Neutral Citation Number: [2005] IEHC 399

THE HIGH COURT

Record Number: 1995 No. 2039P

BETWEEN

MICHELLE QUINN

PLAINTIFF

AND
SOUTH EASTERN HEALTH BOARD

DEFENDANT

Judgment of Mr Justice Michael Peart delivered on the 30th day of November 2005:

1. By Notice of Motion dated the 14th May 2004 the plaintiff seeks to have the Court review the decision of the Taxing Master on the ground that the allowances made by the Taxing Master in respect of the Brief Fee for Senior Counsel and Junior Counsel are inadequate. This was a medical negligence action, and the Brief fee for Senior Counsel was claimed at €47,615.18, and that for Junior Counsel was claimed at €31,743.45, being two thirds of the latter.

2. The fees were at first allowed on taxation by the Taxing Master were €22,500 for Senior Counsel and €15,000 for Junior Counsel, but, as the Taxing Master has stated in his Report to the Court, having considered written and oral submissions on the hearing of objections and having considered the nature of the case, the extent of the work involved and having carried out a revised careful examination and consideration of the sums allowed in the several comparable cases referred to by the defendant, and relying on his own experience of fees allowed in similar matters, he concluded that the sum allowed on taxation was *"slightly on the light side"*, and he increased these Brief fees to €26,000 and €17,333 respectively.

3. The circumstances in which the claim arose were that when the plaintiff was fourteen years of age she suffered from appendicitis which resulted in an appendectomy being performed in November 1993. She was discharged from hospital after about ten days, but after a short time she began to experience pain in her right thigh. By April 1994 she was referred to an orthopaedic surgeon, but was later referred to another surgeon who diagnosed that she was probably suffering from a form of *meralgia parasthetica* due to an irritation of the lateral cutaneous nerve of the thigh. She was injected several times which gave her some temporary relief, but eventually the neurologist advised that surgery was necessary which would result in a division of the lateral cutaneous nerve of the thigh.

4. The parents of the plaintiff contended later that they were never advised that there was risk attached to this procedure. That operation was carried out in August 1994, and in the months which followed, it appears that her condition regressed to the point that she was worse off than before the operation the previous August, and that she was suffering considerable pain in her right leg, as well in her groin and lower abdomen. She was then referred to a neurologist, and it appears that as a result of the operation which had been performed it was not possible for that neurologist to determine what nerve or nerves might be implicated in the plaintiff's then condition. Without going into the effects of this continuing pain on the plaintiff in full detail, it is safe to say that she was suffering from considerable and ongoing pain in that area of her body, and that in the years which followed she continued to suffer greatly, and her quality of life was greatly diminished, with symptomology likely to continue.

5. The case came on for trial on the 11th July 2001 and was heard over a period of three days. Judgment was reserved until the 22nd March 2002, when the plaintiff succeeded in her claim of negligence, and was awarded damages in the sum of €300,000. The learned trial judge was satisfied on the evidence of the plaintiff's expert medical witness that the neurectomy had been the wrong treatment, that there had been no informed consent to that operation, and that in relation to the first operation, namely the appendectomy the doctrine of 'res ipsa loquitur' applied.

6. By order of the learned High Court judge, the plaintiff was, in addition to her damages, awarded her *"costs of this action when taxed and ascertained, to include reserved costs and costs of issues".*

7. Before dealing with the submissions of Counsel, I will give some detail from the Report of the Taxing Master dated 21st October 2004. He states, inter alia, that at the hearing of the objections it had been submitted that he had failed to have due regard to matters relevant to the size of the Brief fee for Counsel, such as the fact that Counsel had committed to this case as far back as 1994 and *"had a wholly interactive and hands on approach throughout the matter, which was wholly necessitated by the unique features of this case and the absence of explanations, facts, details, documents and reporting on the plaintiff's symptoms".*

8. He states also that he had been referred to passages from the reserved judgment of O'Caoimh J. which had outlined the difficult issues involved in the case, and also the extensive report of the plaintiff's medical expert witness. In addition he had been referred to an e-mail from Senior Counsel involved in the case to the instructing solicitor, and in which Senior Counsel requested that he provided with medical research in the area from 1960, as well as any articles referred to in such research on an urgent basis so that he could "become an expert on the subject of meralgia parasthetica". The Taxing Master also noted that he had been furnished with Counsel's notes, and that he had also been referred to the significance and relevance of the extent of discovery which Counsel had to consider and the necessity for Counsel to master the medical research and literature necessary for the preparation for the case.

9. The Taxing Master states that having considered all submissions he concluded that the claimed Brief Fee for Senior Counsel was "excessive and exceptionally high", and after reconsideration of the matter had considered that €26,000 to be fair and reasonable, and a fee which "*more accurately represented the going value for such an action*".

