IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0040 OF 2022
[Civil Action HBC No: 0026 of 2017(Suva)]

BETWEEN : **M. A. KHAN ESQUIRE**

Appellant

AND : **DAYA SHANKAR SHARMA**

Respondent

Coram : **Jitoko, P**
Clark, JA
Andrée Wiltens, JA

Counsel : **Mr V. Maharaj for the Appellant**
Mr R. Singh for the Respondent

Date of Hearing : **10 September, 2024**

Date of Judgment : **27 September, 2024**

JUDGMENT

[1] This is an appeal from the judgment dated 4 August, 2022, of Amaratunga J at the Suva High Court, finding that the Appellant had acted negligently in its professional capacity,

as solicitors for the Respondent. The court ordered compensation of $150,000.00 in damages to the Respondent with $3,000.00 costs.

[2] The Appellant also sought a Stay of the Order until the final determination of the appeal.

Background

[3] The Appellant is a firm of barristers and solicitors operating out of Usher Street in Central Suva city. The Respondent is a retiree and frequent visitor to the law firm, and at times employed by the Appellant as its bailiff. Sometimes in 2009, the Respondent engaged the Appellant to represent him in his personal injury case that had occurred on 5th November, 2006. According to the Respondent, he resided at the relevant time at Bau Street, Suva and on the day in question, while walking along a path on Bau Street, next to Mitchell Apartments building, a falling dead branch of a tree fell down and hit him on his shoulder, and he sustained injury as a result.

[4] According to the Respondent, he was allowed at the Appellant's office, to sometimes help in drafting of legal documents and in this instance, he was permitted to draft and prepare his own Writ of Summons against Mitchell Apartments, the Suva City Council, and the Attorney-General of Fiji. The Writ dated 30 October 2009 was filed in the Suva High Court registry with the case number HBC 336 of 2009. The Respondent claimed special damages of $30,000.00, loss of income of $180,000.00 and general damages plus interests.

[5] It is agreed that the Respondent had not signed any "*terms of engagement*" to formalise the retention of the Appellant as solicitors and Counsel for the Respondent. His claim of the payment of $1,000.00 as a retainer was denied and no receipt produced to prove such payment. It is nevertheless accepted that the Appellant had agreed to be the Solicitors for the Respondent in his High Court claim, as set out in the Minutes of the PTC of 11 October, 2020.

[6] The action laid in abeyance after the closure of pleadings. The Appellant did not proceed to the next phase of discovery of documents under Order 24 rule 1 of the High Court, neither did it file its intention to proceed after six(6) months had elapsed since the close of pleadings, as required under Order 5 of the High Court Rules and as reminded by the Court. Consequently, Counsel for the 1st and 2nd Original Defendants applied and the Court on 4 March, 2011, struck out the action, pursuant to Order 25 rule 9.

[7] The Respondent on 3 February, 2017 filed at the Suva High Court in person, his Writ of Summons, Civil Action No.26 of 2017, claiming professional negligence by the Appellant for failing to prosecute his claim in HBC 336 of 2009, detailed as follows:

(i) The Appellant failed to prosecute the Respondent's claim with due dispatch;
(ii) The Appellant failed to keep the Respondent abreast of proceedings despite numerous requests;
(iii) The Appellant failed to argue the striking out application properly resulting in the acting being struck out; and
(iv) The Appellant failed to advise the Respondent that his action has been struck out.

[8] As a result of the Appellant's negligence, the Respondent submitted, that he had suffered loss of opportunity of having his case heard and determined, loss of fees paid to the Appellants' pain and suffering from his inability to complete his claim because of the matter being struck out. He claimed damages in the sum of $700,000.00 as originally claimed in HBC 336 of 2009 plus interests and costs on an indemnity basis.

[9] The High Court on 4 July, 2022, in its judgment, found that the Appellant was guilty of professional negligence, and awarded damages of $150,000.00 plus $3,000.00 costs to the Respondent. Post judgment interest of 4% from date of judgment, under section 4 of the Law Reform (Misc. Provisions) (Death and Interest) Act 1935, was also awarded.

