

**THE HIGH COURT****1995 7751 P****BETWEEN****SCOTT BOURBON (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND JOANNA BOURBON)****PLAINTIFF****AND****JOHN WARD, JOHN SONNY WARD AND THE MOTOR INSURERS BUREAU OF IRELAND****DEFENDANTS****JUDGMENT of Kearns P. delivered on 17th day of February, 2012.**

This is a review of taxation arising out of a High Court personal injuries case. The defendants seek to review the ruling of the Taxing Master of the High Court dated 23rd June, 2011, pursuant to Order 99 Rule 38(3) of the Rules of the Superior Court and s. 27(3) of the Courts and Court Officers Act 1995 (hereafter referred to as 'the 1995 Act'). The Taxing Master made an allowance of €212,000 in relation to the instruction fee of the plaintiff's solicitors, Messrs. Keane Solicitors of Eyre Square in Galway. The defendants submit that this figure allowed is grossly excessive and that an appropriate instruction fee in the circumstances would have been €135,000.

The plaintiff in this case was born on 9th October, 1986. On 31st October, 1993, when the plaintiff was seven years old, he was playing with other children at a complex known as Ragoon Park in Galway. While crossing an access road, the plaintiff was struck by a vehicle driven by the second defendant. The vehicle was owned by the first defendant. The plaintiff sustained severe personal injuries, including serious head injuries and injuries to his left leg. The motorist was uninsured and the Motor Insurers Bureau were joined as a party in the proceedings.

Liability was contested from the outset and the settlement arrived at in the sum of €800,000 represented half of the value of the plaintiff's claim. At the conclusion of the case the plaintiff's solicitors submitted a bill of costs which covered the work carried out by Keane Solicitors from the receipt of instructions in December 1993 through to the ruling of the settlement in November 2009. The Bill of Costs recorded in detail the facts of the case, the particulars of negligence pleaded on the part of the defendants and the range of personal injuries, both physical and psychological, sustained by the plaintiff.

The plaintiff's solicitors instructed legal costs accountants Lowe, Redmond & Associates, in relation to the Bill of Costs. The total amount claimed therein was €406,069.51. An instruction fee of €240,000 was claimed by the plaintiff's solicitors as an instruction fee. The taxation proceeded before Taxing Master Flynn on 22nd July, 2010. The defendants had valued the instruction fee at €135,000 and offered same upon taxation of costs. The Taxing Master delivered an oral ruling on 30th July, 2010 in relation to the brief fees and instruction fees claimed, followed by a written ruling on 13th September, 2010. The Taxing Master allowed the sum of €212,000 in relation to Item 276, the general instruction fee. Following receipt of the Taxing Master's written decision, the plaintiff's solicitors were requested by the defendants to allow them a further opportunity to inspect the plaintiff's file. This request was refused.

The defendants filed objections on 30th August, 2010. Written submissions were served in support of the objections on 5th November, 2010 and the plaintiff replied on the 15th November, 2010. The objections were heard on the 19th November, 2010. At that stage, the defendants introduced 10 comparator cases in support of their submission and the matter was adjourned to afford the Taxing Master and the plaintiff an opportunity to both consider the comparator cases and to respond to the defendants' verbal submissions.

The defendants renewed their request for further access to the plaintiff's file but this request was formally rejected on the 24th January, 2011. The issue of further access to the files was raised before the Taxing Master on the 26th January, 2011 but the Taxing Master confirmed that he did not need to see the papers again and, as a result, declined to direct the plaintiff to afford the defendants further inspection facilities.

The defendants filed further submissions on the 21st February, 2011 and the hearing of the objections resumed on 22nd February, 2011. On 15th March, 2011, an interim ruling was delivered by the Taxing Master directing the plaintiff to provide supplemental information, including estimates of the time expended on the file. In accordance with this direction, further supplemental submissions were filed by the plaintiff on 31st March, 2011. In light of these extensive submissions, the defendants again renewed their application for further inspection of the plaintiff's file. On 6th May, 2011, the Taxing Master delivered a formal ruling in relation to the application for inspection facilities where he refused to order same.

The defendants' final submissions were served on 13th May, 2011. The Taxing Master delivered a lengthy ruling (hereafter referred to as 'the Ruling') on 23rd June, 2011, in which he upheld his allowance of €212,000 in relation to the general instruction fee.

