**IN THE HIGH COURT OF FIJI**
**AT SUVA**
**CIVIL JURISDICTION**

Civil Action No. HBC 26 of 2017

**BETWEEN**: **DAYA SHANKAR SHARMA** of Lot 3, Wailoku, Retired.

**PLAINTIFF**

**AND**: **MA KHAN ESQUIRE** a law firm of 2nd Floor, Harbour Front Building, Suva

**DEFENDANT**

**Counsel** : **Plaintiff: Mr. Young. M**

: **Defendant: Mr. Maharaj.V and Ms Ben S.**

**Date of Hearing** : **08.04.2022**

**Date of Judgment: 04.07.2022**

*Catch Words*

*Professional negligence-solicitor- strike out. High Court Rules 1988 O.3 r.5, O.25 r.5. Legal Practitioners Act 2009 Section 81, - acting gratuitously- prospect of success – two stage -assessment of loss- trial within trial-percentage of success-comparable awards –*

## JUDGMENT

## INTRODUCTION

1. This is a claim based on professional negligence of solicitor firm. Plaintiff had instructed Defendant, to institute action for personal injury caused to him from a branch of a tree falling on him in 2006. The action HBC 336 of 2009 was instituted, but it was struck off in terms of Order 25 rule 9 read with Order 3 rule 5 of High Court Rules 1988(HCR), with notice to all parties. Action was struck of on 4.3.2011 after more than one year without any step being taken by Defendant. Despite notice of strike out Defendant failed to give Notice of Intention to proceed and even after struck off this negligence continued. So, no appeal was filed, against striking out, within stipulated time period under HCR. Hence, an application for extension of time to appeal was filed supported by an affidavit of Defendant's 'Practice Manager', seven months from striking out of the action! In that affidavit, admitted that there was an 'oversight' on the part of Defendant. Further stated that if the matter was reinstated, Defendant was prepared to file affidavit verifying list of documents and proceed to pretrial conference, without delay. In the said application Defendant had admitted Plaintiff had a

good prospect of success. Those were sworn statements of a solicitor from Defendant filed by way of affidavit filed, on 4.10.2011, seven months after the matter was struck off. This was subsequently withdrawn by Defendant on 17.10.2011. In contrast to what was filed in this court by Defendant on behalf of Defendant in 2011, now Defendant allege that there was no prospect of success for Plaintiff's struck off civil Action HBC 336 of 2009. If so why did they file such a civil action on behalf of Defendant? If there was no prospect of success filing of Civil Action No 336 of 2009 was an abuse of process. By the same token, Defendant is now alleging that lack of medical report was the reason for not prosecuting the said struck off civil action No 336 of 2009. This is also without any merit as Defendant could not show any evidence of such a requirement being communicated to Plaintiff before his departure to USA on 22.5.2010. The civil action was stagnant after close of pleadings, for over a year. For this action 'automatic directions in personal injuries' in terms of Order 25 rule 8 of HCR applies, and Plaintiff caused inordinate delay in the action that resulted struck off. Defendant had acted negligently, in the prosecuting Civil Action No 336 of 2009 that had led to striking that out. Defendant's witness in evidence stated struck off action was a matter taken over by Defendant, gratuitously. This does not change the obligations .Plaintiff's damage is assessed at $150,000, considering comparable awards.

**FACTS**

2. Most of the facts in this actin are not disputed. Plaintiff gave evidence and marked P1,an affidavit filed by Defendant on his behalf in HBC 336 of 2009 , after it was stuck off

3. Plaintiff retained Defendant to prosecute his claim for personal injury happened in 2006.

4. Defendant on behalf of its ex- client, Plaintiff instituted a civil action in HBC 336 of 2009.

5. This matter was stagnant without taking any step for more than one year and in terms Order 3 rule 5 of HCR if no action is taken for six months or more, a Notice of Intention is required to be filed before any action is taken by Plaintiff.

6. Defendant had not taken a step for more than one year in Cavil Action HBC 336 of 2009 when it was struck off on 4.3.2011.

7. No Notice of Intention was filed, despite giving a notice to strike out in terms of Order 25 rule 9 of HCR.

8. Defendant's solicitor had admitted it was an 'oversight' on their part in an affidavit filed by an associate marked P1 filed on 4.10.2011 seeking extension of time to file an appeal against strike out of 4.3.2011. This application for strike out was withdrawn by Defendant on 17.10.2011 (See D2)

9. Plaintiff he had left Fiji to USA on 22.5. 2010 and there was ample time for Defendant to proceed with the action HBC 336 of 2009 before that.

10. According to Plaintiff he had paid a retainer, but this was denied by Defendant. Defendant failed to produce litigation file or any records regarding that. This is more important regarding communications between Defendant and Plaintiff to consider whether he had breached any undertakings as alleged in statement of defence.