The Appeal

[10] The Appellants on 21 July, 2022 filed its Notice and Grounds of Appeal. The seven (7) grounds are:

> *"i. His Lordship erred in law by holding that there could not be a "trial within a trial" when such finding is contrary to authority: Johnson v Perez (1988) 166 CLR 351.*
>
> *ii. His Lordship erred in law and in fact by finding that the Plaintiff (Respondent) had shown that he had a real and substantial case in matter number HBC 336 of 2009 when he had failed to show any loss and damage, an essential element of the claim such that the claim would fail.*
>
> *iii. His Lordship erred in law by holding that the "Plaintiff (Respondent) cannot be expected to prove his claim against third parties" when such finding in contrary to authority: Johnson v Perez (1998) 166 CLR 351.*
>
> *iv. His Lordship erred in law and in fact by finding that the Defendant (Appellant) was estopped from denying the Plaintiff (Respondent) prospects of success in matter HBC 336 of 2009 when it remained incumbent on the Plaintiff (Respondent) to prove that he had a real and substantial chance of succeeding in that matter.*
>
> *v. His Lordship erred in law and in fact by finding that the Plaintiff (Respondent) proved that the Defendant (Appellant) was negligent in allowing the Plaintiff's claim in matter number HBC 336 of 2009 to be struck out for want of prosecution when that finding could not reasonably be arrived at upon the evidence.*
>
> *vi. His Lordship erred in law and in fact by finding that the value of the Plaintiff's (Respondent's) loss was $150,000.00 when that value was arbitrary and could not reasonably be arrived at upon the evidence.*
>
> *vii. His Lordship erred in law and in fact by awarding the Plaintiff (Respondent) damages in the sum of $150,000.00 and costs in the sum of $3,000.00."*

Submissions by the Appellant

[11] The Appellant's submissions are for convenience dealt with together where the grounds overlap or are related.

[12] Grounds 1 to 4 deal with the issue of whether the Respondent had any real chance of success in his action of HBC 336 of 2009, and whether the High Court had asked the relevant questions and applied the correct principles in arriving at its conclusion.

[13] Counsel submitted that the Court should have been guided by the English Court of Appeal decision in **Kitchen v. Royal Air Force Association** (1958) 1 WLR 563, when Lord Evershed MR said, at page 575:

> *"In my judgment, what the Court has to do (assuming that the plaintiff has established negligence) in such case as the present, is to determine that 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 maybe that its value is not easy to determine, but it is the duty of the Court to determine that value as best it can."*

[14] Counsel alluded to Lord Evershed's earlier views (at pp.574 – 575) of how the Court may go about determining the measure of damages, where negligence has been established by it assessing liability as between in this instance, the Respondent as Plaintiff and the three defendants in HBC 336 of 2009, "*as a distinct proceedings within the present action,*" and added:

> *"If, in this kind of case, it is plain that an action could have been brought, and if it had been brought, it must have succeeded, the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that she could get nothing save nominal damages for the solicitors' negligence."*

[15] Counsel for the Appellant also relied on the decision of the High Court of Australia in **Johnson v Perez** (1988) 166 CLR 351 which adopted the ratio of **Kitchen's** case and Justice Brennan's re-phrasing of Lord Evershed's statement above as follows:

> *". . . . where it is plain that the plaintiff would have succeeded in the original action, the plaintiff has lost what he would have recovered; equally where it is*

plain that the plaintiff would have failed in the original action, the plaintiff has lost nothing of value."

The Appellant referred to the facts of this case in the light of the Respondent's assertion at paragraph 8 in his Statement of Claim that due to the Appellant's professional negligence, he had suffered loss and specifically loss of opportunity of having his case heard and determined. At no time, the Appellant asserted, did the Respondent present documentary evidence, including medical reports to support his claim, for injuries and damages. It is in this regard that Counsel submitted, the trial judge erred, into not looking closely at the lost right of value that the Respondent claimed he had suffered.