**THE TAXING MASTER'S ORIGINAL RULING**

The Taxing Master, in an undated ruling, allowed €212,000 on the general instruction fee. This ruling set out considerations to which the Taxing Master had regard in determining the appropriate fee and which he stated "contributed to the complexity and difficulty in vindicating the Plaintiff's rights". These are summarised as follows:

- The plaintiff was seven years old at the date of the accident;
- The relationship between the plaintiff's parents was hostile towards each other throughout the proceedings;
- The plaintiff and his mother moved to Florida in or around 1995;

- Instructions were obtained from the plaintiff's parents separately and from the plaintiff when he reached 18 years of age;
- The relationship between the plaintiff and his mother was hostile throughout;
- The father had a rapport with the plaintiff that was more conducive for extracting information from the plaintiff and the mother was difficult to elicit information from;
- Contributory negligence was pleaded by the defendants and so the law on the contributory negligence of a child, which is a specialised area of tort law, had to be considered;
- The plaintiff's age at the time of the accident created difficulties in ascertaining the loss of earnings aspect of the claim;
- The involvement of MIBI required compliance with additional procedures;
- Securing American reports was difficult;
- The plaintiff e-mailed the solicitors and/or his father indicating that he would commit suicide if the case was not progressed expeditiously and lengthy telephone conversations were necessary to keep the plaintiff's spirits up;
- The plaintiff was made a Ward of Court and ultimately a guardian was appointed, which required extensive research in relation to U.S. guardianship;
- The plaintiff's injuries were extensive, including psychological and psychiatric and this required consideration of the medical reports;
- In relation to liability, the age of the plaintiff, the fact that the defendants were members of the travelling community and that the only witnesses were aged three and nine respectively;
- There were 39 medical reports and 5 addendums of medical personnel and 29 American reports and medical notes;
- The settlement of €800,000 represented 50% of the full value.

#### **THE TAXING MASTER'S INTERIM RULING**

The Taxing Master made an interim ruling on the 15th March, 2011, again allowing €212,000 by way of general instruction fee. The Taxing Master stated that there were no time records and that no comparator cases had been advanced where comparison was of assistance. The Taxing Master sought additional information on the following: the work done; the level of fee-earner; whether a special skill was used, what this skill was and why it was necessary, the amount of time which would reasonably be devoted to the work and whether any special responsibility was borne by the doer of the work. The Taxing Master also asked the solicitors to provide an estimate of time spent on the following: details of letters in and out; details of time expended on consultations; details of time spent on both Irish and American medical reports; details of time spent on appointments for medical examination and; time spent on average on a yearly basis for the duration of the case.

#### **THE TAXING MASTER'S FINAL RULING**

Prior to the Taxing Master delivering his Final Ruling on the 23rd June, 2011, the plaintiff's solicitors filed written submissions setting out their valuation of their work by reference to estimates of time taken under various headings. The plaintiff's solicitors estimated the amount of time spent as follows:-

- Pleadings – time spent 52 hours at €200.00 per hour is €10,400.00;
- Wardship/Guardianship – time spent 74 hours at €200.00 per hour is €14,800.00;
- Special Damages – time spent 42 hours at €200.00 per hour is €8,400.00;
- Suicide Abatement – time spent 70 hours at €200.00 per hour is €14,000.00;
- Trial Day - €2,500.00;
- Application for transfer of funds to Guardian of infant in Florida - €2,500.00;
- Taking instructions over and above the norm to include witness statements – time spent 60 hours at €200.00 per hour is €12,000.00;
- Actuarial Analysis – time spent 3.5 hours at €200.00 per hour is €700.00;
- Garda Abstract Report and Engineer's Report – time spent 4 hours at €200.00 per hour is €800.00;
- Letters in and out – 1069 letters at 20 minutes per letter at €66.00 is €70,554.00;
- Consultations – total 91 hours at hours at €200.00 per hour is €18,200.00;
- Considering, cross-referencing and perusing Irish and American Medical Reports – 249.5 hours at €200.00 per hour is €49,900 and School Reports – 94 hours at €200.00 per hour is €18,800.00;
- Appointments and all aspects involved in arranging same – 111 hours at €200.00 per hour is €22,200.00;
- Total - €245,754.00.

