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Judgment

Title: D. -v- Minister for Health and Children & Anor

Neutral Citation: [2008] IEHC 299

High Court Record Number: 1999 122 CT

Date of Delivery: 23/07/2008

Court: High Court

Judgment by: Herbert J.

Status: Approved

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HIGH COURT

1999 No 122 CT

**IN THE MATTER OF THE HEPATITIS C COMPENSATION TRIBUNAL ACT,
1997 AND**

IN THE MATTER OF S. 6(3)(E) AND

**IN THE MATTER OF S. 5(15) OF THE HEPATITIS C COMPENSATION
TRIBUNAL ACT 1998**

BETWEEN

C. D.

APPELLANT

AND

THE MINISTER FOR HEALTH AND CHILDREN AND

THE HEPATITIS C COMPENSATION TRIBUNAL

RESPONDENTS

JUDGMENT delivered by Mr. Justice Herbert on the 23rd day of July 2008

This is an appeal by the respondents against the decision of Taxing Master Flynn, dated 2nd July, 2005. It is confined to the Solicitors General Instructions Fee of

€51,000 allowed by him following Objection taken by the solicitors for the applicant to the General Instructions Fee of €36,000 allowed by him on taxation of their Bill of Costs. The appeal is brought pursuant to the provisions of O. 99, r. 38(3) of the Rules of the Superior Courts and pursuant to the provisions of s. 27(3) of the Courts and Court Officers Act 1995. This section provides that:-

“The High Court may review a decision of a 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.”

The learned Taxing Master, in his Report to this Court, records that the Solicitor’s for the Costs asserted that a considerable amount to time and effort was expended by them on and in researching, investigating and carrying out the matters following and, that this should be reflected in the amount of the General Instructions Fee allowed to them on taxation:-

- (a) Taking initial instructions.
- (b) Obtaining and reviewing the files of the applicant’s former solicitors in relation to her application to the non-statutory Compensation Tribunal.
- (c) Consulting and advising regarding the new statutory regime.
- (d) Obtaining medical and test results.
- (e) Commissioning medical reports, with particular reference to causation.
- (f) Obtaining the advices of Counsel with regard to the grounds of appeal.
- (g) Preparing and issuing the originating pleadings.
- (h) Obtaining and considering the transcript of the proceedings before the Compensation Tribunal.
- (i) Obtaining a vocational rehabilitation consultant’s report and an actuary’s report.
- (j) Instructing senior counsel to advise proofs.
- (k) Sourcing and binding 16,600 folios of evidential material and furnishing same to the Chief Registrar of the High Court and the Chief State Solicitor.
- (l) Structuring comprehensive briefs for senior counsel and junior counsel.
- (m) Arranging and attending a consultative process with the applicant, counsel and all witnesses concerned.

(n) Compiling evidence in relation to the applicant's psychological profile.

(o) Undertaking medical literature research with Professor Eric Preston regarding the association between idiopathic thrombocytopenia and Hepatitis C., the association between auto-immune Hepatitis and Hepatitis C. and, the effect of steroids if taken over a protracted period on a compromised liver where a biopsy had already indicated signs of necrosis.

(p) Finalising preparation for the appeal hearing to the High Court and attending same on 12th March, 2002.

The learned Taxing Master noted that the Solicitor's for the Costs claimed that the appeal to the High Court in the instant case was particularly complicated, in that the initial prognosis made at the time of the hearing of the applicant's claim before the non-statutory Hepatitis C. Compensation Tribunal, had proved to be incorrect and the applicant's condition had subsequently deteriorated.

The learned Taxing Master recorded that the Solicitor's for the Costs claimed that research and investigative work was carried out with the medical specialists, dealing with the following matters:-

(a) Whether the applicant needed a splenectomy because of platelet depletion noted in January, 1988.

(b) Whether the Compensation Tribunal had been aware that the applicant was suffering from an auto-immune disorder.

(c) The possible effects of the prescription of additional steroids in the light of the development of a further auto-immune illness.

(d) Possible medical complications arising from steroids masking other conditions, for example, appendicitis in November, 1996.

(e) Whether the treatment of the idiopathic thrombocytopenia would further damage the applicant's already compromised liver.

(f) Whether there was a causal connection between the idiopathic thrombocytopenia and the Hepatitis C.

(g) How the Compensation Tribunal dealt with the applicant's two overlapping illnesses and the fact that the steroids were causing damage to her system and were rendering the diagnosis of other problems difficult.

(h) The nature of the impact of the applicant's illness on her psychological profile and whether she was suffering mental distress by reason of her inability to care for her family, especially her three children.

(i) The impact of the applicant's medical condition on her future employment prospects.

(j) The fact that the Compensation Tribunal made its award on the basis that applicant's condition had stabilized, whereas it had in fact deteriorated subsequent to the award of the Compensation Tribunal.

(k) The review of all historical and medical records obtained in respect of the applicant.

(l) The fact that the psychological profile put before the Compensation Tribunal ante-dated the discovery that the applicant was extremely ill with Hepatitis C., in addition to auto-immune Hepatitis.

(m) The diversity to opinion between psychiatrists at the time of the hearing before the Compensation Tribunal.

(n) Whether the applicant was suffering from a "depressive-like syndrome", due to her illness and lack of energy.

(o) The perception by the Compensation Tribunal that the applicant's inability to work was caused by a psychiatric condition rather than by Hepatitis C.

(p) The consequences for the applicant of her low platelet count in terms of liver biopsies, a liver transplant and similar matters.

The learned Taxing Master noted that 13 witnesses (including the applicant) were, "commissioned and/or required to attend court". Of these identified witnesses the following gave evidence to the High Court at the hearing of the appeal from the decision of the Compensation Tribunal:-

(a) The applicant.

(b) Professor F. Eric Preston, Consultant Haematologist specialising in Haemophilia and thrombosis.

(c) Dr. Garry Courtney, Consultant Gastroenterologist.

(d) Dr. Donald McCarthy, Consultant Haematologist.

(e) Dr. C. Gerard Moran, General Medical Practitioner.

(f) Ms. Susan Tolan, Occupational Therapist and Vocational Evaluator.

(g) Mr. John Logan, Actuary of Segrave-Daly and Lynch, Consultant Actuaries.

(h) Ms. Jo Campion, Consultant Psychologist.

The following listed witnesses did not give evidence:-

(a) The applicant's husband.

(b) Ms. Margaret King, State Registered Nurse.

(c) Dr. John Hegarty, Medical Director of the Liver Unit at St. Vincent's University Hospital.

(d) Mr. Oscar Traynor, Consultant Surgeon.

(e) Dr. Peter Fahy, Consultant Psychiatrist.