11. Plaintiff stated that he had gone to Defendant after he returned from USA in 2015, and was told that his action HBC 336 of 2009 was struck off and requested him to file an application to reinstate the matter as court would be more sympathetic towards a litigant appearing in person.

12. Before that Defendant had sought extension of time to appeal against strike out without any knowledge of that to Plaintiff. This was withdrawn by Defendant on 17.10.2011.

13. Plaintiff said that when he called from USA, to inquire about his action, but was not given direct information about the plight of his action and employees of Defendant were vague in their answers to him.

14. When he returned to Fiji on 30.9. 2013, but had gone and returned from USA several time and August 2015 he had returned and stayed till June,2016.

15. In 2015, he had gone to Defendant, and he was requested to make an application to reinstate struck off Civil Action HBC 336 of 2009. An employee of Defendant called Peter, had drafted the affidavit for said application for reinstatement and he had filed that *in person* which was marked by Defendant as D1.Initially he had filed this action, but later he retained another lawyer who withdrew the application for obvious reasons.

16. In cross examination Plaintiff said that he never signed a terms of engagement, when he retained Defendant as his solicitor. He said his level of education is up to form 5.

17. He also said that he obtained dual citizenship in USA/Fiji, 2013 and had travelled between the countries more than 37 times. He said while he was at his children's place in USA he had not access to email but sent an email to Defendant on 28.2.2011 informing that he was in USA. For this he had used his daughter-in-law's email.

18. He also said he did not have an email address at that time and had no access to internet in USA.

19. Plaintiff said that before going to USA he had informed the lawyer who was in charge of his civil action HBC 336 of 2009 and she had told not to worry. He had not provided an address in USA to Defendant but had called, Defendant from USA.

20. According to his travel history Plaintiff had gone to USA on 22.5.2010 and returned on 30.9.2013. There were several trips since then to 2015.

21. For the Defendant an "Office Manager" who is a legal assistant and who is not a legal practitioner, gave evidence. She denied negligence.

22. This witness did not produce any litigation file or minutes regarding HBC 336 of 2009 but stated that when she joined Defendant already this action was filed. According to her no fees were paid by Plaintiff.

23. According to her the action was struck off due to lack of instructions, as Plaintiff departed to USA.

24. She said Plaintiff's civil action HBC 336 of 2009 was a *pro bono* action and done without any fee.

25. She said that Plaintiff did not produce any medical report, and was not aware of Plaintiff's residence in USA. In the document marked D1 there is an annexed marked C but this was obtained after the claim was struck off by the court.

26. She said that when Plaintiff arrived from USA he did not come to office, stated that Defendant did not take any action when civil action no HBC 336 of 2009, and denied that Defendant was negligent to Plaintiff regarding professional services provided for the said matter including litigation.

27. In cross examination witness for the Defendant stated that the affidavit marked P1 was sworn by a solicitor employed by Defendant at that time as 'conveyancing officer' and could not state what she had done about the struck off action HBC 336 of 2009.

**ANALYSIS**

28. In terms of Oder 81 of HCR an action can be instituted 'in the name of firm'. Accordingly this action was instituted against Defendant.

29. Defendant in its statement of defence had admitted the fact that Plaintiff instructed and they instituted Civil Action No HBC 336 of 2009 on behalf of Plaintiff for a claim of personal injury.

30. Defendant also admit that said action was struck off for want of prosecution after issuance of notice by the court in terms of Order 25 rule 9 of HCR.

31. It is also admitted that Defendant in HBC 336 of 2009 had not taken a step for more than a year when it was stuck off on 4.3.2010 after issuance of notice.

32. There is no dispute that, Defendant had not filed an intention to proceed as required by order 3 rule 5 of HCR when a matter had failed to take a step for more than 6 months.

33. In the statement of claim Plaintiff had relied on Section 81of Legal Practitioners Act 2009. It states,

> "81. For the purposes of this Act, 'unsatisfactory professional conduct' includes conduct of a legal practitioner or a law firm or an employee or agent of a legal practitioner or a law firm, occurring in connection with the practice of law that **falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner or law firm**."(emphasis is mine)

34. The above provision refers to general standard and competence in equity and also in common law and includes general obligations of a solicitor towards the client. It is a misconception that this obligation only applied to a paid client. Payment of professional engagement, is separated from its obligations as long as law firm or practitioner represent the client.

35. Defendant had represented Plaintiff in his claim in HBC 336 of 2009 till it was struck off on 4.3.20211 and even after that as Defendant had filed an application even on 4.10.2011. So all material time in this action relating to claim on professional negligence Defendant represented Plaintiff.