The Taxing Master set out these estimates in his ruling, along with the submissions of both sides. The Taxing Master stated that the defendants' valuation of the work at €135,000 had its genesis in an incorrect premise and was arrived at without proper and due consideration for the work undertaken. The Taxing Master further stated that the use of comparator cases by the defendants to establish a mean average was a flawed approach for the purpose of the taxation.

The Taxing Master stated that, in the absence of contemporaneous time records, suitable precedents or other transparent methods of charge, the system would remain opaque in that those who pay would know the work that was undertaken but not the real value of that work. The Taxing Master described the following arithmetic calculation put forward by the plaintiff as "persuasive". The Taxing Master stated that the case, having commenced in December 1993 and having concluded in February 2010, took approximately 17 years. The Taxing Master stated that, taking the active life of the case as 15 years, and the average working week at 40 hours and taking the rate per hour at €200.00, the solicitor would have worked on the case for 1.77 hours per week. The Taxing Master then set out the following equation:-

*"1.77 hrs per week x 40 weeks x 15 years x €200.00 per hour = 212,400.00."*

The Taxing Master went on to state:-

*"It was the plaintiff's opinion that 1.77 hours per week was acceptable as a good guess for the calculation and €200.00 very reasonable as an hourly rate which includes all the practice overheads. This proposition was advanced by the Plaintiff and in the absence of time records, comparable cases or other methods of costing as heretofore mentioned it is a proposition worth considering if valued judgment is no longer applicable [sic] if one accepts the decision in the Cafolla case. At the very least it is a checking mechanism, albeit in retrospect, on valued judgment [sic]."*

The Taxing Master disallowed the objection and affirmed his ruling on taxation.

## **SUBMISSIONS OF THE DEFENDANTS**

The defendants submitted that the Taxing Master's criticisms of the way the defendants conducted the taxation process are unwarranted and unjustified. They submitted that the Taxing Master disregarded the well-established case-law of the High Court. The defendants argued that the Ruling gives an inaccurate or misleading description of the arguments advanced by the defendants and the manner in which the taxation was conducted. It was claimed that these errors in principle have led the Taxing Master to make an allowance that was unwarranted and unjust and arrived at by a method which was inappropriate and wrong.

The defendants accepted that this was a very long-running case and that it involved difficulties and issues that were more complicated than normal. It was acknowledged by the defendants throughout the taxation process that, given the nature and extent of the work involved in this case, the Taxing Master would be justified in allowing a substantial instruction fee. However, the defendants objected to the high allowance made by the Taxing Master in this regard stating that it was excessive and unwarranted in the circumstances.

The defendants submitted that the Taxing Master made the following errors of principle:

1. The Taxing Master erred in his interpretation of and/or application of s. 27 of the Court and Courts Officers Act 1995 in failing to carry out a full and proper assessment of the nature and extent of the work of the plaintiff's solicitors.
2. The Taxing Master erred in his interpretation of and/or application of Order 99 Rule 37(22)(ii) of the Rules of the Superior Courts and the case-law governing the taxation of party and non-party costs. The Taxing Master did not properly address the time factor as required by the provisions of Order 99 Rule 37(22)(ii)(b) and the established jurisprudence of the High Court. The Taxing Master did not relate the allowance made to the time, labour and expertise required of the plaintiff's solicitors. In particular, it is submitted that the Taxing Master erred in his assessment of the time estimates provided by the plaintiff's solicitors. It is also submitted that the Taxing Master erred in his assessment of the complexity of the case and the difficulties encountered by the plaintiff's solicitors.
3. The Taxing Master misdirected himself in relation to the burden of proof in party and party taxation. The Taxing Master did not have sufficient regard for the principle that the burden of proof rests on the plaintiff to demonstrate that the costs are reasonable.
4. The allowance of €212,000 was disproportionate to the nature of the case or any difficulty encountered by the plaintiff's solicitors.
5. The Taxing Master erred in his interpretation of and/or application of the law in relation to comparator cases. It is submitted that the Taxing Master erred in failing to have any or any adequate regard for the comparator cases submitted by the defendants. In particular, it is submitted that the Taxing Master misdirected himself regarding the submissions advanced by the defendants in relation to the comparator cases adduced.
6. The Taxing Master erred in failing to have any or adequate regard for the submissions advanced by the defendants on taxation.
7. The Taxing Master erred in his assessment of the effect that the complicated family circumstances of the plaintiff had on the level of costs incurred. The Taxing Master erred in his interpretation and application of the legal principles relating to causation, remoteness of damage and the egg-shell skull rule.