The hearing of the appeal took place before O'Neill J., on 12th March, 2002. The evidence took somewhat less than a day and, O'Neill J. delivered an immediate ex-tempore judgment of seven pages. All the witnesses on behalf of the applicant were taken by M. Irvine, Senior Counsel and cross examination on behalf of the respondents which was very little was conducted by M. Durack, Senior Counsel. The learned Taxing Master noted that in the course of his judgment, O'Neill J. described the case as very unusual, because the applicant's history was most unusual and complicated. The learned Taxing Master also recorded that the non-statutory Compensation Tribunal had awarded the applicant €88,881.67 by way of general damages and that this was increased by the High Court to €304,737.16. The Compensation Tribunal made no award in respect of loss of earnings, but on appeal the applicant was awarded €203,158.09 in respect of past and future loss of earnings.

The learned Taxing Master expressed the opinion that the documentation generated by way of pleadings in a case is indicative and reflective of the work undertaken and the input and effort on the part of the solicitors involved. The Schedule of Documents furnished to the learned Taxing Master in addition to a Transcript of the proceedings before O'Neill J. which included the judgment of the Court contained the following documents:-

Letter, 20th April, 1998, from Malcomson Law, Solicitors, to Dr. G. Moran, Carlow. (Seeking copies of previous medical reports and, a new medical report in respect of the "drastic change in the applicant's medical condition": informing the addressee that they were awaiting the files and Transcript of evidence from the previous solicitors and that they had been instructed by the client that at a check-up in January, 1998 it was found that she had a depleted platelet count and might require a splenectomy).

Letter 25th May, 1998, Malcomson Law to Dr. Ruth Pilkington, (advising that they had received most of the papers from the previous solicitors and portion of the Transcript. The solicitors point out that this is an unusual case because the applicant has auto-immune Hepatitis together with Hepatitis C. The letter writer noted that there were certain aspects of the medical evidence which he did not understand, and that some of the original prognoses had not been fulfilled and, in fact the contrary had occurred. He stated that he would like to sit down with Dr. Pilkington some day she was down at the Compensation Tribunal and go through the file from beginning to end with her. He advised Dr. Pilkington that they might appeal the award of the Compensation Tribunal).

Letter 26th May, 1998, Malcomson Law to Dr. Gerard Sheehan, (stating that the letter writer was endeavouring to ascertain if there was a possibility of adducing additional evidence with a view to the reassessment of the damages awarded by the Compensation Tribunal. The letter writer asks Dr. Sheehan to review the applicant's records in the light of the following changed circumstances:-

(a) In November 1996, the applicant was suffering severe pain while she was on steroids. After six days of exploration an appendectomy was carried out.

(b) A liver biopsy had shown fibrosis.

(c) The applicant had been prescribed additional steroids and was attending Dr. Donald McCarthy who believed her spleen was killing off platelets and that she had developed idiopathic thrombocytopenia. The applicant had advised the author that her medical advisors had informed her that it was due to her Hepatitis C.

Malcomson Law were updating the medical records (1) to see if the applicant's instructions to them were accurate and (2) to enable them to ask "pertinent questions" so that relevant issues could be dealt with in future medical reports. The applicant wished to have her award reviewed in the light of these circumstances).

Letter 24th June, 1998, Malcomson Law to Mr. Donald McCarthy, Consultant Haematologist, (they had been informed that he was treating the applicant for idiopathic thrombocytopenia and wished to know if this was related to Hepatitis C., and did it exacerbate the progression of her liver disease. They wished to know whether there were adverse consequences for her Hepatitis C., condition from the treatment of the idiopathic thrombocytopenia and asked Mr. McCarthy to furnish a medical report).

Letter 24th June, 1998, Malcomson Law to Mr. Oscar Traynor, Consultant Surgeon, (the applicant had advised them that the steroids which she was taking had masked the results of tests to make a conclusive diagnosis of acute appendicitis. The letter writer asked Mr. Traynor to let them have a report as to whether this was correct and whether difficulties with diagnosis are associated with the use of steroids for the treatment of Hepatitis C.).

Letter 25th May, 1998, Malcomson Law to C.D., (confirming an appointment with the letter writer at their Carlow Office on 4th June, 1998, to take instructions in relation to the problems she had experienced since the Compensation Tribunal award with a view to adducing new evidence to the new statutory Compensation Tribunal or appealing the original award to the High Court. The letter writer advises C.D. that he has engaged a medical expert to advise as to the interaction of auto-immune Hepatitis and Hepatitis C. They had asked this expert to review the Transcript of the evidence before the Compensation Tribunal and to indicate what questions they should be asking her medical advisors in order to best present her application. They had asked this expert for a medical report. The letter writer asks C.D. to complete Forms of Authority addressed to Dr. Hegarty, Mr. Traynor, Dr. McCarthy and the Records Department of St. Vincent's University Hospital).

Letter 7th October, 1998, Malcomson Law to Dr. Gerard Moran, General Medical Practitioner, (enclosing a copy Transcript and a book of the medical reports that were before the Compensation Tribunal and a book of medical reports received since the hearing before that body and asking whether the auto-immune difficulties which the applicant was then experiencing were different from the auto-immune difficulties which she had experienced in the past).

Letter 2nd November, 1998, Malcomson Law to Dr. Gerard Moran, General Medical Practitioner, (enclosing additional material as follows:-

Booklet of medical correspondence and doctors' notes;

Booklet of medical test results between June, 1996 and June, 1998 including, liver biochemistry test results, Hepatitis "A", "B", and "C" test results;

Liver biopsy report;

Immunology report;

Coagulation test results;

Haematology test results and;

Platelet/antibody tests).

Letter 9th February, 2000, Malcomson Law consultation Attendance Note on C.D. and her husband signed by Caroline Foster. Time involved noted at 2½ hours. The note consists of three typed pages with ample spacings. (These notes demonstrate that the applicant was very familiar with her various problems and with the medical personnel involved and the treatments given. She instructed Ms. Foster that she wished to bring a case for loss of earnings. She complained about the progress of her case and was critical that a number of appointments which were to be set up for her which had not come about. C.D. wrote down everything that was said and wished to be furnished with copies of all medical reports and records of all meetings with medical experts prior to the hearing as she was very unhappy with Dr. Hegarty's testimony before the Compensation Tribunal).

Malcomson Law Attendance Note signed by Laurence Kearney of a meeting with C.D. and her husband. (The author explained to C.D. and her husband that the appeal to the High Court would be in effect a re-hearing and would take account of the downturn in her medical condition. They needed to commission a report on the fibrosis of her liver and the rate of decline in her health. They also needed a comprehensive report or reports showing the interaction between the two illnesses and the effect of the steroids on her system. C.D. felt that this was not adequately dealt with before the Compensation Tribunal. The author explained that he had written to Ms. Susan Tolan an Occupational Therapist and asked C.D. to prepare a curriculum vitae. On receipt of a report from Ms. Tolan they would consult an actuary. C.D. advised them that she had seen a male Occupational Therapist on a previous occasion. They would seek an appointment with Ms. Jo Campion a psychologist with regard to a possible claim for mental injury and family stress. They would not be relying on Dr. Darby's report and, would seek a report from Mr. Garry Courtney instead of from Professor Dusheiko or Dr. Hegarty).