10. He went on as follows:

> *"A major significant factor in this case was the limited amount of liability expert reports. The only liability witness was Mr Russell, neuro surgeon, who furnished one report. Secondly, Counsel had the benefit of a very thorough and detailed pre-trial consultation for which a sum of €2000 was allowed. A significant amount of the discovery documentation was to hand and examined by both Senior and junior Counsel when the settling of the Statement of Claim in November 1998 [sic]. It is also a common feature of medical negligence claims that Senior Counsel is involved throughout the lifetime of such litigation advising on numerous matters.*
>
> *I have also had the benefit of examining the notes prepared by Senior Counsel for the hearing of this action. I would not class this as an unusual aspect on the part of Senior Counsel in such an action. I accepted fully that Counsel prepared*

professionally and thoroughly for the hearing. It is his professional duty to do so. In my opinion the Brief fee now allowed by me adequately remunerates for this reading in and preparatory work including the first day in Court. The refresher fees allowed by me were again the going rate and reasonable. Neither party has objected to them.

The Courts have directed that the Taxing Master must have regard for the fees allowed in comparable cases. It is impossible to have two identical cases. Therefore the fees taxed or allowed in other cases are only a guide, but a very compelling guide. It must be borne in mind that the hearing of the action was in July 2001. The fees allowed are what I considered fair and reasonable and the proper going rate at that time. I carried out a careful analysis and comparison with all the above cases referred to in arriving at my determination. It was also evident that no negotiation at all took place between solicitor and counsel in determining a reasonable Brief fee for the case. I was satisfied that no reasonably careful and prudent solicitor would offer to Counsel based on his experience and knowledge of fees charged and paid in cases of a similar cases [sic] a Brief fee of the magnitude marked by Senior Counsel on this case. It is in my opinion tantamount to a special fee and thus not allowable on a party and party basis. Further I had regard for the amount of damages allowed in each of the other cases."

11. James Salafia SC (who was not the Senior Counsel for the plaintiff in the action itself) has made an initial submission that the order of the Court (O'Caoimh J.) did not award to the plaintiff only part of her costs, but rather "her costs", and that any interference by the Taxing Master by way of reduction of Senior Counsel's fee and thereby Junior Counsel's fee is an interference with the intention of the Court when it awarded the plaintiff her costs of the action. He submits that an experienced and competent plaintiff's solicitor has agreed a certain fee with the Senior Counsel of his choice and that the decision of the Taxing Master has the effect now of depriving the plaintiff of a significant portion of her damages unless either her solicitor or Counsel themselves accept a fee less that that marked and agreed.

12. Mr Salafia has referred to the provisions in the Rules of the Superior Courts in Order 99, r. 37(18) RSC where it is provided that the Taxing Master shall allow all such costs, charges and expenses as appear to him to be necessary for the attainment of justice, and to the judgment of Gannon J. in Heffernan v. Heffernan, unreported, High Court, 2nd December 1974 to the effect that the onus is on the defendant to establish that the fee marked is the result of factors such as over caution, negligence, mistake, or that it is unreasonable in amount or unreasonably incurred. Mr Salafia has submitted that unless it is shown that the fee marked comes within any of these terms, it should not be interfered with. He has also referred to the practice which had grown up over many years where Counsel's fee had been based not on actual work done, but rather on some 'going rate' basis or hypothetical basis of assessing what might have been done, whether it was done or not. He suggests that this practice was sought to be justified in those days on the basis that it was inappropriate for the Taxing Master to actually inquire into what work was actually done by counsel in order to earn the fee marked.

13. However, Mr Salafia refers to the changes brought about in this regard by s. 27 (1) of the Courts and Court Officers Act, 1995 ("the 1995 Act") which provides as follows:

"27. -- (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."

14. Mr Salafia refers to this provision when he submits that the Taxing Master may now have regard to the actual work done by Counsel in the case, but that, given the opening words "on a taxation of costs", the provisions of O.99 RSC still apply, and that accordingly the discretion permitted to the Taxing Master under the Rules is still applicable and not removed by the provisions of s. 27(1) of the 1995 Act. In other words it is submitted that s. 27(1) of the 1995 Act gives him additional powers but not in any way which is a substitute for the discretion contained in O.99 (1) RSC.

15. He submits that the Taxing Master cannot simply substitute his own opinion of a proper fee, but must form the view that the fee marked or agreed with Counsel is a fee which no reasonably careful, experienced and prudent solicitor would agree.

16. It is worth recalling at this point that the Taxing Master noted in his Report in this case that there had been no negotiation with Counsel as to the fee, and it is also the case that the fee was not agreed in advance by the solicitor, but rather that it was simply marked by Counsel after the case concluded. Mr Salafia has submitted in that regard that in fact it may only be at the end of the case that the solicitor will be in a position to say what level the Brief fee should be agreed at.

17. But returning to the provisions of s. 27(1) of the 1995 Act, Counsel has submitted that in his examination of the work done by Counsel for the purposes of determining whether the fee is appropriate in all the circumstances, the Taxing Master must look at the work done by Counsel from the time of first involvement, consider what difficulties were encountered at that time and how these difficulties were addressed and resolved over the years between commencement and conclusion of the action, and that the Taxing Master was in error by looking at the judgment of the learned High Court judge and deciding that the case was simply won on the basis of a single expert medical witness, and that this approach does not do justice to the amount of work required to be done in order to bring about the situation where the trial judge was persuaded that the defendant was negligent. In this regard, Mr Salafia has referred to the fact that while only one medical expert had been called and who gave evidence in line with his Report, there were other experts consulted and who gave reports during the lead up to the hearing, but who were not called, but that that does not lead to the conclusion that to consult these other experts was not a necessary part of the preparation for the case.