## **SUBMISSIONS OF THE PLAINTIFF**

It was accepted by the plaintiff that the Taxing Master was bound by decisions of the High Court, but it was submitted that the

Taxing Master acted in accordance with these decisions by asking the plaintiff's solicitors to compile an estimate of time-records. The plaintiff accepted that this estimate was compiled *ex-post facto* and as a result was difficult to compile. However, the plaintiff submitted that his solicitors were under no legal obligation to keep time-records and that they should not be penalised for failing to do so.

The plaintiff submitted that there were particularly complex matters involved in the case and that the Ruling of the Taxing Master was based on the entirety of the work done by the plaintiff's solicitors. In relation to the involvement of MIBI, judgment had to be obtained as against the two other defendants, both of whom were deceased. The plaintiff's solicitors therefore had to investigate, track down and attempt to serve them with relevant material before they could proceed against the third defendant. It was argued that the plaintiff was at a young age at the time of the accident and, due to his age, the plaintiff was constantly changing and needed constantly updated medical reports & school reports. It was submitted that the fact that liability was contested throughout also added to the complexity of the case.

In relation to the failure to allow the defendants further opportunities to inspect the relevant files, the plaintiff claimed that the defendants' solicitors had access to the files, just as the Taxing Master had, and that they failed to do any of their own time-costing on the files. It was submitted that it was only when the plaintiff's solicitors provided estimate of work done that the defendants wanted a second opportunity to examine the files.

The plaintiff submitted that the figure put forward by the defendants of €135,000 was arbitrary and claimed that no basis as to the manner in which it was produced has been put forward by the defendants.

The plaintiff claimed that the U.S. attorney involvement only extended to the filing of papers, and that all research in relation to the wardship, guardianship, and irrevocable trust issues were conducted by the plaintiff's solicitors.

It was submitted that none of the comparator cases put forward by the defendants were on all fours with the case at hand.

In relation to the charges in relation to 'suicide abatement', the plaintiff submitted that it was a real issue in the case at hand. It was argued that the defendants had to take the plaintiff as they found him, and that, as the plaintiff had an acquired brain injury as a result of the accident, such matters arose from the nature and psychological sequelae of such an injury.

In relation to the hours claimed for medical reports, the plaintiff submitted that this was not merely reading, and that the plaintiff's solicitors had to cross-reference the reports with earlier reports, determine whether further investigation was warranted and decide whether referral to an expert was necessary. All these matters were conducted by the plaintiff's solicitors.

As regards the school reports, the plaintiff claimed that his future loss of earnings was a very large part of the case and that this could not be assessed without reference to the school reports. As a result, the reports had to be extensively trawled through by the plaintiff's solicitors and, where necessary, conveyed to experts.

The plaintiff claimed that all appointments and travel arrangements were made by the plaintiff's solicitors, and that they had to arrange any flights necessary for consultations.

The plaintiff accepted that the Taxing Master has to have reference to the nature and extent of the work done by solicitors and that the plaintiff shoulders the burden of proof to show that the costs charged are reasonable and necessary.

The plaintiff submitted that the approach of the Taxing Master, while mechanical in nature, had been communicated well to the defendants. It was argued that the issue here is not the sum, but how the sum was arrived at and how the sum was communicated to the defendants. The plaintiff claimed that the Taxing Master's 16 point illustration at p. 10 of his Ruling shows the nature and extent of the work and that his findings were reasonable.

The plaintiff submitted that, under O.99 R.10(2), taxation should allow all such costs as are necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed. The plaintiff claimed that this was the proper test and was properly applied by the Taxing Master.

The plaintiff also pointed to the volatile nature of the plaintiff's familial relationship. The relationship between the plaintiff and his mother was predominantly hostile and difficult throughout the course of the case, and this was compounded by the fact that the plaintiff's parents were hostile towards each other.

The plaintiff argued that, regardless of whether the Taxing Master agreed or did not agree with the jurisprudence of the High Court, he did attempt to put into practice the various decisions of that court in that the plaintiff's solicitors were required to provide estimates of work done.