Letter 6th July, 2002, Malcomson Law to Ms. Susan Tolan, Occupational Therapist and Vocational Evaluator, (seeking an appointment for C.D. for the purpose of commissioning an Occupational Therapist Report as the applicant was contending that she would have continued working, despite having adopted three children, but for the Hepatitis C infection).

Letter 7th February, 2001, Malcomson Law to Jo Campion, (enclosing a booklet of medical reports and a Transcript of the evidence before the Compensation Tribunal

and seeking an appointment for an assessment of C.D. and asking her to contact Veronica Duffy of that office).

Letter 28th March, 2001, Malcomson Law to Jo Campion, (the Compensation Tribunal had found on the evidence before it that it was unlikely that C.D. would have returned to work even if the Hepatitis C infection had not occurred. Dr. Darby, the Consultant Psychologist instructed in 1986 did not know that the applicant was ill with Hepatitis C and also with auto-immune Hepatitis. The applicant was now experiencing significant fatigue resulting in depressive episodes. They enclosed a report from Dr. Moran, 2nd January, 1986: Dr. Hegarty, 2nd May, 2000: report of Dr. Meenan, Consultant Dermatologist, 28th February, 1996: Dr. Mary Darby, 3rd May, 1996: Dr. Mary Mooney, 19th June, 1996: Dr. Moran, 1st May, 1998 and a vocational assessment report from Ms. Susan Tolan. She was asked to note the difference between the medical report of Dr. Mary Darby and Dr. Mary Mooney as regards the nature and the origin of mental problems being experienced by the applicant. She was asked to note that the Compensation Tribunal had used the evidence and report of Dr. Darby to indicate that the applicant would be unable to take up full time employment).

Letter 28th March, 2001, Malcomson Law to Dr. C.G. Moran, General Medical Practitioner, (enclosing copies of his previous medical reports and asking him to up-date them in respect of any difficulties that the applicant had experienced since the 1998 medical report. The letter writer was particularly concerned to learn whether the applicant was suffering any consequences as regards her medical prognosis arising from the high dosage of steroids and whether she was likely to suffer any other adverse consequences arising out of the requirement for additional medication, particularly as she had developed a low platelet count).

Letter 3rd May, 2001. Malcomson Law, Ms. Jo Campion (advising her that the Appeal had not yet been listed for hearing but that they required a Report as soon as possible).

Letter 3rd May, 2001. Malcomson Law. To Professor Geoffrey Dusheiko, Professor of Medicine and Honorary Consultant at the Royal Free Hospital, London. (Seeking an appointment with the applicant with a view to his furnishing a report).

Letter 3rd May, 2001. Malcomson Law to Dr. John Hegarty, Medical Director, Liver Unit, St. Vincent's University Hospital (referring to his report of 2nd May, 2000, enclosing a report from Dr. C.G. Moran, General Medical Practitioner which was concerning them and asking Dr. Hegarty for an appointment to review the applicant and furnish an up-date medical report, commenting on her prognosis).

Letter 12th October 2001, Malcomson Law to Ms. Jo Campion, (noting that she saw the applicant on 23rd April, 2001. The applicant was having severe mental problems and it might be necessary to seek to have her case heard without much notice. Would she please furnish her report as a matter of urgency).

Letter 27th February, 2002, Malcomson Law, to Dr. Donald McCarthy, Consultant Haematologist, (referring to his report of 21st July, 1998 and enclosing a copy and asking:-

(a) What was the applicant's present platelet level count?

(b) Would he elaborate on her symptoms flowing from the idiopathic thrombocytopenia and,

(c) Would it prevent the applicant from having a liver transplant.

The addressee was asked to revert to Veronica Duffy at their office and asked to be on standby to give evidence).

Letter 27th February, Malcomson Law to Professor Eric Preston, N.E.Q.A.S. Sheffield. (Asking him to do a medical literature search regarding:-

(a) Whether there was an association between idiopathic thrombocytopenia and Hepatitis C.,

(b) Whether there was an association between auto-immune Hepatitis and Hepatitis C and,

(c) What would be the effect on the applicant's liver of taking steroids for a protracted period of time when signs of necrosis were already exhibited on a biopsy.

The addressee was asked to note that the applicant's platelet level count had fallen below 18,000 in recent times and the letter writer asked that some degree of investigation be undertaken with regard to idiopathic thrombocytopenia).

Letter 3rd May, 2001, Malcomson Law to Ms. Elaine Corcoran, Medical Records Department, St. Vincent's University Hospital, (seeking copies of the applicant's medical records).

Letter 12th October, 2001, Malcomson Law to Dr. Peter Fahy, Consultant Psychiatrist, (seeking an early appointment for the purpose of assessing the applicant's psychiatric condition and enclosing a statement from the applicant, a booklet of medical reports, including a psychiatric report from Dr. Mary Mooney dated 19th June, 1996, and a copy of the Transcript of evidence before the Compensation Tribunal on 25th June, 1996).

Letter 1st March, 2002 from C.D. to Raymond Bradley of Malcomson Law, (this four page holograph indicates the extent to which the applicant was aware of her medical condition, the medical experts involved in the diagnosis and, where possible the treatment of her condition and issues which she wished to have raised with various medical experts).

Letter 7th March, 2002 Malcomson Law to Chief State Solicitor, (noting that the matter was listed for hearing before O'Neill J. on 12th March, 2002, referring to their letter of 5th March, 2002, enclosing documentation and enclosing five copies each of the following, medical reports Dr. C.G. Moran dated 27th February, 2002, physiological assessment report of Jo Campion dated 5th March, 2002, and a psychiatric assessment report of Dr. Peter Fahy dated 31st January, 2002, and indicating that the following material was still outstanding, copies would be forwarded on receipt:-

(1) Psychiatric assessment report of Dr. Mary Mooney,

- (2) Medical report of Professor Eric Preston,
- (3) Medical report of Dr. Gary Courtney,
- (4) Medical report of Dr. Donald McCarthy and,
- (5) Actuarial report of Messrs. Seagrave-Daly and Lynch.

Letter 8th March, 2002, Malcomson Law to Mr. John Logan, Consultant Actuary, (referring to a conversation between him and Ms. Veronica Duffy of their firm on 8th March, 2002 and enclosing the following additional information as he requested:-

- (1) Copy Transcript of the original hearing before Compensation Tribunal on 25th June, 1996, and
- (2) A booklet of medical and experts reports.