36. Halsbury's Laws of England Legal Professions (Volume 65 (2020), paras 201–514; Volume 66 states,

> Solicitor's Obligations towards His Client
> "a. Obligations in equity, common law and Code of Conduct
> 565. General principles
> The obligations of a solicitor towards his client may be viewed from two aspects, that of equity and that of the common law. In equity the relationship of solicitor and client is recognised as a fiduciary relationship and carries with it obligations on the solicitor's part to act with strict fairness and openness towards his client. Failure to fulfil this obligation **renders a solicitor liable to make compensation in respect of any resulting loss to his client**. By the common law a solicitor's retainer imposes on him an obligation to be skillful and careful. **Failure to fulfil this obligation may lead to liability in contract,**

**whether he is acting for reward or gratuitously**, and whether he has or has not a practising certificate in force at the time, or to **liability in tort for negligence**."(emphasis added) (foot notes deleted)

37. According to above Defendant is liable both in equity and common law to Plaintiff. At the same time, Defendant is obliged to follow statutory provisions and also rules and regulations, such as HCR.

38. Non compliance of HCR that resulted striking off of Plaintiff's action is professional negligence on the part of Defendant. Not only strike out on 4.3.2011 but even after that no appeal was filed within stipulated time but an application for extension of time for appeal was filed, on 4.10.2011 after seven months from strike off. This was withdrawn by Defendant on 17.10.2011. These are all individually and collectively, professional negligent acts by Defendant. These are more fully discussed below.

39. In the statement of defence at paragraph 5 stated that Plaintiff had 'breached his undertaking to the Defendant to instruct Defendant properly.. .'. This fact is not proved at the hearing. Plaintiff was in Fiji till 22.5.2010 and Defendant had not followed HCR in timely prosecuting this action due to automatic directions applicable. This was disregarded. Once struck off no timely appeal was lodged. The application for extension of time filed seven months from striking off was also withdrawn by Defendant.

40. Halsbury's Laws of England[1] Legal Professions (Volume 65 (2020), paras 201–514; Volume 66 (2020) states,

"506. Extent of liability to answer for loss

The solicitor's liability as an officer of the court in respect of a failure to fulfil his duties in relation to a matter which is before the court[2] is not confined to costs thrown away, but extends to such loss as is the **natural and probable consequence of his conduct**[3]."(emphasis added)

---

[1] Halsbury's Laws of England Legal Professions (Volume 65 (2020), paras 201–514; Volume 66 (2020), paras 515–1079) > 3. Solicitors > (5) Liabilities of Solicitors as Officers of the Senior Courts > (iv) Liability to Answer for Loss

[2] Ie the Senior Courts, not the County Court: see *Gain v Provincial Advertising* Co (1904) 117 LT Jo 222; *Davies v Coles* (1912) 132 LT Jo 577 (cases relating to the liability to pay costs). See also *R v Smith (Martin)* [1975] QB 531, [1974] 1 All ER 651, CA, per Lord Denning MR.

506. Extent of liability to answer for loss.

[3] *Dixon v Wilkinson* (1859) 4 De G & J 508 at 522–523 per Turner LJ; Marsh v Joseph [1897] 1 Ch 213, CA. A solicitor employed by a committee will not under this jurisdiction be made to pay or account to the court for money received for the committee (*Re Butler* (1866) 1 Ch App 607), nor will a solicitor who takes money out of court in good faith, but misled by an ambiguous plea, be ordered to refund it after having paid it away to his client (Davys v Richardson (1888) 21 QBD 202, CA). As to the liability of a solicitor in tort for loss, including financial loss, suffered by a third person as a result of the solicitor's negligent acts or omissions see para 571 et seq. He may also be liable in contract.

41. Accordingly, Plaintiff is entitled to seek damages due to striking off of his claim based on an action for professional negligence of his solicitors.

42. There is no immunity for solicitors for negligence on their failure to prosecute an action, if it is proved on balance of probability the delay was due to negligence on their part. There was no pleading as to immunity pleaded hence it was not an issue though written submission of Plaintiff had dealt with that issue. The basis of immunity for actions in court is based on primary obligation of a counsel to the court. This has no application to present scenario.

43. Plaintiff's claim is based on negligence and this is based on general duty of care and also statutory obligations in terms of Legal Practitioners' Act 2009.