18. In relation to the submission that s. 27(1) of the 1995 Act does not substitute the discretion enjoyed by the Taxing Master under O.99 RSC, Mr Salafia has referred to the provisions of that rule, which provides as follows:

"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 question involved;

(b) the skill, specialised knowledge and the 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."

19. Mr Salafia has submitted that none of these criteria were addressed by the Taxing Master in his consideration of Counsel's fee.

20. It is also submitted that while the taxation process is one by which the defendant in this case can be protected in the matter of what costs are payable, it is also the case that the defendant had it within its own power to limit the extent of the case and the fact is that this action was fought on all issues raised and no concessions or admissions were made. It was therefore necessary for the plaintiff's legal team to be fully prepared to fight all the issues and that justice would therefore require that the plaintiff should be entitled to be *indemnified* in relation to the cost involved in so doing.

21. It has been submitted also that the instructing solicitor must have regard to what the appropriate fee is having regard to what he has referred to as "the market place" and in this regard he suggests that the market place is not judged by what is allowed on taxation in other cases, but rather by what is marked by Counsel, and that in this regard it is relevant to the question of what constitutes "the market" to refer to the fact that there are just two Taxing Masters in the High Court, and that they cannot be seen therefore as determining the market place.

22. There are some specific criticisms made by the plaintiff of the Taxing Master's decision - for example, that he did not have regard to a detailed letter from Senior Counsel which sets out the complex nature of the case and the extent of the work necessary for the case on his part, and the basis and reasons for the Brief fee and other fees marked, and that the Taxing Master has not carried out the detailed analysis required of him by s. 27(1) of the 1995 Act or O. 99 RSC. The fact that the Taxing Master referred to the fact that only one expert had been called by the plaintiff is also criticised on the basis that it underestimates the complexity of this case and the number of experts' consulted and who gave reports, as is his statement that Counsel had to consider the discovery documentation for the purpose of drafting the Statement of Claim. In regard to the latter, it is submitted that this shows a misunderstanding on his part between the consideration of discovery for the purpose of drafting the Statement of Claim and the consideration required for the purpose of preparing himself for the case itself where it would be necessary to be in a position to competently cross-examine any medical experts who may have been called by the defendants. It is fair to say that considerable emphasis is placed on the fact that in a medical negligence case it is necessary for Senior Counsel to have very thoroughly prepared himself so that he could adequately cross-examine expert medical witnesses, and that this must be recognised in the fee marked.

23. It is also submitted that the Taxing Master was wrong to regard the fee marked as being in the nature of a special fee. Mr Salafia submits that there is no basis in this case for regarding the fee as containing an element of 'special fee' and he accepts that any such special fee element would be a matter for solicitor/client costs rather than party and party costs.

24. In relation to the use of comparators, Counsel has submitted that the cases considered by the Taxing Master were irrelevant and misleading, because they are meaningless unless it can be shown that they involved the same amount of work in the context of similar issues, and that the work was actually done in those cases. Reference is made to the fact that in m any cases the fee actually marked by counsel is withdrawn by Counsel on the basis that he or she cannot show working papers or provide evidence as to the work actually done so that the fee can be justified, and that this is in contrast to the present case where Counsel's notes and other material was provided to the Taxing Master in order to show the work actually done by Senior Counsel. It is also noted that while it was open to the defendant to call evidence before the Taxing Master in order to challenge what was stated by Counsel as to the work done, so that Counsel could thereby have been afforded an opportunity to give evidence himself as to the work undertaken. In these circumstances where the basis of the fee is not challenged by the defendant in such a way, that the fee should be reduced in the way it was.

25. Emphasis has also been placed on the fact that the Taxing Master has not placed any importance on considering the fee from the standpoint of a solicitor acting reasonably carefully and reasonably prudently. In this regard, Mr Salafia has referred to the judgment of Hamilton J. (as he then was) in *Kelly v. Breen* [1978] I.L.R.M. 63 at p. 68 where that learned judge stated:

"…2. It is the function of the practising solicitor --

(a) to select counsel competent in the field of work to which the brief relates, and

(b) to determine the proper and reasonable fee which such counsel, namely a counsel competent in the field of work to which the brief relates and not a particular counsel whom the solicitor may wish to brief would be content to take.

3. In the determination of such fee the practising solicitor should act reasonably carefully and reasonably prudently and should have regard to his day to day and year to year experiences in the course of his practice.

4. These experiences include, inter alia, fees charged and paid in respect of cases of a similar nature, the practice of barristers as to marking fees in so far as accepted by solicitors in practice, fees paid to the opposing counsel in the same matter, subject to whatever factors might be special to the case, and the depreciation in the value of money."

26. Having regard to these remarks and the provisions of s. 27(1) of the 1995 Act, Mr Salafia has submitted that the Taxing Master is now only entitled to disallow any, or any part of a solicitor's disbursements, including Counsels' fees, if he or she is satisfied that no solicitor acting reasonably carefully and reasonably prudently based on his experiences in the course of his practice would have made such disbursements in the course of his practice having regard to the work actually done and the services actually rendered by counsel which were necessary for the successful prosecution, or Defence, as the case may be, of the action.