The learned Taxing Master refers in his Report to aspects of the evidence given before him by Raymond Bradley, Solicitor, of the Solicitors for Costs, to which his attention was drawn by the Legal Costs Accountant representing the Solicitor's for the Costs and, which he considered was of assistance in demonstrating the extent of the work done by the Solicitor's for the Costs in prosecuting the appeal, the attention to detail which the case required and, the unique medical problems which required to be addressed. The following is a summary of the matters referred to by the learned Taxing Master:-

"The Solicitor's for the Costs stated that whereas most persons suffering from Hepatitis C., had common symptoms and problems, the applicant in the instant case, 'had a myriad of medical complications' which were unusual and initially, at least, were not considered to derive from the Hepatitis C., infection. This made the management of her claim more difficult.

The Solicitor's for the Costs stated that the claim on behalf of the applicant for loss of earnings was particularly difficult to formulate, in particular because of her disrupted employment history, her family circumstances and her place of residence.

The Solicitor's for the Costs contrasted the ease of ascertaining the source of a Hepatitis C., infection in the case of Anti-D patients with the difficulty of identifying the probable source of the infection in the case of haemophilic patients.

The Solicitor's for the Costs pointed to the fact that the applicant, in the absence of any legal precedent, had to be advised whether to seek aggravated or exemplary damages at common law or to opt in lieu for the 20% payment from the Statutory Reparation Fund. The issue of a Provisional Award had also to be considered because of her uncertain medical condition.

The Solicitor's for the Costs pointed to the fact that they did not represent the applicant before the non-statutory Hepatitis C.,

Compensation Tribunal, so that no residue of knowledge could be attributed to them in the instant case.

The Solicitor's for the Costs pointed to the fact that one could not often rely upon information provided by clients who had been infected by Hepatitis C., because as sort of coping mechanism, these clients could deny or underplay what had happened to them.

The learned Taxing Master noted that it had been submitted by the Legal Costs Accountant representing the Paying Party, that the amount of the Solicitors General Instructions fee must be reduced to reflect the residue of knowledge derived from the hearing before the non-statutory Compensation Tribunal and, the extent to which the work involved in the instant case was reduced by work done by the Solicitor's for the Costs in other similar cases, (*Ormond an infant*) v. *Ireland, The Attorney General and Others*, (Unreported, High Court, Barron J., 29th May, 1997). He noted that it was submitted on behalf of the Solicitor's for the Costs that there was no such residue of knowledge in the instant case as the Solicitor's for the Costs had not acted for the applicant before the non-statutory Compensation Tribunal. The learned Taxing Master noted that it was accepted on behalf of the Solicitor's for the Costs that some adjustment to the Solicitors General Instructions Fee would have to be made for such, "common denominator" items as he should consider existed between the instant case and the five other Hepatitis C., cases before him, which had also been dealt with by them.

The learned Taxing Master recorded that it was submitted on behalf of the Solicitor's for the Costs that the Solicitors General Instructions Fee should reflect the very material and substantial increase in the Compensation awarded to the applicant by the High Court. However, it was submitted on behalf of the Paying Party that the amount of this increase ought not to be a factor because the same importance to the client attached and, the same degree of responsibility was borne by her solicitors even if no increase or only a nominal increase was made in the award.

The learned Taxing Master stated that it had been submitted on behalf of the Solicitor's for the Costs that Solicitors General Instructions Fees allowed on awards of equivalent amounts under the provisions of the Garda Síochána (Compensation) Acts, 1941-1945, where the most appropriate comparators to be used by him in applying the principles established in *Best v. Wellcome Foundation Limited and Others*, [1996] 1 I.L.R.M. 34, per Barron J. It was submitted on behalf of the Paying Party that the appropriate comparators were Solicitors General Instruction Fees allowed on taxation or agreed between the parties in other Hepatitis C. compensation claims to the non-statutory or the statutory Compensation Tribunals or on appeal to the High Court. The Legal Costs Accountant representing the Paying Party indicated that a large number of such comparators were available to the learned Taxing Master. Alternatively, it was submitted on behalf of the Paying Party that the learned Taxing Master should use as comparators, the Solicitors General Instructions Fees allowed on Appeals from the Circuit Court to the High Court in civil matters.

In his Report the learned Taxing Master reached the following conclusions:-

(a) Developments in medical science and, changes in medical prognosis and, the success or otherwise of new treatments were additional factors that had to be considered and catered for, by the

Solicitor's for the Costs, when assisting the applicant to make the ultimate decision to appeal to the High Court.

(b) The brief to Senior Counsel and Junior Counsel contained all the historical and current data regarding all aspects of the applicant's medical and financial history and her livelihood.

(c) Copies of all these documents were also furnished to the Chief Registrar of the High Court and to the Chief State Solicitor prior to the hearing of the Appeal.

(d) The instant case involved a most unusual set of complicated medical circumstances as a result of the Hepatitis C, which were not initially appreciated and, this made the management of the claim and dealing with the client more difficult.

(e) The work carried out on the financial aspects of the applicant's case, were most complex.

(f) The Solicitor's for the Costs had to advise the applicant whether to accept the 20% payment from the Statutory Reparation Fund or to seek aggravated damages at common law.

(g) The Solicitor's for the Costs had to ensure that a person who would inevitably require a liver transplant was adequately protected in relation to that treatment.

(h) There was no carried over residue of knowledge from the hearing before the non-statutory Compensation Tribunal in the instant case because of the intervening change of solicitors.

(i) While the historical documentation which was before the non-statutory Compensation Tribunal had been sourced by the applicant's former solicitors, her present solicitors had to up-date the medical and financial material and had to fully familiarise themselves with the historical material as well as the new material.

(j) There was a special "sensitivity factor" involved in dealing with persons wrongfully infected with Hepatitis C., which imposed a special burden of skill and responsibility on the Solicitor's for the Costs which did not arise in ordinary personal injuries litigation.

(k) The appropriate comparators were decisions on taxation of costs on equivalent awards made under the provisions of the Garda Síochána (Compensation) Acts, 1941 - 1945.

(l) The following were the "common denominators in respect of which a discount required to be made from the general instructions fee payable to the Solicitor's for the Costs:-

"The notices of appeal with the exception of Client detail are identical in all cases".

The grounding affidavit, with the exception of Client detail is identical in all cases.

The extent or paucity of pleading is of significance in all cases.

The time period for compliance with proofs is significantly short.

It is also of considerable significance that compliance with proofs in the largest case was completed in a matter of weeks.

Proofs in the instant case were complied with in a very short time frame as is demonstrated at page 11 hereof under the heading Documentation generated to prosecute the appeal.

Medical practitioners in all cases are similar.

There was no rebuttal evidence in all cases.