[16] Specifically, the Appellant contends, that the Court was obliged, in assessing whether the Respondent would have succeeded in HBC 336 of 2009, to look at the evidence available that would have supported the claim for injuries the Respondent allegedly suffered in 2006, some 3 years before the filing of the action. There was no evidence, according to the Appellant, to lend any support to the possible success of the 2009 action. In dismissing the duty to assess and determine right of value allegedly lost by the Respondent, and instead starting at paragraph 103 of the judgment that:

"Plaintiff is not required to prove his claim as he would have done in his civil action No. HBC 336 of 2009"

the Court, in the Appellant's submission, had erred in law. The proper course of action and procedure would have been, as stated by Brennan J., **Johnson v Perez** (supra) for the Court to put the plaintiff back in the "*same position*" as if he was continuing with the action, and *"must assess best as it can whether or not the cause of action would have yielded a judgment or settlement and, if so, how much the plaintiff would have received and when."* To be able to do this, Brennan J, suggested that, it maybe necessary to conduct a trial within a trial "*to determine what the cause of action would have produced."*

[17] In respect of HBC 336 of 2009, the Appellant argued, the Court was obliged in determining the likely success or otherwise of the Plaintiff's action, to look at the issues of the alleged duty of care of the 1st, 2nd and 3rd defendants, the breaches and the damages

due to injuries allegedly suffered. The Court did not, and whatever evidence, including the medical reports referred to by the Court, were not relevant or of no merit to the claim.

[18] Ground 5 of the appeal is specifically on the issue of whether the Appellant was negligent. The trial Court, after hearing all the evidence leading to the action being struck off for want of prosecution, and thereafter failing to take the necessary actions to apply for extension of time as permissible under the Court Rules, found that:

"Professional negligence of defendant is proved on balance of probability."

[19] Submissions by the Appellant on the issue of negligent conduct on their part, emphasise mainly their inability to maintain any contact with the Respondent during his long absence from the country. There was no contact point left by the Respondent during his visits to the United States and this was conceded by Respondent during the hearing.

[20] On the lack of instructions from the Respondent to progress the action, the Appellant referred to the provisions of the Legal Practitioners Act 2009 and specifically section 3(6) which states:

> *"A practitioner shall not maintain any issue compromise any matter, or consent to any order, save on the client's instructions,"*

and section 5(5) adding:

> *"A practitioner shall not make any statement to the court or put any proposition to a witness that is not supported by reasonable instructions or information available to the practitioner."*

[21] The one year long delay in the action proceeding further after the closure of the pleadings, was, the Appellant argued, attributable solely to the failure of the Respondent to furnish instructions because of his leaving the country without any contact address. He testified that he did not have an email address in the 3 years being away in the United States, and he only managed to contact the Appellant through the daughter-in-law's email.

[22] The Appellant emphasised that the Respondent is a "*habitual litigant*" referring to his earlier failed attempt in **Daya Shankar Sharma v. Vijay Prasad Chaudhary** [2023]

FJHC 653; HBC 114.2018 where the plaintiff, the respondent in this case had delayed for some 11 years before bringing his action.

[23] The court in that case, in dismissing the action, stated that the plaintiff had failed to provide any reasonable explanation for the delay in taking action and to all intents and purpose, it appeared to everyone include the defendant, that the plaintiff had abandoned the agreement.

[24] On Ground 6 and 7 of the appeal, the Appellant contended that trial court's assessment of damages was arbitrary as there was no evidence to support the award of $150,000.00.

Submissions by the Respondent

[25] In respect of grounds 1 and 3 the Respondent argued that the Court was correct in dismissing the notion of a "*trial within a trial*" to enable the Court to determine whether there was a reasonable chance of the Respondent succeeding in his action and furthermore, the Respondent was not expected to prove his claim against the third parties. Counsel emphasised that the primary focus in professional negligence cases is the breach of duty to client and the consequence of the breach. The "*trial within a trial*" and proving the claim against third parties, according to the Respondents, should only be considered within that context.

[26] Counsel for the Respondent submitted that whilst **Johnson v Perez** (supra) is authority for assessment of damages in professional negligence cases, it did not suggest the application of a "*trial within a trial*" was a necessary component of the assessment of damages, but only "*the need to assess the hypothetical outcome had the negligence not occurred."* Counsel shared the Court's assessment of the situation at paragraph 83 of its judgment saying:

> *"83. In **Coote v Olstein** (11 April 2022), applied "loss of change" evaluation. This is not the only method. As stated in 1958 case of **Kitchen v. Royal Air Forces Association**, Court is required to do its best, on available*

evidence to assess damages. This cannot be elevated to "trial within a trial."