The plaintiff submitted that the figure of €135,000 put forward by the defendants was arbitrary and that no indication has been given of how they arrived at that figure. It was argued that the defendants had resiled from the fact that before the Taxing Master they had advocated the use of comparator cases, whereas now they were suggesting that they be used only as a reference. The plaintiff claimed that the only injustice the defendants had identified is that the Taxing Master did not accept their figure.

## **JURISDICTION OF THE TAXING MASTER**

Order 99 Rule 27(18) of the Rules of the Superior Courts provides:-

*"On every taxation the Taxing Master shall allow all such costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for enforcing or defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons or by other unusual expenses."*

It is well-established that the onus is on the claiming party to demonstrate to the satisfaction of the Taxing Master that costs incurred are proper and reasonable in all the circumstances, as held by Laffoy J. in both *Dunne v. Fox* [1999] 1 IR 283 and *Minister for*

*Finance v. Goodman* [1999] 3 IR 333.

S. 27 of the 1995 Act provides inter alia:-

*"(1) On a taxation of costs as between party and party by a Taxing Master of the High Court, or by a County Registrar exercising the powers of a Taxing Master of the High Court, or on a taxation of costs as between solicitor and client by a Taxing Master of the High Court, the Taxing Master (or County Registrar as the case may be) shall have power on such taxation to examine the nature and extent of any work done, or services rendered or provided by counsel (whether senior or junior), or by a solicitor, or by an expert witness appearing in a case or any expert engaged by a party, 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, or by a County Registrar exercising the powers of a Taxing Master of the High Court, or on a taxation of costs as between solicitor and client by a Taxing Master of the High Court, the Taxing Master (or County Registrar as the case may be) 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 counsel (whether senior or junior) or in respect of a solicitor or an expert witness appearing in a case, or any expert engaged by a party as the Taxing Master (or County Registrar as the case may be) 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."*

In *Superquinn v. Bray U.D.C. (No. 2)* [2001] 1 IR 459, this court held that there is an obligation on the Taxing Master to examine the nature and extent of the work done.

*"It seems to me that in the aftermath of the Act of 1995, any ruling of the Taxing Master must of necessity, set out in some detail an analysis of the work and the reasoning which leads to the determination made in respect of solicitor's instruction fees and counsel's fees, particularly having regard to the powers and responsibilities imposed on the Taxing Master by s. 27(1) and (2), and on the court by s. 27(3), given that the Court may be called upon to review taxation."* (at p. 480)

This approach has been endorsed in subsequent decisions of the High Court, notably that of Charleton J. in *Mahony v. KCR Heating Supplies* [2007] 2 IR 633, where he stated:-

*"Up to that time, the use of comparators with the amounts awarded in such things as counsel's brief fees, refreshers and solicitors' instruction fees had been a paramount consideration. As Kearns J. explains, the Act of 1995 made a determination of the actual work done in any case a primary consideration. Of course, heedlessly pursuing work for its own sake, which is of no benefit to the case, or engaging expert witnesses who have nothing to offer the case, cannot add to the bill which the losing party is obliged to pay, as unnecessary work may be discounted. This process of examining the solicitor's files, however, is part of the process of examining the nature and extent of the work done in a case."* (at para. 12)

In *Cafolla v. Kilkenny & Others* [2010] I.E.H.C. 24, Ryan J. set out a useful summary of the relevant principles which should be considered by the Taxing Master:-

*"The section prescribes a new approach for the Taxing Master in assessing costs. Whereas previously the main focus in a taxation was on comparisons with other cases, particularly when it came to major items such as instructions' and brief fees, s. 27(1) and (2) of the Act now focus on the work that was done in a case by solicitors, barristers and expert witnesses and mandate the Taxing Master to examine the nature and extent of their work in order to evaluate the claims in the bill of costs. The section has been examined in a series of cases and the law can be considered to be settled in this area. The consensus is that the Master must assess the nature and extent of the work which is the subject of the item of claim in the bill of costs. This applies to the work of a solicitor giving rise to his claim for his instructions fee and also the work of counsel."*

Order 99 Rule 37 (22) (ii) RSC provides:-

*"In exercising his discretion in relation to any item, the Taxing Master shall have regard to all relevant circumstances, and in particular 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."