The Chief State Solicitor acted in all instances.

Counsel was very familiar with the proceedings.

Counsels brief consisted of documentation with indices and no statement of instructions.

The legal procedure is the same in each of the six appeals.

To a large extent the same experts were employed.

The same experts were dealing with more or less the same topic.

The appellants were dealing with the same firm of solicitors and the same senior counsel.

(m) He was not aware of any principle or judicial pronouncement as to how allowance should be made for these matters or the esoteric factors detailed in O. 99, r. 37(22)(2) of the Rules of the Superior Courts

(n) The measurement of costs was not an exact science, as indicated by Donaldson J. in *Property and Reversionary Investment Corporation Limited v. Secretary of State for the Environment* [1975] 2 A.E.R. 436 where he held that:-

'Each case will always have to be considered on its merits. Various figures will no doubt come to mind. They can be

tested relative to the remuneration generally accepted, or previously held to be fair and reasonable, in comparable transactions, due allowance being made for all distinctions. In the end it is a valued judgment, based on discretion and experience. We have had to make a value judgment. Our figure may not be the right figure, and indeed such a figure probably does not exist, but we hope that it will be the right figure – one which is reasonable in all the circumstances.”

(o) Applying as comparators the fees allowed under The Garda Compensation cases as furnished on behalf of the Solicitor's for the Costs, the value of the solicitors work necessary to prosecute the appeal was €60,000.

(p) This sum required to be reduced by 15% (€9,000) to take account of the instances of commonality, the Ormonde factor and, the time factor in compliance with proofs.

The learned Taxing Master therefore allowed the Objection by the Solicitor's for the Costs and increased the solicitors general instructions fee of €36,000 which he had allowed on taxation to €51,000.

It was contended by senior counsel for the Paying Party that this decision of the learned Taxing Master was deficient and, therefore unjust, in three important respects. The learned Taxing Master, senior counsel said, on the face of the Report had failed to carry out any, or if he had, the report did not contain any, itemised and specific assessment of the several items of work claimed by the Solicitor's for the Costs to have been done, and which he considered justified a General Instructions Fee of €60,000 on a party and party taxation.

While accepting that a deduction from this sum could only be realistically made on a percentage or fractional basis, senior counsel for the Paying Party submitted that the learned Taxing Master, though he had indicated the matters which he was taking into account as warranting a deduction, had not given any reasons as to why he considered that the appropriate amount of that deduction was 15 per centum of the total fee. Without prejudice to his claim that the General Instructions Fee allowed by the learned Taxing Master was excessive and unjust, senior counsel for the Paying Party submitted that the amount of the deduction imposed by the learned Taxing Master was altogether insufficient and was therefore unjust. Senior counsel for the Paying Party submitted that the amount of the deduction should be 50 per centum of the General Instructions Fee allowed or even more.

The third submission made by senior counsel for the Paying Party was that the learned Taxing Master by referring to the taxed costs of awards made under the provisions of The Garda Síochána (Compensation) Acts 1941-1945, had employed inappropriate and incompatible comparators. The learned Taxing Master, senior counsel said, was in error in failing to use as comparators costs agreed or awarded on taxation in decisions under the Hepatitis C. non- statutory and statutory Compensation Schemes. In the unlikely event that a suitable comparator could not be found within those schemes, the learned Taxing Master should not have employed as comparators costs awarded on taxation in an entirely different statutory compensation scheme even though the procedures under that scheme were similar to those under the Hepatitis C. schemes. On appeals to the High Court from decisions of the Hepatitis C., Compensation Tribunals, the learned

Taxing Master, senior counsel submitted, in the absence of any suitable comparators under the Hepatitis C. Compensation Schemes, should have employed as comparators costs awarded on taxation in appeals in civil matters from the Circuit Court to the High Court.

In his judgement in *Patrick J. McGrory v. Express Newspapers Plc and John Junor*, (Unreported, High Court, 21st July, 1995), Murphy J., emphasised (p. 13), that an Instructions Fee, unlike a Brief Fee, is not earned simply by the fact of receiving instructions in a given case. It represents a payment for work done. In *Smyth v. Tunney* [1993] 1 I.R. 451, the same learned judge at pp. 468 and 469, defined a "Solicitor's General Instructions Fee" in the following terms:-

"Mr. Anthony Behan, a very experienced legal costs accountant who gave evidence on behalf of the plaintiffs, explained that it was to cover taking instructions for the trial or hearing and not merely instructions for the preparation of a brief. He said it was to cover the overall care and attention which the case required: the difficulties in taking proofs of evidence from intended witnesses and generally organising the case; ensuring the availability of witnesses and indeed the availability of counsel. It had to cover 'living with the case'. It covered a variety of consultations as well as the cost of assembling and preparing the brief itself. Mr. William Brennan, the costs drawer who gave evidence on behalf of the defendants, explained that the instruction fee was frequently referred to as 'the great equaliser'. It was the means by which solicitors were compensated for the minimal nature of the fees allowed on the itemised basis."

In *Best v. Wellcome Foundation Limited and Others* [1996] 1 I.L.R.M. 34, Barron J., at p. 43, concluded that a Solicitors General Instructions Fee is determined by reference to the special expertise of the solicitor, the amount of work done and the degree of responsibility borne and, that comparison was ultimately the correct approach to assessing the appropriate sum to be allowed.

In *Superquinn Limited v. Bray Urban District Council and Others* [2001] 1 I.R. 459, Kearns J., at p. 480, dealing with the question of the Solicitors General Instructions Fee, stated as follows:-

"Insofar as the instruction fee in this case is concerned, I do not find the comparator cases cited of any great assistance in relation to the instruction fee because the cases cited to the Taxing Master and to this court addressed very different facts. The instant case comprised fairly unusual facts and was a case which demanded assessment on its own merits both for that reason and because the Act of 1995 so requires.

It is for that reason that I have set out in some considerable length details of the judgment of the learned trial judge. I believe a clear picture of the work necessarily done in preparation does emerge from this exercise. I believe it establishes that the solicitors for the defendants did 'live with this case' for many years. It is not necessary for them to show that they devoted ten 'uninterrupted years' to the case. It is also somewhat unsatisfactory to read that the Taxing Master, even had he held that a ten year period had been involved, could not have assessed the fee by reference to that period as the nature of the case did not lend itself to such a

calculation. The ruling is unfortunately lacking in any specifics as to how the instruction fee was calculated.

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."