27. Eileen Barrington BL for the defendant has commenced her submissions by submitting that before this Court should interfere with

the decision of the Taxing Master it would be necessary for the plaintiff to identify some error in principle in his consideration of counsel's fee, and that none such has been identified in the case put forward by Mr Salafia on behalf of the plaintiff.

28. She submits that the nature and complexity of the case is not underestimated or misunderstood by the Taxing Master.

29. Ms. Barrington has also submitted that the introduction of s. 27 (1) of the 1995 Act fundamentally changed the manner in which fees are considered, and that it gave the Taxing Master greatly increased powers to delve into and consider the actual work done by Counsel in a case so that the appropriateness of the fee charged can be assessed. She submits that the market place to which Mr Salafia referred is more correctly described by reference to what a plaintiff's solicitor and a defendant's solicitor would agree was the reasonably appropriate fee for the work involved. She submits also that these changes have resulted in the Taxing Master becoming a specialist tribunal, and that the Court's review of the taxation is now in the nature of a judicial review and that the Court should interfere only if there is an error shown which would lead to injustice, and that some measure of 'curial deference' must be paid to the office of the Taxing Master.

30. In this regard, the Court has been referred to the provisions of s. 27(3) of the 1995 Act dealing with the power of this Court on a review of taxation, and which provides as follows:

> *"27.-- (3) 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 …is unjust."*

31. Ms. Barrington has referred to the judgment of Kearns J. in *Superquinn Limited v Bray UDC & ors.* [2001] 1 IR 459 in which the learned judge considered the effect of s.27 on the procedure for review of taxation by the Court. The learned judge regarded as correct the view, expressed by the Taxing Master in his Report (relating to the taxation of costs in relation to export credit issues) in Minister for Finance v. Goodman (No.2), when the Taxing Master stated:

> *"The Act [of 1995] bestows a right on me to examine the nature and extent of work carried out by counsel and solicitor and determine the value of that work in relation to the case. This removes the limitation on my discretionary powers if in fact there were limitations on that discretion. Also I have the power to allow in whole or in part expenses that were incurred that I consider are fair and reasonable with regard to the circumstances of the case."*

32. Ms Barrington also referred to the fact that Ms. Justice Laffoy has also expressed the view in *Minister for Finance v. Goodman* (No.2) [1999] 3 I.R. 333 at p. 349 that:

> *"While this point was not addressed by counsel, it seems to me that sub-ss (1) and (2) of s. 27 have introduced a fundamental change in relation to the function of the Taxing Master in the taxation of solicitors' disbursements, including counsel's fees. Before the coming into operation of the Act of 1995, it was no part of the function of the Taxing Master to make a value judgment as to what the disbursements should be. However, by virtue of sub-s. (1) it is part of his function to examine the nature and extent of work to which disbursements relate and to determine the value of the work done or the service rendered. By virtue of sub-s. (2) his function is to assess what he consider in his discretion to be a fair and reasonable allowance for the work done and service rendered."*

33. In Superquinn, Kearns J. considered the extent to which the change in the powers of the Taxing Master has resulted in a change also in the powers of the High Court on review of the decision of the Taxing Master. In that regard, he states at p. 475:

> *"Under the old system, the court had a wide ranging remit and, in the context of a review under O.99, r. 28, could "make such order as may seem just".*
>
> *Now under s. 27(3) of the Act of 1995 it can intervene '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 is unjust."*
>
> *This wording seems to represent a significant shift of emphasis and to impose a heavier burden on any party seeking to challenge a ruling of the Taxing Master…….. It would suggest when taken in conjunction with s. 27(1) and (2), that the court should exercise a considerable amount of judicial restraint in the context of a review, although it must clearly intervene if failure to do so would result in an injustice."*

34. Ms. Barrington submits that not only must it be shown that the Taxing Master has made an error of principle but also that it is such as to result in an injustice to the plaintiff. In that regard she has referred to the fact that the question as to what might be sufficient to constitute an injustice was also referred to by Kearns J. in Superquinn, and that he considered that such an error to constitute an injustice would have to be of the order of 25%, and that translating that formula into the present case, this Court would have to be satisfied that the Brief fee for Senior Counsel in July 2001 should have been at least €32,500 (i.e. €25,000 + 25%).

35. Ms. Barrington submits that there has been no error of principle identified by the plaintiff in these proceedings, unlike a number of other cases to which she has referred, such as Doyle v. Deasy & Company Ltd, unreported, High Court (O'Caoimh J.), 21st March 2003 where the learned judge identified a number of errors of principle such as the rejection of comparative cases on a "blanket basis", and the overestimation by him of the complexity of the case based on an undue regard for some irrelevant material before him, as well as the admission into evidence before him of a statement of evidence by the plaintiff, and which was not evidence given in the case itself.

36. On the other hand, Mr Salafia has submitted that it is incorrect to say that an error of principle must be identified. Rather, he submits that it is necessary, as appears from s. 27(3) of the 1995 Act, to show that the Taxing Master has *"erred as to the amount of the allowance … so that the decision of the Taxing Master … is unjust*."