[27] The Respondent then went on to cite cases (**Perry v Raleys** Solicitors [2019] UKSC 5; **Bolan v. Friern Hospital Management Committee** [1957] 1 WLR 581; **Allied Maple Group Ltd v. Simons & Simons** [1995] 1 WLR 1602; **Shariff v. Garrett & Co**. [2001] EWCA 1269; and **Hanif v. Middle Weeks** [2000] Lloyd's Rep. PN 920) in support of his submission on the "*trial within a trial*" application.

[28] Finally, the Respondent argued that conducting a "*trial within a trial*" would make the proceedings unnecessary complex and costly. Courts should focus on the substance of the dispute and avoid by hypothetical scenarios, thus emphasizing efficiency and practicality in legal proceedings.

[29] As for Grounds 2 and 4, the Respondent contends that, contrary to the Appellants submissions that the Respondent had failed to show any real evidence to prove his loss and damage and that the court had erred in law and fact in finding that the Appellant was estopped from denying the prospects of the Respondent's success, the Court had in fact found that the Appellant's Practice Manager had clearly stated in her affidavit that the Respondent "*has a good prospect of success*."

[30] Counsel further submitted in support of the belief of chance of success, that the Appellant would not have filed HBC 336 of 2009 if it believed there was no prospect of success.

[31] Counsel also alluded to the Court's reference to, and reliance on, medical reports the Respondent had obtained from the United States and had submitted as evidence of this treatment of injuries he had suffered. He referred to the four (4) propositions set out in **Mount v Barker Austin** [1998] PNLR 493, (per Simon Brown LJ) under which the Court is obliged to assess the likelihood of the success of the action without resorting to a "*trial within a trial."*

[32] Finally, the Respondent referred to the warning issued by the House of Lords in **South Australia Asset Management Corporation v. York Montague Ltd** (1996) UKL10, that

professionals have a duty of care to ensure their advice is accurate and reliable and may be held liable for damages if clients suffer loss from negligent advise, including conduct.

[33] As to Ground 5, Respondent emphasised that all the evidence from the failure of the Appellant to promptly and diligently prosecute HBC 336 of 2009, after the closure of the pleadings, followed by its failure to file the Intention to Proceed and allowing the matter to be struck out, and failure to file affidavit in support to show cause why the action should not be struck out, are prima facie evidence of professional negligence on the part of the Appellant.

[34] Finally, the Respondent on grounds 6 and 7 of the appeal, submitted that the Court, without the benefit of any case precedent in the jurisdiction may be guided by the UK cases, including **Coote v Olstein** (supra) as well as Lord Evershed MR's formulation of how the court may assess damages in **Kitchen v. Royal Air Force Association** (supra). Respondent submitted, that the Court, had very carefully analysed the methodology of assessment of damages in professional negligence cases as referred to above, including the earliest case of **Armory v. Delamirie** (1722) 1 Str. 505, and in the end guided by the Law Reform (Miscellaneous Provisions) Act 1935, that provides some framework for assessing damages in general negligence cases, arrived at the amount $150,000.00 as the appropriate amount that should "*put the claimant back into position, they would have been in, had the breach by the professional negligence of the Appellant not occurred."*

Consideration

Was there Professional Negligence?

[35] The chronology of the events and the length of time that had elapsed before actions were taken, if at all, by the Appellant, is important in the determination of whether there was negligence on the part of the Appellant as solicitors to the Respondent, as its client.

[36] The Writ was filed and issued from the Suva High Court on 13 October, 2009. The Statement of Claim, which the Respondent admitted he partially, if not, wholly drafted by

in person, set out at paragraph 1 thereof the nature of the claim. It is relevant to set it out in full.

> *"1. THAT at all material time the Plaintiff was self-employed. The plaintiff brings his claim for damages and compensation for injuries from the dead branches of a mango tree growing in the premises of Michelle Apartments Limited where Noble House is situated. This mango tree had branches protruding and hanging over the footpath belonging to Suva City Council. On 4 November 2006, as the plaintiff was walking along Bau Street on the footpath belonging to Suva City Council, and in front of the gate of Noble House which is in the premises of Michelle Apartments, some dead branches from the mango tree growing in the premises of Michelle Apartments, which were protruding and hanging over the gates and over the footpath (which is under the care of the Suva City Council) fell on his head and shoulder thereby causing him injuries. The mango tree was growing in the premises of Michelle Apartments within the boundary of Lot 2, DP 2944 CT.12495 with its branches protruding and hanging over the footpath belonging to the Suva City Council."*

[37] The Writ named Michelle Apartments as the 1st Defendant, the Suva City Council as the 2nd defendant and the Attorney General of Fiji as the 3rd defendant.