In *Minister for Finance v. Taxing Master Flynn* (Unreported, High Court, 31st July, 2003), at p. 27, I held that:-

"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 this 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 and should not be unduly concerned with the more minute differences 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 *Bloomer v. The Law Society of Ireland (No. 2)* [2000] 1 I.R. 383, Geoghegan J., at p. 387, interpreted the provisions of s. 27(3) of the Courts and Court Officers Act 1995, with respect to the power of this Court to review a decision of the Taxing Master, as follows:-

"In considering whether the Taxing Master erred, I must see whether in arriving at his decision he had regard or excessive regard to some factor which he either should not have had any regard to or to which he should have had much less regard. I then have to consider whether there was some significant factor to which the taxing master ought to have had regard and to which he either had no regard at all or insufficient regard. Those are examples of errors of principle in the consideration of the facts but of course the court must also consider whether the taxing master has fallen into error in either law or jurisdiction.

If this court finds that the taxing master has erred in the sense described, this court then has to address the second question which is whether the taxation was unjust. In relation to any given item in the taxation which is in controversy, the justice or injustice of the decision will be determined by the amount. If after falling into error, the taxing master in fact arrives at the correct figures or at figures within a range which it might have reasonably been open to him to have arrived at, the court should not interfere. The decision may not be exactly the same as the decision which the court would have made but it cannot be described as an unjust decision."

In applying this decision in *Superquinn Limited v. Bray Urban District Council and Others (No. 2)*, above cited, Kearns J., at p. 477 held that:-

"In discharging its function the High Court inexorably must, if it can, form a view itself of the particular item of costs or the amount it would have awarded in any given situation. Otherwise, there is no basis upon which any conclusion as to 'injustice' can exist in the absence of some mistake of principle. ...

There may of course be instances where the court does not feel equipped to offer its own view, particularly in relation to Solicitors' Instruction Fees, which has always been regarded as an area of considerable difficulty for judges. This may leave the court with no option but to remit the matter back to the Taxing Master where some mistaken principle has been applied or where there is no sufficient material to enable the court to arrive at a figure which is proper in the circumstances.

In my judgment in the instant case the learned Taxing Master most unfortunately and, despite an erudite Report which quite obviously involved a great deal of time and attention, erred in principle in basing his decision to allow a Solicitors General Instructions Fee of €60,000, upon broad statements and conclusions, unaccompanied by reasons and, having only a very tenuous connection to the various items in the Bill of Costs identified by him as grounding the claim. The decision to allow this fee is not, at least upon the face of the Report, based upon any reasonable independent and objective analysis and evaluation of the work claimed to have been done by the Solicitor's for the Costs and, the extent to which this work was necessary and proper for the attainment of justice in this case, in the form of an appropriate award of compensation to C.D.

The decision of the learned 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, in my judgment, employed a mistaken principle in his assessment of the Solicitors General Instructions Fee in the instant case, in the sense that he entirely failed to observe the principle stated by Kearns J., in *Superquinn Limited v. Bray Urban District Council and Others (No. 2)*, (above cited). The learned Taxing Master had an altogether excessive and unacceptably uncritical regard to the assertions made by the Legal Costs Accountant for the

Solicitor's for the Costs in his oral submissions. He had insufficient regard to the task of objectively assessing and, forming an independent judgment as to what work was in fact done by the Solicitor's for the Costs and whether it was properly allowable, in whole or in part, on a Party and Party taxation. By reason of this failure there is no sufficient material available to this Court to enable it to arrive at a figure which it would consider to be proper to allow to the Solicitor's for the Costs as a General Instructions Fee. On reading the transcript of the evidence given before O'Neill J., on 12th March 2002 the judgment of that learned Judge, the Documents in the Schedule of Documents which was before the learned Taxing Master and having regard to the "common denominator" items identified by the learned Taxing Master and, in respect of which it was accepted on behalf of the Solicitor's for the Costs that an adjustment would have to be made to the amount of the General Instructions Fee, in my judgment the Paying Party has made out a prima facie case that the General Instruction Fee allowed by the learned Taxing Master was outside the range of figures at which it was reasonably open to him to have arrived and that his decision was consequently unjust.

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

In my judgment it is neither necessary nor desirable and, indeed in the absence of a time costing system, it would usually be impossible for the Taxing Master to value individual items making up a claim to a General Instructions Fee. While it is necessary for the Taxing Master to give reasons for his or her decisions, it is neither necessary nor desirable that this should take the form of a lengthy dissertation or legal discourse. It should be possible for the Paying Party and for this Court on review quickly and efficiently to identify at a glance the item of costs claimed, whether it has been allowed or disallowed and the reason or reasons why. It is not necessary for the Taxing Master to provide, nor is it desirable that the High Court on a review of taxation should have to consider, lengthy opinions referring to evidence given and submissions made before the Taxing Master and, citing and analysing numerous legal authorities. This would provide for clarity, the efficient use of court time, prevent delay and, result in a great saving of time and expense. It should present no insuperable problem as the Taxing Master is an expert as well as exercising a quasi judicial function under the statute.

The ideal Report would be in the form of a Commentary, with the item of costs in issue appearing in one column of the text and the ruling of the Taxing Master in the opposite column of the text, but this might not always be achievable in practice. A glance at the sixteen items recorded by the learned Taxing Master in his Report in the instant case in respect of which the Solicitor's for the Costs submitted that they should be entitled to a General Instructions Fee of €73,000, will be sufficient to emphasise that without such a careful and objective analysis of work actually done, special skill (if any), employed and, degree of responsibility borne by the Solicitor's for the Costs, a valid exercise of his discretionary powers under the provisions of s. 27 of the Courts and Court Officers Act 1995, is simply not possible and amounts to an error of principle.

The learned Taxing Master in his Report records that it was submitted on behalf of the Solicitor's for the Costs that for the purpose of calculating a General Instructions Fee, such fees as have been allowed on taxation in proceedings pursuant to the Garda Síochána (Compensation) Acts 1941-1945, were the most comparable, because the procedures involved were generally very similar to those in an Appeal to the High Court from a decision of the Hepatitis C. Compensation Tribunal.. It was submitted on behalf of the Paying Party, that the costs allowed in other Appeals from the Hepatitis C. Compensation Tribunal to the High Court were far more appropriate as comparators. The Legal Costs Accountant representing the Paying Party furnished the learned Taxing Master with a list of twenty one such cases and, with detailed particulars of one such case, *M.McL. v The Minister for Health and Children*.

The facts of that case, as disclosed in the Report of the learned Taxing Master, bear a very close resemblance to those of the instant case. For example, both victims were married with several children, both became infected through the administration of Anti-D immunoglobulin treatment, there was evidence of liver necrosis found on biopsy in both cases, the consequences of the Hepatitis C., infection had a devastating psychological effect on the victims in both cases and, evidence was given in both cases by a Rehabilitation Consultant and an Actuary. Of course, in the instant case C.D. suffered additionally from auto-immune Hepatitis (diagnosed in 1986) and, from idiopathic thrombocytopenia, (diagnosed in 1988) ,both of which were due to the Hepatitis C. infection (diagnosed in 1994).

