take place and the Plaintiff's life expectancy was of considerable concern having regard to the cost of future care and related costs. My original ruling describes the settlement negotiations and the emergence of a PPO arrangement in relation to this period of work i.e. from January to October 2011.

The sum of €180,000 is proposed by the Plaintiff's Solicitor as reasonable. The Solicitor's template suggests that the Taxing Master's assessment for this period was €175,000 and that the Defendant had put forward €150,000 as the appropriate sum. In my view the Plaintiff's Solicitor appears to be mistaken in this regard.

I assessed the sum of €175,000 on the basis of the nature and extent of the work carried out for the entire period of assessable work, up to the date of settlement, with the exception of the remaining work relating to preparation of briefs, exchange of experts' reports, attendance at settlement meeting and reorganising of Witnesses for which I added a further €30,000. In addition a further sum of €10,000 was added to cater for the costs of attendance at Court on 18, 19, 20 and 21 October (full days) and 25 and 26 October 2011 (half days).

Thus, I measured the fees for all work carried out, up to 26 October 2011, at €215,000. By combining estimated time and recorded time, the Plaintiff's solicitor assesses the appropriate fees as follows:

(i)	€180,000 based on estimated time at €375 per hour	: 480 hours
(ii)	€165,000 based on recorded time	: 440 hours
	€345,000	920 hours

The logic of the Plaintiffs assessment is that for the period from January to 26 October 920 hours of work were expended: €345,000 + 920 = €375 (rate per hour).

Taking the Plaintiff's suggested fees for the years 2008 to 2010 into account (€140,000) brings the instructions fee to the amount claimed at €485,000.

I cannot accept the reliability of the estimated hours. As earlier observed herein, the Plaintiff's Solicitor has argued that a much higher rate per hour could have been reasonably adopted. This would render completely unreliable the estimated hours as now presented. In my view, the Plaintiff's Solicitors, in valuing the time worked for this period at €180,000 have overestimated the hours involved at 480 hours. It was the only amount available given their own recorded time at 440 hours (€165,000). No real assessment was apparently involved. In addition the recorded hours must be treated with a degree of vigilance. All hours are not recoverable as observed by Ms. Justice Laffoy in *Goodman* and allowance must be made for work of an administrative nature which can be undertaken by assistants.

I am required to assess the nature and extent of Solicitors' work and other professionals' work on an almost daily basis. Insofar as Solicitors' fees are concerned I believe that the use of recorded or estimated 'hours worked' as a basis for measuring professional fees while of assistance, must have a fully transparent and credible basis in order to minimise the danger of inflated assessment of professional fees. The onus of proof rests with the Claimant party and estimated time must be considered with particular vigilance. Recorded time should be backed by appropriately informative attendance notes by way of explanation of the nature of and the necessity for the work in question. There should also be proof of concurrent recording of the time and the methodology adopted. In the absence of regulation, the system of recording time utilised by Solicitors (and other professionals) is not satisfactory. There may be little in the way of preservation of proof of time recorded and explanation of work done with specific reference to the length of time involved, specific tasks addressed, or dates work carried out. These are general comments and not intended as a criticism of the Plaintiff's Solicitors herein.

The Statutory criteria under which taxations of costs take place provide for a reasoned analysis of the work and its value. I am conscious of the Plaintiff's Solicitors' disparaging and I believe, needlessly offensive remarks, both in the objections/submissions, concerning my approach to the assessment.

I believe that my first ruling was based upon an objective analysis of the issues, the work, the time reasonably expended and the parties' respective submissions. The ruling I now deliver reflects, I believe, an objective analysis of the matters argued before me. There is no place for innuendo or invective, at any stage, in the process of taxation costs.

In my view the Defendant is correct in asserting that the Plaintiffs Solicitor relies far too heavily on 'the intangibles' as a component of the instructions fee. As explained, I have taken such factors into consideration. It seems to me that a sum in excess of €100,000 may have been factored into the instructions fee by the Plaintiff's Solicitor to cover this aspect. To allow any additional sum over and above the sums already allowed by me would, in my view, be completely unreasonable and be more in the nature of a penalty than

anything else.

I will allow this objection to the extent of increasing the Court attendance allowance to take into account the attendance of a senior Solicitor and the notional attendance of an Assistant Solicitor at Court on all the days in question by increasing the allowance under this heading by €6000 to €16,000.

Thus, the instructions fee is increased to €276,000.