[38] Defence was filed and served in accordance with O.18 r.2, and there being no counter-claim filed with the defence the pleadings would have been deemed closed 14 days after filing of the defence. So assuming that the Writ filed on 13 October 2009, and served on the same day, the pleadings would have closed by 14 November, 2009.

[39] There being no Security for Costs application made under Order 23, then the Applicant on behalf of the Respondent should have moved for Discovery and Inspection of documents under Order 24 soon after the close of pleadings, unless the parties agree to dispense with it. Summons for Direction pursuant to Order 25, were to follow within 1 month after the pleadings in the action are deemed to be closed. All of these phases in the court proceedings are almost pro forma documentations clearly defined by time and regulated by the Rules of the High Court, and are routine and everyday tasks for solicitors and their clerks.

[40] It is agreed that no further action to progress the matter was taken by the Appellant from November 2009 to 4 March, 2021 when it was struck out by the Court under O.25 r.9.

The O.25 r.9 gives the powers to the Court to strike out any cause or matter which has remained six months in abeyance from the last action taken.

[41] The High Court noted that the Appellant had also failed, pursuant to O.3 r.5, to file its Notice of Intention to proceed after 6 months of delay. This court however notes that the proviso to the rule clarifies that the filing of a notice of Intention to Proceed is not a step in any cause or matter, as Coventy J pointed out in **NBF Asset Management Bank v. Adi Sainimili Tuivanuavou** [2006] HBC 174/00S:

> *". . . . .the issuing of Notice of Intention to Proceed is not a step in any case or matter. It does not progress the cause or matter in any way. It merely gives notice that, that which was not progressing will be progressed after a month after service of the notice."*

[42] So, a Notice of Intention to Proceed under O.3 r.5 would not save the applicant from the Strike Out by the Court under O.25 r.9.

[43] This Court further notes that the only plausible explanation advanced by the Appellant for not progressing the matter further after the pleadings closed, was that the Respondent had not left any contact point when he left for the USA, as they needed instructions from the client to take further actions. Surely, we are of the view, the Appellant could have proceeded with the requirements of Order 24 and Order 25 without waiting for fresh instructions from the client. At the very least, the Appellant should have filed applications under these orders, if only to keep the status quo, until they established contact with the client.

[44] From all the evidence set out above on the Appellant's failure to act on behalf of the Respondent, the relevant question then is: Did the Appellant fail to devote the standard of care which was due from it as solicitors, to the Respondent, as its client? We have no doubt that the Appellant had failed to meet the requisite standard care in its duty as solicitors of the Respondent, its client in this case.

[45] This Court therefore agrees with the conclusion of the High Court that the Appellant was negligent in its duty of care to the Respondent.

The Effort to Re-Instate the Action

[46] From the evidence in the Court below, it is agreed that upon his return from the United States on 30 September, 2013, and after discussing the fate of HBC 336 of 2009 with the principal of the Appellant, he proceeded with the assistance of Pita, a Senior Clerk in the Appellant's Office, to prepare and filed the application to re-instate the action with his supporting affidavit on 24 August, 2015. He stated that he was persuaded by the Appellant, to file the re-instatement application in person, as according to him, the Appellant said, that the Courts are more sympathetic to In Person applications.

[47] Before the application was heard, the Respondent upon the advice of another senior lawyer, whom the Respondent had sought alternative advice from, withdrew the application, on 8 December 2015. When asked why it was withdrawn, the Respondent mentioned that the time had expired even although the Counsel of the Appellant assured him that there was no time limit on reinstatement applications.

[48] The Respondent in the cross-examination conceded that the re-instatement was withdrawn upon the advice of his new Counsel in favour of filing of a complaint against the Appellant to the Legal Professional Unit (LPU) of the Government.