37. She has also submitted that in the conduct of the taxation the Taxing Master must, as found in *Best v. Wellcome Foundation* [1996] 3 I.R. 378, adopt the standard of the practising solicitor who is reasonably careful and reasonably prudent, and that the Court should be careful not to deal with the review on the basis of an appeal on the merits. In other words that the Court should not find in favour of the plaintiff on this motion simply because on the same material this Court might allow a higher Brief fee to counsel.

Conclusions

38. Mr Salafia has made submissions based on the Taxing Master firstly having a discretion in the matter of Counsel's fees emanating from O.99, r.37(22)(ii) RSC, the factors therein contained being said to be secondary to the primary criterion as now provided by s. 27(1) of the Act of 1995. I think that this is an incorrect starting point in fact, since in my view the matters referred to in O.99, r.37(22)(ii) RSC appear to be matters to be considered in relation to a consideration of the solicitor's instruction fee rather than Counsel's fees. This is evident in my view firstly from paragraph (b) of that rule which refers to "the skill, specialised knowledge and responsibility required of, and the time and labour expended by, *the solicitor*."(my emphasis). There is no mention of 'counsel' in that paragraph. Paragraph (g) refers also only to "the solicitor".

39. It appears to me that Counsel's fees are addressed in O.99, r.37(18) which provides that the Taxing Master shall allow on every taxation "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 no costs shall be allowed……by payment of special fees to counsel……". Counsel's fees are a disbursement of the solicitor and seem to come within this rule rather than O.99, r.37(22)(ii) RSC. The footnotes to these rules as appear in the invaluable and well-known work on Practice and Procedure in the Superior Courts, by O'Floinn and Gannon would bear this out. It follows in my view that Mr Salafia cannot, as he has sought to do, impugn the decision of the Taxing Master on the basis that none of the criteria set forth in this rule were addressed, in relation to Senior Counsel's Brief fee, by the Taxing Master in his decision.

40. The discretion of the Taxing Master in relation to counsel's fees had, prior to the enactment of s. 27 of the 1995 Act, been distilled down to the proposition appearing in cases such as *Kelly v. Breen* [supra] and *The State (Gallagher Shatter and Company) v. De Valera* [1987] ILRM 555 and expressed as being essentially that that the Taxing Master should disallow a counsel's fee only if he was of the view that no solicitor acting reasonably carefully and reasonably prudently based on his experience in the course of his practice would have agreed such a fee.

41. Prior to the enactment of s. 27 aforesaid, the appropriateness of the fee marked by counsel was measured to an extent by what was "the going rate" for such a case and in many instances this criterion bore little if any relationship to the amount of work done and time spent by counsel in preparing for the hearing and presenting the case to the court. That feature of course had the consequence of working both ways, as it were. In other words, one case might have involved counsel in relatively little work by way of preparation, and yet because of the nature of the case and the amount of the damages either awarded at hearing, or agreed on the steps of the court, the brief fee allowed would be similar to one marked in a case of equal value in money terms but which involved significantly more actual time and preparation. Prior to the enactment of s. 27 of the 1995 Act, the taxing Master was precluded from inquiring into the amount of work actually undertaken by counsel in any particular case.

42. Section 27 has not replaced the provisions of O.99, r.37(21) RSC, but has conferred additional powers upon the Taxing Master in the matters of assessing the appropriateness of the solicitor's instruction fee, counsel's fees, and the fee of any expert witnesses called or engaged in any case. Those additional powers include the power to examine the nature and extent of work actually done by counsel (whether senior or junior), and to allow only such fee or part of a fee as he "considers in his or her discretion to be fair and reasonable in the circumstances of the case".

43. In my view this enactment has made sweeping changes to the manner in which costs are taxed.

44. Firstly, it is clear that the fees of junior counsel, which were always allowed on the basis of two thirds of those of senior counsel, can now be examined on the basis of the nature and extent of work actually done by junior counsel. That of course can work both ways also depending on whether junior counsel has done more or less work in the case than senior counsel. The Taxing Master has the power to look at that question now in a way which he did not prior to that enactment.

44. Secondly, it would seem to me that the level of the appropriate Brief fee for counsel (be it senior or junior, the latter's being no longer calculated only by reference to the level of the former's) is now not to be based simply on what a solicitor acting reasonably and reasonably prudently based on his experience in the course of his practice would have agreed, but rather on the basis of what in the opinion of the Taxing Master was fairly and reasonably necessary to be incurred "for the attainment of justice or for enforcing or defending the rights of any party".

45. It is the introduction of the Taxing Master's view of what is "fair and reasonable" by s. 27(2) which appears to effect a change from what was previously the rule appearing in O.99, r.37(18) RSC where the Taxing Master was required to allow such fees as shall "appear to him to be necessary or proper", and which allows the Taxing Master to substitute his own views in this regard for the opinion of the solicitor who was acting reasonably carefully and reasonably prudently. Nevertheless, it must be noted also that in s. 27 it provides only that "the Taxing Master shall have the power…" to examine both the nature and extent of work done and to allow a fee which he considers fair and reasonable. It is not mandated by the section that he avail of these powers, and this is in contrast to the mandatory nature of the provisions of O.99, r.37(18) RSC. But it seems to follow that the Taxing Master will now normally need to exercise his discretion in the matter of fees by looking at the work actually done and making his own assessment as to whether the fees in question were fairly and reasonably "necessary for the attainment of justice or for enforcing or defending the rights of any party".