44. Halsbury's Laws of England[4] states,

> "1086. Negligence amounting to breach of contractual duty.
>
> Where one person is employed by another to perform a duty and the failure to perform, or negligence in the performance of, that duty gives rise to a cause of action in contract, time runs from the date of the breach of contract, which will be the date of non-performance or negligence, and not from its being discovered or from the occurring of damage, unless:
>
> (1) the claim is based upon the fraud of the defendant; or any fact relevant to the claimant's right of action has been deliberately concealed from him by the defendant; or the claim is relief from the consequences of a mistake, in which case time runs from the date the claimant discovered the fraud, concealment or mistake (or could with reasonable diligence have discovered it); or
>
> (2) the claimant can establish, **in addition to the contractual duty owed by the defendant, a general duty of care owed as a matter of law in which case, in accordance with the rules** applying to claims brought in the tort of negligence, time will run from the date when damage is sustained by the claimant or when he had the necessary knowledge to bring a claim in negligence." (Foot notes deleted) (emphasis added)

45. See,( *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 , [1985] 2 All ER 947, PC; *Lancashire and Cheshire Association of Baptist Churches Inc v Howard & Seddon Partnership* [1993] 3 All ER 467) regarding duty of care under a law or in accordance with

---

A solicitor may take out an insurance policy against loss arising from claims which may be made against him by reason of any neglect, omission or error committed by him or any person employed by him in or about the conduct of any business conducted by him in his professional capacity, but such a policy may not cover a loss sustained by the solicitor as a result of a clerk's acts by which the clerk fraudulently obtained money from the solicitor's clients: see *Davies v Hosken* [1937] 3 All ER 192. As to solicitors' indemnity insurance see para 801. As to professional negligence insurance generally see insurance vol 60 (2018) paras 641–646.

[4] Limitation Periods (Volume 68 (2021)) (3) Tort (ii) Negligence

rules such as HCR. Legal obligations and rules applicable to solicitors and failure to do so result an action being struck off is a professional negligence on the part of solicitor.

46. In terms of Order 3 rule 5 of HCR when more than six months had lapsed, there is a requirement to file notice of intention to proceed. Order 25 rule 9 of HCR also allows matters which are not proceeding to be struck off. It is an admitted fact that Civil Action HBC 336 of 2009 was stagnant for over one year without any step being taken and it was struck off on 4.3.2010.

47. The Pleadings in the said action were closed and automatic directions applied in terms of Order 25 rule 8 applicable as the claim in HBC 336 of 2009 was personal injury. So obligation was on the Defendants to take steps for the hearing of the action.

48. In this action the allegations are based on breach of general duty of care and HCR and delay in prosecution of the Civil Act HBC 336 of 2009 by Defendant. These are covered in general obligations contained in Section 81 of Legal Practitioners Ac 2009 as this was negligence on the part of Defendant.

49. Defendant's only witness who presently holds "Office Manager" did not admit negligence on the part of Defendant. She was a law clerk, during 2010-2011, and had seen Plaintiff coming to Defendant's office during 2010. She said that he was friendly with the staff.

50. This proves that prior to Plaintiff's departure on 22.5.2010 he had visited Defendant several times but Defendant had failed to take any action to prosecute his Civil Action No 336 of 2009 with due diligence as pleadings were already closed and 'automatic directions in personal injuries' in terms of Order 25 rule 8 of HCR.

51. Civil Action HBC 336 of 2009 was struck off on 4.3.2011 after no action was taken for over one year. So Defendant had ample time and opportunity to proceed the claim for personal injury.

52. Plaintiff had left Fiji to USA on 22.5.2010 and there was no issue of contacting him prior to that. He said he had visited the office of Defendant to get some work such as typing of documents. He said he had paid for such services and he was a bailiff and frequently went Defendant law firm for numerous occasions.

53. Witness for Defendant without producing litigation file or any document stated that Plaintiff had not paid any fees and it was a '*pro bono*' action. Though the Plaintiff said he had paid a retainer of $1,000 he did not produce a receipt for that.

54. Whether Plaintiff paid or not is not an issue in this action. (see *Donaldson v Haldane* (1840) 7 Cl & Fin 762, HL). The obligation to Defendant does not change on whether Plaintiff paid Defendant or engagement was gratuitous.

55. Defendant had admitted they were acting on behalf of Plaintiff in Civil Action No 336 of 2009, when it was struck off for want of prosecution. If Defendant had accepted Plaintiff's claim without any payment that cannot be a reason to be less diligent. If no fee was accepted there cannot be an issue regarding payment while he was in USA. There was no evidence of Defendant requesting fees and or Plaintiff refusing or delaying such payment.

56. There was no evidence that Defendant had requested any specific from Plaintiff and he had not complied with such a request. Defendant had informed the court in P1 that they were in a position to proceed with the civil action HBC 336 of 2009.

57. The Defendant's witness said that Plaintiff had not provided any medical report and that was the reason for delay. She had not handled this action in 2010 -2011 time period and had not involved with this action other than examining litigation file prior to this action. So in the analysis of evidence more reliance should be placed to affidavit of "Practice Manager" marked P1.

58. Plaintiff said he did not meet principal legal officer but had met the associate who was in carriage of the matter. According to Plaintiff he had even informed his departure to USA prior to departure on 22.5.2010.