O'Neill J. found that both these conditions were treated by the administration of steroids. Unfortunately this treatment had increasingly severe side effects on C.D., such as the fact that she developed osteoporosis. O'Neill J., found that though idiopathic thrombocytopenia was a life threatening condition, he was satisfied on the evidence that treatments were available which should ensure that C.D. survived, though she would have a very troubled time for some years. He found that C.D. was unlikely to get cirrhosis or to suffer the worst effects of Hepatitis C. The learned Judge found that C.D. was suffering from very severe emotional and psychological disturbance due to fear and distress arising from the idiopathic thrombocytopenia and, as a result of the cumulative effects of having been "plagued with the effects of Hepatitis C.," for the previous twenty five years. He considered that her physical and psychological problems would continue for the foreseeable future and might even get worse, depending upon how successful her medical advisers were in combating the idiopathic thrombocytopenia. In the *M.McL.* case the Solicitor's for the Costs had claimed a General Instructions Fee of €36,822.40. A fee of €33,000 was agreed between the parties. The learned Taxing Master noted in his Report that in the *M.Mc.L.* case that the witnesses who gave evidence on behalf of the victim in the Appeal to the High Court from the decision of the Hepatitis C. Compensation Tribunal were as follows, the applicant herself, her husband, her General Medical Practitioner, a Consultant Gastroenterologist, a

Psychologist, a Registrar in Haematology, a Rehabilitation Consultant and an Actuary. The compensation awarded to the applicant in that case was increased from €143,480.40 to €538,638.95.

It was submitted on behalf of the Paying Party that the learned Taxing Master should alternatively, follow the established practice of many years in Appeals from the Circuit Court to the High Court in civil matters, which take the form of a full re-hearing and, allow the Solicitor's for the Costs in the instant case a General Instructions Fee of 50 per centum of that allowed on taxation following the decision of the Hepatitis C., Compensation Tribunal.

In his decision the learned Taxing Master found, without giving clearly identifiable and specific reasons for that finding, that an Appeal from the Hepatitis C., Compensation Tribunal to the High Court was different in nature from an Appeal from the Circuit Court to the High Court. In his opinion, the General Instructions Fees allowed on taxation in Garda Síochána Compensation claims, where malice was not an issue, were more suitable comparators, because those claims shared an almost identical procedure with Appeals from the Hepatitis C., Compensation Tribunal to the High Court. He pointed to the fact that both proceedings were commenced by Special Summons grounded upon an Affidavit which exhibited the entire personal, career, medical and financial information relating to the appellant. He noted that witnesses were called for the appellant to establish the claim for compensation in both proceedings and, no rebuttal evidence was generally called by the State which was the sole respondent in both. The learned Taxing Master accepted that the Garda Síochána Compensation cases did not involve the same medical issues as the Hepatitis C., cases and did not involve, what the Legal Costs Accountant for the Solicitor's for the Costs described and, which the learned Taxing Master appears to have accepted, as the "sheer complications involved in the financial considerations and taxation issues etc." flowing from a claim for loss of earnings where the applicant was self employed. The learned Taxing Master found that of the twenty one comparator cases put to him by the Legal Costs Accountant for the Paying Party, most, if not all of the individuals concerned were either not working or were not self employed.

The learned Taxing Master found that the running of self employed cases was more complicated than employee cases for the reasons given by a witness for the Solicitor's for the Costs at the hearing of the objection where he stated that:-

"It is much, to use an expression, cleaner, to run a case with somebody who has a P.60 in relation to his loss of earnings because you can see

(a) what their past history in terms of earning capacity has been,

(b) what they are earning at the present time. You can look at bonuses, you can look at pension entitlements,

(c) you can also then look at what promotional opportunities might be available. Somebody who is in self-employment is more speculative. You have to net down the figures for tax. You have to take into account the overheads. You have to take into account all the risks associated with being in

business, and that is something that makes it that bit more difficult.”

The learned Taxing Master also found that cases where the victim became infected with Hepatitis C. as a consequence of Anti-D immunoglobulin treatment were not valid comparators for haemophiliac cases where the problem of when and where the victim became infected during treatment, was a frequently difficult issue to establish. However, that issue does not arise in the instant case because C.D. became infected as a result of Anti-D immunoglobulin treatment.

In my judgment the correct comparators to be employed in ascertaining a General Instructions Fee to be allowed to the Solicitor’s for the Costs in the instant case, are those fees allowed or agreed in other Appeals from the Hepatitis C., Compensation Tribunal to the High Court, in particular, but by no means exclusively, other Anti-D immunoglobulin infection cases such as *M.McL.* The issues requiring to be addressed will be very similar, though it is altogether improbable that they will be identical. Agreed costs are less satisfactory as comparators than taxed costs. The Taxing Master would require to have evidence as to the circumstances in which they were agreed, in case there was some factor present which would render the sum agreed unrepresentative of the level of General Instructions Fees allowed on taxation in such Appeals. The Taxing Master may have to make certain adjustments in the amount of the General Instructions Fee to take account of differences in the amount of work done, the specialist skills employed or the degree of responsibility borne, the latter reflected, amongst other things, in the extent of the increase achieved in the amount of the compensation, rather than in the totality of the ultimate award. However, as I stated in *Minister for Finance v. Taxing Master Flynn*, (above cited), the greater the degree of similarity between the cases, the more appropriate is the comparison.

I find that there is no validity whatever in the principal reason given by the learned Taxing Master for not using as comparators the costs taxed in the Hepatitis C., Appeals to the High Court and, for looking instead to the fees taxed in the Garda Síochána Compensation cases. The proof of loss of income to date and, future loss of income is entirely different in Garda Síochána Compensation cases, from cases such as the instant case, where the injured party is a female who ceased salaried employment on marriage and, the issue is whether and, to what extent, if at all, she would have resumed paid employment outside the home but for the injuries she sustained. In my judgment, the learned Taxing Master entirely misdirected himself or I think, perhaps more accurately permitted himself to be misdirected as to the actual proofs required to establish such a claim. There are no complications involved relating to financial considerations, taxation issues, pension entitlements, promotional opportunities, business risks and overheads. This is abundantly clear from the evidence given before and the judgment of O’Neill J., in the instant case to which, unfortunately, the learned Taxing Master had insufficient regard. The same list of witnesses dealt with this aspect of the claim in the instant case as dealt with the generally similar claim in the case of *M.McL. v. The Minister for Health and Children*. In my judgment the learned Taxing Master erred in principle in passing over a very similar line of comparators in favour of a much less appropriate line of comparators for a wholly insufficient and unsustainable reason. Where costs have been assessed on taxation and, where they have also been agreed between the parties in identical types of Appeal to that in the instant case, it would require very compelling reasons indeed for declining to employ those decisions and agreements as suitable comparators. No such compelling reasons have been shown to exist in the instant case.