There is an obligation on the Taxing Master to comply with the requirements of natural justice, and therefore to provide a reasoned basis for his decision. A paying party should be aware of the reasons for which he has to pay a particular amount, and so the Taxing Master should outline the considerations to which he had regard. In *Cafolla*, Ryan J. stated:-

*"The Taxing Master must act judicially and so he has to proceed in a rational, transparent way in accordance with fair procedures. And as has been said by Charleton J. and other judges, a paying party should know why he is being obliged to pay the particular sum that the Taxing Master awards. In this case, the disputed costs are a very large sum of money and it is entirely legitimate for the defendants to want to know why they have to pay that much and how the figure was arrived at. The more general and non-specific the assessment, the more difficult it is for any reviewing body such as this court to decide whether the task has been done properly. The essence of transparency is to enable everybody to understand what has been done and why. It operates as an incentive to the decision maker to proceed in a proper manner and it enables the reviewer to assess the process independently. Giving reasons is also an essential part of any judicial-type process or adjudicative system."*

In *C.D. v. Minister for Health & Children & Anor* [2008] I.E.H.C. 299, Herbert J. provides guidelines in relation to the obligations of the Taxing Master:-

*"The decision of the Taxing Master is consequently clearly at variance with the general guiding rule stated by Kearns J., in Superquinn Limited v. Bray Urban District Council and Others (No. 2), (above cited), at p. 480, that a Taxing Master must of necessity set out in some detail an analysis of the work and the reasoning which leads to the determination. This principle in my judgment is not complied with by the learned Taxing Master identifying the items grounding the claim and the documents offered in support of it, citing extracts from the evidence on taxation and from the submissions made on behalf of the parties by their respective Legal Costs Accountants, identifying the witnesses procured and those who gave evidence at the hearing of the appeal and, then making a series of general findings. In these circumstances, I accept as valid the criticism of the Report of the learned Taxing Master by Senior Counsel for the Paying Party that it was impossible to know, as his client was entitled to know, what actual work the learned Taxing Master considered was done by the Solicitors for Costs and was properly allowable on a Party and Party taxation, what special experience or skill (if any) he considered it was necessary for the Solicitor's for the Costs to have employed, what degree of responsibility he considered they had borne and, how all this compared with the work done and the fee allowed in some unidentified and unanalysed Garda Síochána Compensation Claim or claims. This Court has the same difficulty and it renders a proper review of the learned Taxing Master's decision in accordance with the provisions of s. 27(3) of the Act of 1995, impossible.*

...

*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 scrutiny, 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."*

In *Cafolla*, Ryan J. endorsed the approach of Herbert J. in *C.D.* and extrapolated a number of principles to which the Taxing Master should have regard when determining the level of allowance:-

*"The most detailed prescription of the obligations of the Taxing Master is contained in the judgment in C.D. v. Minister for Health & Children and Anor [2008] IEHC 299. In that case, Herbert J. analysed the earlier cases, some of which I have mentioned above, and acknowledged the change that was brought about by s. 27 of the 1995 Act. The judge then looked at how the mandatory considerations in the Rules are to be applied in this context of establishing the nature and extent of the work and then putting a value on it. Herbert J. said that the Taxing Master when he is considering the instructions fee has to list out the different kinds of work that the solicitor did. In regard to the obligation to look at the nature and extent of the work and the time and labour expended and the amount claimed and the degree of responsibility undertaken by the solicitor, the different types of work have to be specified and the time spent on them detailed.*

*It is obvious that not every piece of work is going to be charged out at the highest rate. Or, rather, not every piece of work can be recovered from the paying party at the highest rate. It may be that a client will insist on the most senior and expert solicitor doing every single piece of work in the case, no matter how trivial or mundane, or even wholly clerical in nature. The*

client is entitled to do that, but is not entitled to recover costs at that level from the other side. So, as Herbert J. points 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. Thus, for example, purely routine work would be charged at one rate for whatever time was appropriately and reasonably taken up by it, whereas other work would call for a higher level of remuneration because the responsibility taken in doing that work was higher and because it needed a much more qualified person to do it. The Taxing Master also has to decide whether the work was necessary and he can and must disallow any unnecessary work or expense that has been engaged in or incurred. Adopting the approach prescribed by Herbert J. will obviously require an analysis of the time records of the solicitor making the claim for costs. It may be that a solicitor will not carry such records, although I would have thought that those solicitors would be few in the present world and becoming fewer as time goes on. But, assuming that there are no time records, it should nevertheless be possible for the work to be detailed and for the time spent to be estimated or calculated and to the extent that there is difficulty in calculating the time spent, that is a problem for the claimant solicitor because there is a clear obligation under the Rules to have regard to that element.