59. Defendant's counsel had highlighted that Plaintiff had previously stated that he had left to USA in September, 2010. Plaintiff is elderly person suffering from common diseases when he gave evidence. People may forget the dates but not events. The immigration details were supplied by Plaintiff and this shows Plaintiff did not want to conceal or lie.

60. Plaintiff was suffering from some other conditions of Non Communicable Diseases (NCD) and he had also obtained treatments in USA in 2012. He had returned to Fiji in 2015 and he told that when he went to Defendant he was told that HBC 336 of 2009 was struck off and Defendant's employee named Peter prepared an affidavit and motion to be filed in person as the court will be 'more sympathetic' towards him. Said motion and affidavit of Plaintiff allegedly prepared by an employee of Defendant this is marked as D1.

61. In the pre-trial conference it is recorded erroneously that 'live action no 336 of 2009 was withdrawn'. This is completely wrong and neither party sought to correct this at hearing, but the evidence before the court showed that once the Civil Action No HBC 336 of 2009 was struck off on 4.3.2009, it was never reinstated. So there was no 'live action' as erroneously recorded in the pre trial conference minutes. Defendant had marked D2 which contained all

'journal entries' contained in Minute Sheets of the court for Civil Action No HBC 336 of 2009 from 4.3.2009 to 8.12.2015. This is typed entries produced by Court Reporting Unit and relied by Defendant and marked at hearing. There was no dispute as to the entries contained therein.

62. According to D2, Plaintiff had filed an application in person and this was D1. This application was withdrawn by Plaintiff on 8.12.2015 and Master of High Court had recorded it as "Application withdrawn and struck out'. So there was no live civil Action at that time and what was pending was a belated reinstatement filed by Plaintiff marked D1 in 2015 which I had discussed previously.

63. This affidavit of Plaintiff, which was allegedly done to gain 'sympathy from court' to reinstate a summons filed on 13.10.2009 to reinstate, cannot be considered as correct position of the events. As stated by Plaintiff in evidence it was prepared by Defendant's employee known to him as Peter, to gain sympathy for Plaintiff from court.

64. According to Plaintiff said affidavit in support prepared by Peter, on instruction of principal legal officer of Defendant. The sole purpose of the said affidavit was to obtain sympathy from court after four years from striking out. After Defendant had withdrawn the application seeking extension of time to appeal against the order made on 4.3.2011. This application was filed seven months after strike off and it was withdrawn on 17.10.2011 (See D2). This shows negligent manner Civil Action No HBC 336 of 2009 was handled.

65. The contents of the affidavit in support in document marked D1, in the analysis of evidence cannot be considered as correct position, to say the least.

66. So I do not attach much weight to the evidential value of document mark D1 and its affidavit in support in the analysis of evidence, considering circumstances.

67. Plaintiff's action for a claim on personal injury to him on 2006, was struck off on 11.3.2011 he had instructed Defendant for that purpose , and failure to prosecute the claim was a negligence on the part of Defendant that struck off the action on 4.3.2011

68. The Practice Manager of Defendant law firm had filed an affidavit dated 3.10.2011, marked P1 where she had sworn to following facts,

    i. The appeal against striking out on 11.3.2011 could not be made due to delay in obtaining instructions from the client hence sought extension of time to file an appeal.
    ii. HBC 336 of 2009, was stagnant for more than one year before it was struck off by issuing notice by court to show cause.

iii. Believed that failure to file Notice of Intention to Proceed was an **oversight on the part of Defendant.**

iv. **If the matter is reinstated by court Defendant will file Affidavit verifying List of documents without delay.**

v. **There was a good prospect of success of the claim for personal injury.**

69. According to said affidavit 'Practice Manager' of Defendant had admitted their 'oversight' and had also stated that, Defendant was in a position to proceed with Affidavit verifying list of documents if the matter was reinstated.

70. This was clearly in conflict with D1 where blame was imputed to Plaintiff for striking out by, affidavit prepared by Peter who was employed by Defendant on instructions he had received. Plaintiff said that his level of education was up to form 5 and he had signed the said affidavit for purported application seeking reinstatement of struck off Civil Action HBC 336 of 2009 on 4.3.2010.

71. This purported application for reinstatement that Plaintiff had allegedly filed in 2015 in person was withdrawn for obvious reasons.

72. In the affidavit marked P1 there was no issue raised regarding non availability of medical report. So this is an afterthought by witness for the Defendant at the hearing.

73. Defendant had clearly stated that they could proceed with Civil Action 336 of 2009 on 3.10.2009. At that time Plaintiff was abroad and there seemed no issue at that time to proceed though he was in USA. This corroborate the evidence of Plaintiff who said that he gave calls to Defendant's office regularly. So he was kept in dark, by Defendant while his action was struck off, till he returned in 2015.