[49] In this regard, Counsel for the Appellant submitted that the Respondent by voluntarily withdrawing the re-instatement application, even although filed In Person, had deprived himself of the opportunity of the Court hearing and adjudicating on his case and specifically his claim as to damages for injuries he had sustained.

[50] In any event the application to reinstate was doomed, and that it was sensible to withdraw it so that further time and expenditure was not wasted.

Assessment of Success of Action and Measure of Damages

[51] Grounds 1 to 4 are considered together, dealing with assessing whether the Respondent had a real and substantial chance of success if the case had proceeded to a hearing and

secondly, the process in the court arriving at a determination of the measure of damages to be awarded.

[52] In respect of the first, the relevant question is, was there any hope for the action. No doubt, we agree that there maybe a cause of action for negligence that lay against the 1st and 2nd defendant in HBC 336 of 2009, as articulated by the Statement of Claim and set out in full paragraph 36 above. It is most likely that adding the Attorney-General as a party, the 3rd defendant to the action, without specific reference to a legislation upon which the claim is based, would not have succeeded, and possibly be struck out in the course of the proceedings.

[53] In this instance, the High Court had addressed the issue of the chances of success of the action in our view, very generally. He emphasised firstly that chances of the success of the action, had positively been identified by the Appellant in the affidavit of its Practice Manager, Amrita Singh, in support of its Summons for leave to appeal the Master's order to strike out the action. At paragraph 5 (vii), Amrita Singh stated:

> *"that our client has instructed to proceed in his case and I verily believe that this case has a good prospect of success and that the plaintiff should not be prejudiced or allowed to suffer _ _ _"*

[54] The High Court noted that whilst the Summons (including Amrita Singh's affidavit) had been withdrawn on 17 October, 2011, the assessment of the chances of success of the action, as stated in the affidavit, remains, and added:

"So, defendant is estopped from taking a different position, on these facts."

The Court notes the emphasis placed by the Respondent and the High Court on Amrita Singh's affidavit confirming that there was a good prospect of the plaintiff succeeding in his action. This must be taken in context of the application to appeal the Masters orders to strike. Almost invariably, in all the affidavits support of Summons for leave to appeal, enlargement of time, and other applications where the discretions of the Court is craved, one of the guiding consideration by the Court, is deciding, the merit of the appeal, and therefore the chances of its success. The applicant therefore has to assure the Court that there is a good prospect of the action succeeding. The applicant's assessment, must be

taken and accepted in the context discussed. It is not in our view, crucial but only a factor in the Court's overall consideration of the success of the case.

[55] It is quite possible within this context that the Court arrived at its determination at paragraph 88 of the judgment that:

> *"88. There is no need for the Plaintiff to conduct "trial within a trial" for several reasons. Already court has found due to professional negligence of the Defendant, Plaintiff's right to have a day in a court was lost."*

[56] The Court then proceeded to assess and/or calculate the damages that the plaintiff was likely to have been awarded, if the claim was proved against the defendants in HBC 336 of 2009.

[57] The numerous authorities cited by the Respondent in his submission before this Court are generally in support of the proposition that the determination of the value of the claim lost does not necessary require a "*trial within a trial*." However, in all the cases referred to by the Respondent, the facts and evidence are plain and the plaintiff would most likely have succeeded in the original action.

[58] In our view, the correct position is as laid out by Lord Evershed MR in **Kitchen v. Royal Air Force Association** (1958) 1 WLR 563 at p.575 where His Lordship after taking account the facts of the case in which it was not certain that the plaintiff would have succeeded in the claim which the solicitors had allowed to be statute barred, said:

> *"If in this kind of action, it is plain, that an action could have been brought, and if it had been brought that it must have succeeded, of course the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was not case which the plaintiff could reasonably ever have formulated, then it is equally plain that the answer is that she can get nothing, save, nominal damages for the solicitors negligence."*

[59] Further, on at page 575 of the judgment His Lordship added:

"*In my judgment, what the court has to do (assuming that the plaintiff has established negligence) in such a case as the present, is to determine what the plaintiff has by that negligence lost. 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 at it can.*"

[60] In this Court's view, the concept of a "*trial within a trial*" in the circumstances of ascertaining the chances of the success of an action by a client that has been abandoned through the negligence of the client's solicitors, is a necessary and valuable tool for the Court. It need not be applied where from all the evidence available, it is plain that the plaintiff would have succeeded in the action against the third party. This is the essence of all the cases cited to by the Respondent's Counsel. But where there are elements of doubt, creating some uncertainty that the Respondent in this case would have succeeded in his action for negligence against the defendants in HBC 336 of 2009, then the question of liability as between the plaintiff and the defendants, Michelle Apartments, Suva City Council, and the Attorney General has to be looked at much more closely. If on a balance, the action may not succeed, then it follows that damage is nominal.