46. It is presumably because of the nature of the changes brought about by the section that Kearns J. stated in Superquinn [supra] as follows at p. 480:

> *"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. "*

47. In the present case, the Taxing Master states in his Report that in arriving at his determination on taxation he did in fact carry out "an examination of the nature and extent of the work and services rendered by both Solicitor and Counsel as is required pursuant to Section 27 (1) and (2) of the Courts and Court Officers Act 1995". So the question as to whether or not he is "required" to carry out such examination or whether he simply has the power to do so, should he consider it desirable or necessary, does not have to be finally determined for the purpose of this case. He clearly has the power so to do. Mr Salafia submits however that he erred in that task and in the assessment of the appropriate fee to be allowed.

48. In arriving at what he considers to be a fair and reasonable fee necessary or proper for the attainment of justice, the Taxing Master will naturally draw upon his expertise and experience in the matter of costs, and he may, and often does, have regard to what fees are allowed on taxation in what are regarded by him to be comparable cases. Judges called upon to review a taxation of costs have often stated that of course no two cases are identical, and that therefore they can only be seen as similar, but that is not a

reason to disregard them altogether as a guide in the assessment of fees in the case at hand. But an allowance based only on one made in a similar case could not, in my view, ever be an appropriate method to adopt. But that is not to say that such a guide is not relevant and useful to the Taxing Master in deciding what is a fair and reasonable fee in the case at hand. However, it cannot be a substitute for a close examination of all the features and circumstances of a case, and even though I drew attention earlier to the fact that the criteria set forth in O.99, r.37(22)(ii) RSC appeared to apply only to the question of the solicitor's instruction fee and not Counsel's fee, those very same criteria, including the nature of the case, its complexity, the difficulty of the issues involved, the time required to prepare the case, including in appropriate cases the time required to research specialist material to determine whether in the first place there is an arguable case at all, and the skill, expertise and specialised knowledge, seem to me to be matters which would have to be borne in mind and had regard to by any Taxing Master bringing his mind to bear upon the question of what is a Brief fee which is fair and reasonable in order to attain justice when exercising his discretion in accordance with the provisions of s. 27 of the 1995 Act.

49. Where a Brief fee, as marked, is higher than what the Taxing Master considers fair and reasonable, having had regard to all relevant factors, the party whom he or she represented may (subject to any re-negotiation of the fee which might take place) be called upon to discharge the difference on the basis of what are called solicitor/client costs. It has always been the case that party and party costs are not calculated on the basis that the client will be fully indemnified in respect of all costs, except in exceptional cases. It is the extent of that difference which has the capacity to constitute an injustice for the purpose of a review of the taxation by this Court by virtue of the provisions of s. 27(3) of the 1995 Act. As already referred to above, Kearns J. in Superquinn [supra] felt it appropriate to use the same criteria for determining injustice in this regard, as has been found to be appropriate by the Supreme Court is assessing whether an award of damages was unjust - namely "unless an error of the order of 25% or more has been established in relation to an item under challenge." I have some hesitations about such a pragmatic formula in the context of a costs item, because it does not in my view allow for the fact that the same amount of work may be required of Counsel in a case where the damages award is €100,000 as in a case where the award is €300,000, giving rise to a similar level of fee. In a situation where the fee marked in each case is €30,000, and each is reduced by €10,000 on taxation, the impact on the plaintiff in the first case is to the extent of 10% of the damages received, whereas in the second case its impact is of the order of only 3.33%. This demonstrates that where cases of different value but requiring the same work are compared, what is not unjust in one may be unjust in another. It seems to me therefore that the question of what is just or unjust in this regard must be viewed on a case to case basis, since different factors may be at play, rather than by an arbitrary formula such as is entirely appropriate to the question of the justice of a damages award per se.

50. In the present case, this Court can intervene only if it is satisfied (1) that the Taxing Master has "erred as to the amount of the allowance or disallowance", and (2) that this error is such as to amount to being "unjust". I prefer to avoid the use of the term "error of principle". It is not how the section is expressed. In addition, it seems to me that the subsection permits this court to intervene in circumstances where although it is satisfied that the Taxing Master went about his task in a way that was correct in every way, taking into account properly all relevant matters and excluding irrelevant matters, including a close examination of the work done and required to be done and so forth, and in that way committing no error in principle as such, the Court nevertheless may form the view that the figure actually allowed or disallowed is, by being either too high or too low, unjust to the party seeking the review.

51. Therefore the question before this Court which is presented upon a review, having regard to the provisions of s. 27(3) of the 1995 Act, is simply whether the Brief fee in the sum of €26,000 for Senior Counsel is, in this particular case, wrong to the point of being unjust to the plaintiff who may have to pay the difference of €21,615.18 out of the award of damages in the sum of €300,000 which she received. Such an error may well occur because the Taxing Master has erred in the manner in which he has addressed the issues to be addressed in forming his view of the amount, or it may arise simply because having gone about his task correctly he has arrived at a figure which works an injustice on the plaintiff.