74. So Defendant is estopped from stating that it could not proceed with the action due to Plaintiff's departure to USA on 22.5.2011. If so how can a solicitor employed by Defendant as 'Practice Manager' in a sworn statement stated that Defendant would file affidavit verifying list of documents and proceed to pretrial conference on 3.10.2011.

75. Apart from that Defendant allege that failure to prosecute the claim for personal injury was due to Plaintiff not submitting a medical certificate. If so where was that evidence? Did Defendant wrote a letter to Plaintiff informing this or requesting a medical report prior to his departure to USA on 22.5.2010?

76. It is an admitted fact that more than a year before 4.3.2011 no action was taken in HBC 336 of 2009. This clearly shows that reason given by witness for Defendant was not the actual reason.

77. So in my mind the admitted 'oversight' along with Defendant's ability to proceed with the action without delay sworn in the affidavit marked P1 shows on balance of probability that Defendant was liable for professional negligence as a firm of solicitors for their failure to prosecute Plaintiff's civil action.

78. Next issue is the assessment of damages for the professional negligence. As the obligations of solicitors are based on both equity and common law the type of damage is general damages. This is no easy task, as this action cannot be elevated to the claim of negligence after full trial.

79. This difficulty was discussed in UK Court of Appeal decision in *Kitchen v Royal Air Forces Association and Others* [1958] 2 All ER 241

> "In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case as the present is to determine what the plaintiff has lost by that negligence. The question is: Has the plaintiff lost some right of value, some chose in action of reality and substance? **In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can.**"(emphasis is mine)

80. The above UK Court of Appeal decision was applied for more than half a century and in the latest case that I could find was *Coote (by her mother and litigation friend) v Ullstein and another* [2022] EWHC 607 (QB).(decided on 11.4.2022). So the duty of the court to assess damages, as best as it could cannot have only one method depending on facts of the civil claim that Plaintiff could not prosecute in court due to professional negligence.

81. *Coote v Ullstein* [2022] EWHC 607 (QB) (11 April 2022) it was held,

> "This suggests a two-stage test, first determining whether the Claimant has lost some right of value and then making an assessment of what the loss of that right is worth. This argument was developed further in Allied Maples Group Ltd v Simmons & Simmons [1995] WLR 1602. The following selected passages reflect the conclusions of Lord Justice Stuart-Smith:
> "In these circumstances, where the plaintiffs' loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.
> (1) What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the plaintiffs depends in the first instance on whether the negligence consists of some act or misfeasance, or an omission or non-feasance.....

(2) If the defendant's negligence consists of an omission, for example to provide proper equipment, given proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given? This can only be determined from all the circumstances. The plaintiffs own evidence that he would have acted to obtain the benefit or avoid the risk, while important ,may not be believed by the judge, especially if there is compelling evidence that he would not.... Although the question is a hypothetical one, it is well established that the plaintiff must prove on the balance of probability that he would have taken action to obtain the benefit or avoid the risk....

(3) In many cases the plaintiffs loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on balance of probability, as Mr. Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages? Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr. Jackson's submission is wrong and the second alternative is correct."

This authority also suggests a two-stage test, in the first stage, the issue of causation effectively to be proved by the Claimant is on the balance of probability but in the second stage quantum is proved by the assessment of loss of a chance. So the decision in Allied Maples above represented the genesis of the dividing line between those issues which the Claimant must prove, on the balance of probability, and those which may be assessed on the basis of the evaluation of a lost chance. This was confirmed by the Supreme Court in Perry v Raleys Solicitors [2019] UKSC 5 in the leading speech given by Lord Briggs:

"20. For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."

82. In *Coote v Ullstein* [2022] EWHC 607 (QB) (11 April 2022), applied 'loss of chance evaluation'. This is not the only method. As stated in 1958 case of *Kitchen v Royal Air Forces Association and Others* [1958] 2 All ER 241, court is required to do its best, on available evidence to assess damages. This cannot be elevated to 'trial within trial'.

83. Both parties have filed written submissions with numerous authorities but had not addressed the issue of assessment of damages. This is not an easy task as Plaintiff cannot be expected to prove his claim for negligence against third parties. One obvious drawback on such an effort is, the absence of such third parties' defenses and prospect of such issues.

84. Defendant argued that there was no prospect of success for the struck off civil action HBC 336 of 2009. This argument cannot hold water due to several reasons. Firstly, Defendant had thought it proper to instate civil action on behalf of Plaintiff in HBC 336 of 2009. So Defendant cannot now blow hot and cold on that issue. Secondly, Defendant's Practice Manager had sworn in the affidavit filed in said Civil Action 336 of 2009 , after it was stuck off , stating that Plaintiff had a good prospect of success.