As was indicated in *Quinn v. South Eastern Health Board* [2005] I.E.H.C. 399 by Peart J., such comparable cases can only be employed as a guide in arriving at the correct General Instructions Fee after the Taxing Master has first ascertained what work was actually done by the Solicitor's for the Costs in the case. In my judgment a General Instructions Fee of 50 per centum of the General Instructions Fee allowed on taxation in respect of the hearing before the Hepatitis C. Compensation Tribunal would not be at all appropriate in the instant case. The Appeal in the instant case was not merely a re-statement of the former evidence and a re-argument of the case by way of a re-hearing. Very material and significant new issues were raised and new evidence called on the Appeal before O'Neill J., which had not been in issue at the hearing before the Compensation Tribunal. The fact that the Solicitor's for the Costs were not the solicitors who represented C.D. before the Compensation Tribunal is a less important, though still not insignificant, consideration in arriving at an appropriate General Instructions Fee.

In the unlikely event of no suitable comparator being found from amongst the Appeals to the High Court from the Hepatitis C. Compensation Tribunal, the Taxing Master would have to seek guidance by considering the General Instructions Fees allowed for an equivalent or similar amount of work, exercise of skill and bearing of responsibility in other personal injury cases. I do not consider that it would be appropriate for the Taxing Master to have regard only to the General Instructions Fees allowed in Garda Síochána Compensation cases. This is a very long established and independent Scheme designed to compensate Members of An Garda Síochána injured in the course of duty and, consequently the awards and, the sums allowed on taxation of costs might not be truly representative of what Peart J., referred to as the "going rate" of General Instructions Fees.

The learned Taxing Master in his decision, reduced the sum of €60,000 which he awarded to the Solicitor's for the Costs in respect of a General Instructions Fee, by 15%, to take account of three matters which he identified as, (a) the commonality between the Appeals, referring to features shared in common by the six Appeals from the Hepatitis C. Compensation Tribunal to the High Court, (b) the Ormond Principle, or the extent to which work done in one case was reduced by reason of the extent of the work done in the other cases and, (c) the fact that Proofs, meaning instructing expert witnesses and obtaining reports, were complied with in a very short time in each case. As I have already indicated earlier in this judgment, the learned Taxing Master in his Report sets out a list of ten respects in which he considered that these three factors operated to reduce the amount of work needed to be done by the Solicitor's for the Costs. In his Report the learned Taxing Master recorded that he was not aware of any judicial pronouncement as to how these matters and what he described as the "esoteric factors" detailed in O. 99, r. 37(22)(ii) of the Rules of the Superior Courts 1986 (as amended) were to be measured and, he had not been referred to any judgment dealing with the matter. Order 99, rule 37(22)(ii) provides that:-

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

An indication of the extent to which all cases, where the unfortunate victims were infected with the Hepatitis C. virus were similar, is to be found in the judgment of O'Neill J., in the instant case, where he refers to, "the usual effects of Hepatitis C. itself", to "fairly usual symptoms" and, to "fairly common features". It is further emphasised by the fact that the instant case was considered by the learned Judge to be unusual and complicated by reason of the fact that C.D. had additionally developed auto-immune Hepatitis C. and idiopathic thrombocytopenia as a result of the Hepatitis C. infection. It is clear from the above indicated findings by the learned Taxing Master with regard to, "commonality", the "Ormond Principle" and "the significantly short time in which proofs were complied with in all cases", that the amount of work properly and necessarily required and, any special skill (if any) exercised by and on the part of the Solicitor's for the Costs in dealing with the various items identified in *Smyth v. Tunney* (above cited) at p. 468, as covered by the General Instructions Fee, was significantly reduced in the instant case.

At one extreme it could reasonably be said that some (unfortunately unidentified), part of the work undoubtedly done by the Solicitor's for the Costs, amounted to little more than repetition, while at the other extreme, - if it had been properly identified, assessed and measured by the learned Taxing Master, which unfortunately it was not, - some work done by them was probably in some degree complex, unique and difficult, possibly requiring the exercise of considerable skill and the expenditure of considerable effort and time. In between these poles, whatever work was carried out by the Solicitor's for the Costs probably consisted of various amounts of repetition, adaptation and originality. In arriving at the percentage amount by which justice to the Paying Party required that the General Instructions Fee be reduced to take account of the three factors identified by the learned Taxing Master, all these matters should have been identified and taken into account and balanced by him.

In my judgment, the appropriate position from which to start in seeking to arrive at a just and proportionate percentage reduction, would be a maximum of 50 percentum,, reflecting the long established practice in the taxation of costs of reducing the General Instructions Fee allowed on an Appeal in a civil matter from the Circuit Court to the High Court by way of a straightforward re-hearing

involving the same solicitors, to 50% of the General Instructions Fee allowed to those solicitors at first instance. Thereafter, the percentage reduction should be on a sliding scale to take account of the nature and number of any similarities and differences between the several Appeals in the context of the three factors. When the Taxing Master has assembled the necessary data, that is, when he has ascertained by a full and independent examination of all the evidence, what work was actually done and properly and necessarily done by the Solicitor's for the Costs, he should then be able to assess and, to express in decimal or percentage form, the extent to which work done in one case or other cases would reduce the amount of work needed to be done in the instant case. What he is assessing is in effect the amount of repetition involved in the work, which in turn reduces the amount of time and effort needed to be employed in carrying out that work. The work in question does not have to be exactly the same but it should be substantially the same. No evidence was given to the learned Taxing Master that this could be done by employing some mathematical or statistical formula. The Taxing Master must base his assessment on common sense, his own expert knowledge and, his experience, gained in dealing with large numbers of these claims.

By way of example, if the Taxing Master was satisfied that the work which he found had been actually done by the Solicitor's for the Costs in the case under taxation was predominantly repetitious of work already done by them in another case, he should reduce the sum awarded by way of a General Instructions Fee by the maximum of 50 per centum. Lesser degrees of repetition should be reflected in lesser deductions on a ratio of percentage repetition found, to percentage reduction of 2:1, ie., a 50% repetition found should be reflected in a reduction of 25% in the amount of the General Instructions Fee. In my judgment, this level of reduction would prevent injustice to the Paying Party arising from the Solicitor for the Costs receiving payment many times over for the same or, substantially the same work, while at the same time accepting that the work was actually done on each occasion and, allowing some continuing credit for the initial effort and skill employed by the Solicitor's for the Costs.

For reasons already stated I have found it impossible to form my own view of what should be awarded to the Solicitor's for the Costs in respect of this particular item of costs. I have therefore no option but to remit the matter back to be reassessed. Justice and fair procedures, demands that this should be done by a different Taxing Master of the High Court.