What this comes down to, as I see it, is that the Taxing Master is asked to inquire 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."

## DECISION

The ultimate ruling of the Taxing Master in this case is notable for his highly critical approach to various decisions of the High Court. At p. 79 he states:-

*"The Defendants' use of the dicta in the Cafolla case and C.D. v. Minister for Health and Children for critical purposes is in my view inappropriate, not solely because of the criticism. To apportion time as suggested in both cases is pure guess work, is difficult to comprehend and shows a complete lack of understanding of the current taxation process."*

The Taxing Master states at p. 80:-

*"The learned [Judges of the High Court] should be aware that most of the cases that come before me do not have the benefit of time costing. Simply put there is no legal obligation to have such a method at present. With respect to the learned judiciary to introduce a concept of guesstimate of timing as to pieces of work and ascribing a unitary value to it or them would not result in attributing time-frames to discrete pieces of legal work in cases."*

The Taxing Master states later in his Ruling:-

*"The method of assessment is of critical importance in that the approach is not a concrete science and the justification of a cost is exclusively dependent upon its part it has played in the litigation or matter under taxation. I feel as of late certain judgments of the High Court endorsing or permitting a spurious 'gap-filling' exercise which is dangerously entering the taxation process. We should not endeavour to impose scientific analysis upon pure human judgment."*

The Taxing Master thus quite deliberately and impermissibly departed from the established jurisprudence of the High Court in his overall approach to this taxation. A measure of reserve about the existing jurisprudence may be understandable, but the *ex post facto* nature of the Taxing Master's method of calculating the instruction fee provides the clearest illustration of his departure from approved principles led in this case to a method of assessment which defies logic and reason.

The provisions of Order 99 Rule 37(2)(ii)(b) and the jurisprudence of the High Court require that the Taxing Master ascertain what work was done by the solicitor, and subsequently identify firstly whether a special skill was required in the commission of such work, secondly what skill that was and thirdly the reason why such skill was necessary. The Taxing Master in the case at hand did not determine whether the work done necessitated any special skill, did not identify the use of any skill and did not examine any reason why such skill was required. The Taxing Master went so far as to suggest that it would be inappropriate for him to estimate the time expended by the plaintiff's solicitors in relation to a piece of work, which is directly in contrast to the established case-law of the High Court. As stated by Ryan J. in *Cafolla*, asking what a person did and how long it took are the most elementary inquiries in evaluating work.

It would appear that the Taxing Master allowed €212,000 in respect of the general instruction fee on the date of his original ruling and was determined to stick to it. In his final ruling he, in effect, worked backwards from that figure in order to determine the amount of hours worked per week by the plaintiff's solicitors by reference to the number of years consumed by the litigation and deemed the figure thus arrived at to be appropriate. This is an entirely inappropriate manner in which to deal with taxation and is both artificial and irrational. If upheld, it would for a start provide an incentive for a plaintiff's solicitor to drag out litigation for as long as possible.

## TIME-ESTIMATES

In relation to the time-estimates provided to the Taxing Master by the plaintiff's solicitors, it appears to this court that the Taxing Master accepted these without attempting to properly analyse whether or not the estimates were reasonable having regard to the nature and extent of the work carried out under each heading. The time factor cannot predominate to the exclusion of other considerations.

## COMPARATOR CASES

At the original taxation, the plaintiff's solicitors did not adduce any comparator evidence. The defendants subsequently submitted ten comparator cases involving road traffic accidents of a similar monetary value. The Taxing Master referred to these comparators in the following terms at p. 70 of his Ruling:-

*"The Defendants have chosen, by reference to ten cases, a mean average of €90,000.00 for an instruction fee, where monetary compensation was approximately €800,000.00. This in effect measures the fee by the simple expedient or old methodology of 10% of the award plus €10,000 which I had considered saw its demise with the introduction of Section 27 of the Courts and Court Officers Act 1995. It would appear to be alive and thriving in some instances however. The Defendants acknowledge that this case was difficult and have increased that valuation to €135,000.00. There is no explanation given of how the figure increases by €45,000.00. The Plaintiff in my view, by the forensic analysis heretofore referred to has successfully demonstrated that such an approach is flawed and should be confined to the dustbin of costs... I am of the opinion that the Defendants have failed to carry out a thorough examination of the work but have chosen a now defunct method of a mechanical mathematical evaluation, which if followed would render an injustice to the Plaintiff."*