85. Apart from above, on the facts of the case Plaintiff had suffered personal injuries from a falling of a branch on to him. So on balance of probability it is proved that his action was not frivolous or abuse of process but had a good chance of success.

86. I was not submitted any Fiji case where assessment of damages was done , in relating to a professional negligence of solicitor or legal practitioner in relating to an unliquidated claim such as a claim on personal injury.

87. *Cooter v Olsten* [2022] EWHC 607 (QB) (11 April 2022) it was discussed in detail several decisions and principles used to address the issue of assessment and stated,

> **"The Mount v Barker Austin principles**
>
> The Claimant relies on the rebuttable presumptions set out by Lord Justice Simon Brown in *Mount v Barker Austin (a firm)* [1998] PNLR 493 where he said:
> "(1)The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim ... he has lost something of value i.e. that his claim ... had a real and substantial rather than merely a negligible prospect of success. (I say 'negligible' rather than 'speculative' -- the word used in a somewhat different context in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 -- lest 'speculative' may be thought to include considerations of uncertainty of outcome, considerations which in my judgment ought not to weigh against the plaintiff in the present context, that of struck-out litigation.)
>
> (2) The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck

out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position ....

(3) If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim ... than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors. It is quite likely that the delay will have caused such difficulty ....

(4) If and when the court decides that the plaintiff's chances in the original action were more than merely negligible it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure. To my mind it is rather at this stage than the earlier stage that the principle established in *Armory v Deglamorize* (1722) 1 Star 505 comes into play."

This was developed further by Lord Justice Simon Brown in *Sharif v Garrett and Co* [2001] EWCA CIV 1269:

"38 In stating the principles generally applicable to this class of case, I indicated in *Mount v Barker Austin* [1998] PNLR 493, 510 a two-stage approach. First, the court has to decide **whether the claimant has lost something of value or whether on the contrary his prospects of success in the original action were negligible**. Secondly, assuming the claimant surmounts this initial hurdle, the court must then **'make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out'.**

"39 With regard to the first stage, the evidential burden rests on the negligent solicitors: they, after all, in the great majority of these cases will have been charging the claimant for their services and failing to advise him that in reality his claim was worthless so that he would be better off simply discontinuing it. The claimant, therefore, should be given the benefit of any doubts as to whether or not his original claim was doomed to inevitable failure. With regard to the second stage, the *Armory v Deglamorize* (1722) 1Str 505 principle comes into play in the sense that **the court will tend to assess the claimant's prospects generously given that it was the defendant's negligence which has lost him the chance of succeeding in full or fuller measure**."

I must have the principles in mind when dealing with the current application but it will be necessary to examine whether the Claimant was given consistent bullish promises of success as she alleges or more mixed messaging as the Defendants contend."(emphasis added)

88. There is no need for Plaintiff to conduct 'trial within trial' for several reason. Already court had found that due to professional negligence of Defendant, Plaintiff's right to have a 'day in court' was lost.

89. Next stage is two prone test.

a. Prospect of success in Plaintiff's civil action or whether Plaintiff had lost something in value.
b. What is the value that was lost.

90. There is no difficulty in answering to (a) above due to the undisputed facts produced by parties. Plaintiff had got injured due to dead branch falling on him and Defendant had instituted an action seeking a damage of $700,000.

91. Assuming that Defendant was not abusing the process seeking a damage of $700,000 on behalf of Plaintiff was not without reason.

92. Plaintiff had more than an arguable case and in my assessment on the undisputed evidence, including medical report annexed to D2 produced by Defendant.

**What is the value that Plaintiff lost due to professional negligence**?

93. There can be various factors that affect such an assessment and it is futile to list them here. Some were discussed in detail in *Cooter v Olsten* [2022] EWHC 607 (QB) (11 April 2022) without any list being considered for good reason.

94. His prospect of success is high. I am not inclined to apply the percentage method applied in *Cooter v Olsten* [2022] EWHC 607 (QB) (11 April 2022). This method was applied in *Mount v Barker Austin* [1998] PNLR 493. In my mind the said principles can be applied when there is a doubt as to prospect of success depending on circumstances such as prospect of damage due to MMR vaccine and lack of expert evidence on that and in similar instances.

95. In contrast the prospect of success in Plaintiff's case is high due to nature of the claim and circumstances. There were no evidence produced by Defendant to show that it was not so, but Plaintiff is not entitle to $700,000 he had claimed in this action as well as in struck off action.

96. In my mind there is no 'one –size- fits-all' approach in the assessment of damages. A percentage method can be applied in instances such as *Coote v Ullstein* [2022] EWHC 607 (QB) (11 April 2022), but that should not be the only method.

97. If that is applied the prospect of success of Plaintiff is very high hence, the amount of damages will invariably be excessive. As an equitable and common law remedy court should be mindful as not to allow the claims for professional negligence to be 'wind fall' but rather

realistic values. So, in my mind with the available evidence, court must consider comparable personal injury cases and awards granted by Court of Appeal.