Evidence of Injuries Sustained by the Respondent

[61] The injuries allegedly sustained by the Respondent as set out in his Statement of Claim at paragraph 6 are:

"(i) injury to his left arm;

(ii) injury to his shoulder."

[62] At paragraph 7 the Respondent states:

"7. THE Plaintiff reserves the right to produce further particulars of injury and disability during the trial.

PARTICULARS OF PAIN AND SUFFERING

(i) He suffers excruciating pain in his left arm and shoulder;
(ii) Continuous paid and tenderness to his shoulder;
(iii) He was given analgesics for pain.

PARTICULARS OF PERMANENT INCAPACITY

(i) Plaintiff was unable to use his left arm for many months from date of injury;
(ii) Plaintiff continues to experience pain especially on lifting his arm overhead;
(iii) Plaintiff continues to experience pain in his left arm and shoulder;
(iv) Plaintiff is unable to lift heavy objects;
(v) Plaintiff is assessed to suffer from disability of his left arm."

[63] It is easy to envisage and assume that for the injuries allegedly sustained by the Respondent as detailed in paragraph 6 of his Statement of Claim, that, the Respondent would have, in the first instance, sought medical attention and treatment from the Colonial War Memorial Hospital (CWM) and any medical centres around Suva and in the process, given the doctor's medical report. Yet, when he was asked by the Appellant's Counsel, whether he had provided any medical report(s) when he first instructed the Appellant, or any time after, before the left for the United States in 2013, he said no, although he claimed that the medical report is in his personal file at home. It is perplexing to this Court, that no medical reports, whatsoever were produced by the Respondent as evidence of the types of injuries he had sustained, neither are there any follow-up reports pointing to the pains and sufferings and permanent incapacity, or percentage thereof, as set out in paragraph 7 of his Statement of Claim. Instead, when cross-examined by the Appellant's Counsel on the subject, it almost seemed to this Court that he was very evasive on the matter as can be ascertained from his response to Counsel at pp.238, 239 of the Record:

"Mr. Maharaj: Now in this case, No.in the other case (HBC 336 of 2009) have you ever given any medical report whatsoever to say these were your injuries as the result of the falling of the branches?

Mr. Shankar: This is just because of the first, the negligence by MA Khan Office, we could not proceed with the medical.

Mr Maharaj: No, no. When you go to a lawyer and you say that you have been injured and before you do a Statement of Claim, one has to look at what injuries you suffered, where is the medical report, because you were claiming $700,000.00 and presumably that's what you have been claiming from MA Khan so did you have any medical report whatsoever to say that you have suffered the injury?

Mr Shankar: I do possess a doctor's report with medical report within my file.

Mr Maharaj: I am not worried about your file. In the affidavit you were represented by Counsel's throughout, you are smart man, you had put an affidavit verifying in which you did not disclose any medical report whatsoever in which you were going to rely?

Mr Shankar: The claim was according to my what benefit I could not have it, and damages by my doctor's report, that is why I was just, firstly I go with the negligence of the office, so the second stage could be the medical treatment and whatever the report may overcome to me."

[64] The only medical reports produced in the High Court hearing are firstly, three (3) medical reports for the Respondents late wife, which were intended to assist the Appellant, in its submission to the Master before the Striking Out and the attempted appeal against the decision and the re-instatement application. These are not relevant to the claim.

[65] The other two American medical reports on the Respondent, in this Court's view, are also of little relevance and unhelpful to the nature, details and severity of the alleged injuries of the Respondent. The first medical report dated in February, 2012 from Stockton Cardiology Medical Group, San Adres, California, details the Respondent's heart bypass surgery and identifying at the same time his "*long-standing diabetes and along hypertension and hyperlipidaemia,"* and the doctors prognosis that it will take 6 – 12 weeks after surgery to resume normal activities. In our view, the Respondent's medical treatment and condition described in this report are not directly linked or related to his shoulder and left arm injuries.