52. I would be of the view that it is no longer appropriate to have the same regard as heretofore to so-called comparable cases when attempting to arrive at the appropriate fee for the case. Some regard can be had, but its importance has been diminished by the enactment of s. 27 whereby the Taxing Master can look at the extent and nature of work actually done. In my view it was an entirely appropriate thing to do when fees could be based on a "going rate" or a rate in the market place, rather than on work actually done. One of Mr Salafia's criticisms of the decision in the present case is that the Taxing Master was unduly influenced by the comparator cases to which he was referred by the defendant's costs drawer, and that this prevented the Taxing Master from approaching the question on the basis of work actually done in this case, especially where there was considerable material before the Taxing Master from which he could glean the extent of work actually done. Having looked at the decision of the Taxing Master where he refers to the comparator cases to which he was referred, it seems to me that he perhaps allowed himself to be unduly influenced by them, in as much as while he refers specifically to the fact that they are only a guide, he added in his report that they are "a very compelling guide". This would indicate to me that he placed considerable reliance upon the comparators, and as already stated I would be of the view that the significance of comparator cases must be much less now since the enactment of s. 27 than prior to that when the "going rate" was much more relevant, rather than the work actually required to be done and actually done.

53. Mr Salafia was also critical of the Taxing Master's decision in as much as it referred to "a major significant factor in this case" being the fact that there was only one expert witness called by the plaintiff at the hearing, and that the reliance placed on the fact that only one expert was called was erroneous given that it had been necessary as part of the overall preparation for the case to consult many experts until they found one whose evidence was supportive of the plaintiff's case. The submission in that regard is that this is a case which required much investigative work on the part of Senior Counsel, and was not simply reliant upon skills of advocacy in court at the hearing. In omitting to have regard to this feature of the case, it was submitted that the Taxing Master had not had sufficient regard to the complexity and unusual nature of the case, and that it involved the mastery of a considerable amount of research by Senior Counsel going beyond normal preparation even for a medical negligence case.

54. In his decision the Taxing Master has stated that the only liability witness was Mr Russell, the neuro surgeon, that a significant amount of discovery documentation was examined by Counsel when settling the Statement of Claim, that there was nothing unusual about Counsel being involved in a medical negligence case throughout the case, that the notes provided by Senior Counsel do not disclose anything unusual as far as the work done is concerned, above and beyond what normal professional preparation for the case, and that the Brief fee allowed adequately remunerates for all his work including the first day's hearing. He stated that the fee marked was "excessive and exceptionally high".

55. The Taxing Master does not set forth the contents of the letter from Senior Counsel to his instructing solicitor which sets out the basis for the fee marked by him, and against which no evidence was given before the Taxing Master. That said, I accept of course that the Taxing Master had before him the entire of the solicitor's file and the papers in the case. It is desirable that I should refer to certain passages in this letter. Having referred to the issues raised in the case he continues:

> *"…This was an exceptionally complicated medical negligence action in which I was first instructed in 1994 when I settled*

various papers in relation to discovery. No explanation for the plaintiff's condition was forthcoming from either of the defendant's hospitals and agents had to embark on a prolonged discovery procedure - perseverance in which was absolutely vital for the success of the action. Indeed, it was on the basis of such documents as had been obtained on discovery at that time that the statement of claim was drafted…….

A major difficulty was in obtaining the evidence of a medical witness to support the plaintiff's case. Agents indeed sought a number of reports from different experts all of which were negative and which I found to be unsatisfactory and which, in the event were themselves proved t be wrong.

……A conservative estimate of the pre-trial work involved greatly exceeds 150 hours.

The defendants by their Defence denied liability for negligence both in relation to the appendectomy and the subsequent treatment by neurectomy of the plaintiff's meralgia paresthetica.

The defendants were vigourously pursued in successive motions to particularise allegations in their Defence and to complete their discovery. This was essential to the successful prosecution of the case. Thus for example the Defence were forced in particulars to make vital concessions as to what had been told to the plaintiff concerning the risks involved in a neurectomy.

……

Since the opinions which had been obtained -- from both a general surgeon and a neurologist -- had proved negative, I had to do an extensive search of medical literature to obtain a basis for fixing the defendants with liability. The literature ultimately relied upon is enclosed and extends to over thirty articles and excerpts from medical treatises. However it should be remembered that the task of research extended not only to considering and assimilating this relevant literature but also many more articles and texts from which these were ultimately selected as being the most relevant.

There were numerous consultations with agents on an ongoing basis during the lifetime of this case……Agents were given a commitment on my part that I would attend exclusively to the trial of the action.

Preparation for the trial involved, in addition, mastery of a large and complicated discovery relating to affidavits concerning treatment at Cashel and Waterford, and documents furnished under the Freedom of Information Act. Comprehension of the discovery documents was extremely difficult and highly time-consuming as the manner in which they were furnished was calculated to mislead with no order on the documents and many being of poor quality writing or copy.