The use of comparator cases to provide broad guidelines to a Taxing Master has been accepted by the High Court. In *Minister for Finance v. Taxing Master Flynn* (Unreported, High Court, 31st July, 2003), Herbert J. stated:-

*"When it comes to deciding on an appropriate Instructions Fee to be allowed to a Solicitor to cover the work done by, the special expertise of and the degree of responsibility borne by that Solicitor, it is not necessary in my judgment that there should be an exact similarity between cases – something which would in any event be seldom if ever achieved – for there to be a valid comparison. Neither is it necessary that the differences between cases for the purpose should be capable of some form of exact mathematical evaluation. In my judgment the Taxing Master is concerned to find guidance from the broader and more general picture between the cases sought to be compared. Of course the greater the degree of similarity between cases the more appropriate the comparison should be."*

In *Cafolla*, Ryan J. stated:-

*"Comparison of costs in other similar cases is recognised as a method of cross-checking the costs allowed in the instant case. Obviously, the difficulty is to find cases that are truly comparable and not just where the fees are at the level desired by the party to the taxation. The search is for relevant comparators."*

In the case at hand, the Taxing Master should have first examined the nature and extent of the work and, having done that, had some regard to the submitted comparator cases when evaluating the work done. The defendants in the case at hand had accepted before the Taxing Master that each case must be taken on its merits and that the use of comparators could not be a substitute for the examination of the nature and extent of the work done. However, the Taxing Master refused outright to cross-check his Ruling with the comparator cases.

## FAMILIAL CIRCUMSTANCES AND 'SUICIDE ABATEMENT'

On a party and party taxation, a plaintiff is under an obligation to conduct the proceedings expeditiously and to refrain from increasing costs unnecessarily. Party and party costs are de minimus and a party seeking his costs is only entitled to the bare essentials required to conduct the litigation, see *Attorney General (McGarry) v. Sligo County Council* [1991] 1 IR 99.

The Taxing Master makes reference in his Ruling to the family background of the plaintiff and refers to the fact that the plaintiff's parents were hostile to each other. It is also mentioned that the plaintiff and his mother had a poor relationship. These are not matters which are appropriate for party and party taxation and are not relevant to the issue of costs in the case. The plaintiff's solicitors have claimed a sum for 70 hours in respect of 'Suicide Abatement'. This is in relation to conversations on the phone and e-mail contact with the plaintiff, who is said to have been suicidal at times during the lengthy process of the litigation. This is clearly not a matter which is appropriate for a party and party taxation and indeed a solicitor has no special qualification to provide counselling or psychiatric advices.

## APPOINTMENT OF THE GUARDIAN

The Taxing Master states that an "extensive amount of research" was done by the plaintiff's solicitors in relation to the appointment of the plaintiff's guardian. However, the Taxing Master failed to ascertain the amount of time spent on the work, as he was required to do by virtue of Order 99 Rule 37(22)(ii)(c). The plaintiff's solicitors engaged two attorneys from the U.S.A. to undertake the necessary work in that jurisdiction, the costs of which are provided for separately in the Bill of Costs. The Taxing Master failed to have sufficient regard to the assistance which would have been provided by the attorneys and the consequent reduction in work required of the plaintiff's solicitors in that regard.

## CONCLUSION

The Taxing Master erred in failing to apply the criteria set out in the jurisprudence of the High Court, in applying irrelevant criteria and in the approach taken to the use of the comparator cases. His ex post facto justification of the total sum allowed was based on a mathematical formula of taking the years expended on the litigation, dividing that into the sum of €212000 and allowing the same rate under every heading. This in my view could never constitute a proper discharge of a taxing master's functions on an exercise in taxation of costs. Further, his allowance included a 'suicide abatement' fee which I believe should never have formed part of any claim for costs. In the circumstances, I believe that I have no alternative but to remit the matter to the newly appointed Taxing Master for a proper determination of the general instruction fee.



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. However, as this point was not argued in the case before me it will have to be addressed in some other case.