[66] The second medical report from Sidhu Chiropractic Healthcare, Manteca California, dated 27 July 2015. It stated that the Respondent commenced treatment at the Centre from 20 July 2014 and last treated on 4 August 2015. The report confirmed that the Respondent received spinal manipulation, and physiotherapy. The doctor also confirmed that the Respondent told her that the symptoms he was experiencing was "*correlated to an injury he suffered while in Fiji, when a tree branch broke and hit (him) on the head and neck region."*

[67] Unfortunately, quite apart from the direct link of the parts of the body treated, to the injuries of the Respondents left arm and shoulder, as the doctor was just recording what was told to her by the Respondent who has no medical expertise.

[68] In this Court's assessment, there does not exist any medical evidence, especially medical reports, that would have supported the Respondent's claim for injuries and their seriousness and extent that would have supported his action in HBC 336 of 2009. As such, the Respondent, would most likely, have not succeeded, without the essential medical reports to substantiate his claim in damages, even if the action had proceeded to a hearing.

Damages

[69] The award of $150,000.00 and costs of $3,000.00, the Appellant submitted, was arbitrary and unreasonable given the evidence and the court had erred in law and in fact. This are in essence the issues raised under Grounds (vi) and (vii) of the appeal.

[70] The trial judge conceded that this is the first case in the jurisdiction that is attempting to assess damages in cases of professional negligence by solicitors for unliquidated damages in personal injury claims. The court leaned on personal injury cases and awards in this Court, as comparison, and given the framework for assessing damages for negligence case provided under the Law Reform (Miscellaneous Provisions) Act 1935, arrived at the amount of $150,000.00 as damages.

[71] In the light of the conclusion of this Court at paragraph 68 above, it can only refer to the guiding principles as originally articulated by Lord Evershed MR in **Kitchen's** case (supra) and re-stated by Brennan J in **Johnson v Perez** (supra) at p.371 as follows:

> *"When a plaintiff loses his original cause of action by the negligence of his solicitor, what is the extent of his loss? He has lost the monetary compensation for his personal injuries which he would have received at the*

time when he would have received it but for the solicitor's negligence. That being the extent of the plaintiff's loss, a court which seeks to put him back in the "same position" must assess as best as it can, whether or not the cause of action would have yielded a judgment or a settlement and, if so, how much the plaintiff would have received an when. It may be necessary to conduct a trial within a trial to determine what the cause of action would have produced."

[72] The Court's objective is to find out as best as it can, what the cause of the action was worth to the plaintiff, in this instance, the Respondent. The value of the lost cause of action, will necessarily take into account, the plaintiff's prospects of success in the original action.

[73] In the end, as pointed out by Lord Evershed MR in **Kitchen's** case (supra), where it is plain that the plaintiff would have succeeded in the original action, the plaintiff has lost what he would have recovered, but where it is clear that the plaintiff would have failed in the original action, the plaintiff has lost nothing of value, and all he is entitled to is nominal damages.

[74] In this instance, it is plain from this Court's analysis and examination of all the evidence before us, that whilst we agree with the findings of the Appellant's negligence in the High Court, we do not agree with its conclusion that the Respondent would, in the absence of vital relevant medical evidence, have succeeded on his action in HBC 336 of 2009. In our view, the Respondent is only entitled to nominal damages.

Conclusions

[75] For the reasons set out above, the appeal is partially allowed. The Final Order of the High Court is set aside. The following orders are substituted.

Clark, JA

[76] I have had the benefit of reading Jitoko P's judgment in draft and, for the reasons he gives, agree with the orders made.

Andrée Wiltens, JA

[77] I agree with the judgment and orders of Jitoko P.

Orders:

1) *The Respondent is awarded $7,000.00 as nominal damages.*
2) *Interest of 5% from date of High Court judgment to today.*
3) *Each party to bear its own costs.*

Hon. Mr Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL

Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr Justice Andrée Wiltens
JUSTICE OF APPEAL