Moreover, preparation had to proceed on the basis that at least six medical witnesses would be called on behalf of the defendants, and a number of medical reports were furnished on the basis that several at least of these experts would be called on behalf of the defendants……"

56. It is worth referring also to the fact that only one Senior Counsel was briefed in this case.

57. I believe that a reading of this letter, and there was no contradictory evidence before the Taxing Master, indicates that the manner in which the case was considered by the Taxing Master has not given sufficient weight to the pre-trial work which was required to be done. I refer in particular to the reliance placed in the report on the fact that there was only one liability witness called, and that the discovery documentation had been to hand at the Statement of Claim stage. The Statement of Claim was settled in November 1998, whereas the hearing was in July 2001, nearly three years later. It was inevitable in those circumstances, in my view, that this documentation would have to be re-visited as part of the trial preparation and Senior Counsel could not be reasonably expected to rely on his examination of the documentation some three years previously. In addition, I accept the point made by Mr Salafia, that the examination and understanding of the discovery documentation for the purpose of settling a Statement of Claim could not be adequate for the purpose of equipping Senior Counsel to properly and thoroughly cross-examine any expert medical witnesses in their area of specialist knowledge. In my view the Taxing Master has undervalued the extent of that work which was necessary as part of the preparation of this case, and that this is evident from the decision itself. I have already set forth a passage from the judgment of Kearns J. in Superquinn [supra] where he refers to the necessity to *"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…"* In my view this has not occurred in the present case, and if this Court is to be in a position to carry out a review in the way contemplated by s. 27(3) of the 1995 Act, it must be able to do so in the light of clearly set forth findings in the Taxing Master's Report. There is a greater onus upon the Taxing Master perhaps than heretofore given that he must now justify his decision on the basis that it is fair and reasonable, as opposed to being in line with the "going rate".

58. It is probably inevitable that the Taxing Master in most cases approaches his task from the point of view that the fees marked are higher than solicitor and counsel are expecting to be allowed. However it cannot be reasonable that such is assumed to be the case in all cases. To accept this would be to reflect upon the integrity of counsel who in the present case has set out in a clear and detailed way the basis on which his fee has been marked. Perhaps such an inference can be more properly drawn in a case where the fee is not accompanied by such a detailed explanation for the size of the fee as in the present case. Clearly there is an onus on the solicitor to satisfy the Taxing Master as to the necessity and appropriateness of any particular disbursement. The other side can submit evidence in rebuttal and make objections, as often happens. But the Taxing Master must have appropriate regard for the materials before him, particularly when making a decision to disallow almost half of the fee claimed, as in the present case. In my view he has fallen into error, and in a way which in the present case could rightly be referred to as an error of principle, although I have expressed reluctance to speak of it in those terms for the reason already given. I believe that given what is known about the difficulties attendant upon the plaintiff's case from the outset, this was a case which could easily have been lost or not even commenced were it not for the energetic pursuits of the plaintiff's solicitor and Senior Counsel in investigating the issues so thoroughly and carefully prior to the delivery of the Statement of Claim. It is a case perhaps which many lawyers would have discouraged the plaintiff from pursuing at all. In the events which happened the plaintiff's case was won and an award of damages which is said to represent the full value of the plaintiff's claim was achieved, but not without considerable and documented hard work and effort outside the courtroom itself - i.e. pre-trial.

59. Even allowing for the fact that the fee must be looked at from the 2001 stand-point, I have little doubt that a Brief fee of €37,500 would be justifiable in this case, particularly when one takes into account the fact that refreshers were allowed in the sum of €4000, and that the Brief fee includes an allowance for the first day's hearing. Since no cross- review by the defendant is before the Court in relation to the two thirds basis of calculation in respect of the Brief fee for Junior Counsel, I am satisfied in this case that

that fee should be increased by the same margin to the sum of €25,000.

60. To some extent the size of the award of damages is irrelevant to the size of the Brief fee since the enactment of s. 27 of the 1995 Act, because of the emphasis on the work actually done, rather than hypothetical work taking into account the size of the damages. There can however be some regard had to that aspect. It must also be remembered that s.27 allows the Taxing Master to take account of the amount of necessary work actually done by Counsel, and which might not be done in what is referred to in a so-called comparable case value-wise, in order to justify a fee which is in excess of the so called "going rate", based on amount, and not solely for the purpose of reducing the fee claimed because it may be higher than is thought normal.

61. The remaining question is whether the degree to which the decision is an error is unjust to the plaintiff. I prefer not to be confined to thinking of this question solely by reference to the 25% yardstick already referred to, although in the present case that formula would render the decision unjust since the difference is greater than 25%. One approach would be to ask would it be unfair to ask this plaintiff to pay to her Senior Counsel a sum of €21615.18 out of her own resources, rather than require that the defendant pay this sum. In order to answer that question in the negative, it would surely be incumbent upon the Court to find and set forth some reason why she should do so, in circumstances where the Court is of the view that a fee of €37,500 was justifiable given the particular circumstances of this case.

62. In some cases the Court might be able to identify some special feature, such as a special fee or retainer fee element in the fee marked, and for which it would not be unfair to ask the successful plaintiff to discharge, but that is not the case in the present case, even though the Taxing Master expresses the view that the size of the full fee marked would represent a special fee.

63. I am unable to discern any reason why it would be fair and just to ask the plaintiff to discharge the amount marked on the Brief exceeds that allowed by the Taxing Master. To do so would accordingly be to render the decision of the Taxing Master unjust to the plaintiff. I can well envisage cases where the margin of error as to amount might be so slight as to not amount to an injustice, or even that in the context of a very high award the amount by which the allowance was increased by the Court would make little impact on the plaintiff's resources. I am not satisfied that such would be the case for the present plaintiff.

64. I will order accordingly.