98. In my mind there is no need to consider detail analysis of comparable cases, as those were personal injury cases where full trials were conducted with all relevant evidence. As stated in '*Armory v Delamirie* (1722) 1Str 505 principle comes into play in the sense that the court will tend to assess the claimant's **prospects generously** given that it was the defendant's negligence which has lost him the chance of succeeding in full or fuller measure'. This aspect of being generous to Plaintiff cannot be eliminated due to nature of this action. The defendants in personal injury, are not parties to this action. So court can do so much as to grant an award comparable with such an injury.

99. Defendant's Practice Manager who was a legal practitioner employed at the time of strike of Civil Action HBC 336 on the sworn affidavit marked P1 had stated that Plaintiff had injured his left arm and shoulder in 2006 while being a pedestrian on public thorough fare due to a fall of a dead branch of a tree protruding and hanging over the pavement.

100. Defendant is estopped from denying prospects of success as sworn statement of a solicitor employed by Defendant in a sworn statement had admitted there was a good prospect of success to Plaintiff's claim for personal injury in HBC 336 of 2009.

101. It was admitted fact that Plaintiff was injured but beyond this evidence that his left arm and shoulder was injured Plaintiff did not produce.

102. Defendant produced an affidavit marked D1 which had annexed a medical certificate as 'C'. And it was obtained in 2015 in USA. This medical certificate can be considered for the present action, though it was obtained more than nine years from his alleged incident in Fiji in 2006.

103. Plaintiff is not required to prove his claim as he would have done in his civil action No HBC 336 of 2009. Annexed marked 'C' in D1 'medical report' stated

> "During the course of treatment patient reported symptoms he was experiencing were correlated to an injury he suffered while in Fiji, when a tree branch broke and hid Mr. Daya Shankar on head and neck region. The patient received spinal manipulation perfumed through activator method. Throughout the course of treatment, he underwent physiotherapy such as Intersegmental Traction, Electrical Muscle Stimulation, ad Ultrasound. .."

104. This action is based on professional negligence hence Plaintiff is entitled to general damages based on equity. He could not proceed with his claim for personal injury due to fall of a

branch on to him while being a pedestrian on a pavement. So , there was a good prospect of success and considering alleged injury as stated by Defendant in P1 a damage of $150,000 is granted. Plaintiff had sought interest after judgment and this is statutorily determined at 4% in terms of Section 4 of Law Reform (Mis. Provisions) (Death and Interest) Act 1935. Plaintiff had not sought interest prior to judgment hence no interest granted prior to judgment.

**CONCLUSION**

105. Defendant had instituted Civil Action HBC 336 of 2009 and there was no evidence that at any time they withdrew till the action was struck off for want of prosecution. It is admitted that more than a year, it was stagnant in the registry without taking any step. Defendant had not filed an intention to proceed as required by Order 3 rule 5 of HCR despite giving notice to strike out in terms of Order 25 rule 9 of HCR. Even after striking out on 4.3.2011 no appeal was filed within in stipulated time period contained in HCR, but later filed extension of time to file supported by an affidavit of 'Practice Manager' of Defendant . This was withdrawn on 17.10.2011. In that affidavit, marked (P1) it was admitted that there was an oversight on their part and had also stated there was a good prospect of success for the Plaintiff's claim to succeed and had stated Defendant was in a position to file affidavit verifying list of documents and take other steps to finalize pretrial stages. So Defendant is estopped from taking a different position, on those facts. Even if I am wrong on that, Defendant's negligence was the sole cause for the striking out and not Plaintiff's departure on 22.5.2010. According to evidence for Defendant, Plaintiff had come to Defendant's office in 2010 several times and he was friendly with the staff there. No action was taken, for over a year when the matter was struck off on 4.3.2011 which clearly covers time period Plaintiff was in Fiji. Professional negligence of Defendant is proved on balance of probability. Plaintiff is not entitled to the amount claimed. First Plaintiff had a good prospect of success, but he is entitled, only to the amount that he lost due to negligence of Defendant. Considering the awards given for personal injury cases in the Court of Appeal, a damage of $150,000 is granted. The cost of this action is summarily assessed at $3,000. Plaintiff had asked interest after judgment, and not prior to that. Post judgment interest is determined by Section 4 of Law Reform (Mis. Provisions) (Death and Interest) Act 1935. This is 4% from date of judgment.

**FINAL ORDER**

1. Plaintiff is granted a damage of $150,000.
2. Cost of this action is summarily assessed at $3000 to be paid within 21 days.

**Dated at Suva this 4th day of July, 2022.**


.....

**Justice Deepthi Amaratunga**
**High Court, Suva**