Settlement being the value of the lost cause of action

By Michael Joseph SC *

In circumstances where a lawyer has been negligent causing a client's personal injury claim to be statute barred or dismissed courts, to date, have primarily assessed the client's loss by, firstly, assuming that the lost claim would have come to trial, secondly assessing the prospects of a verdict being obtained and thirdly then multiplying the damages by the assessed percentage of that prospect. Perhaps such an approach has been encouraged by the High Court decisions in *Johnson v Perez* (1988) 166 CLR 351 and *Nikolaou v Papasavas Phillips & Co* (1988) 166 CLR 394. However, in each of those decisions it was agreed that there was no issue that the original cause of action would have succeeded and thus it was assumed that there was no reason for reducing the damages for the prospect of a loss (or settlement). Those decisions did not involve consideration of any alternative to the method outlined above as to how assess the damages suffered by the plaintiffs in such circumstances.

I would like to consider another method of assessing the damages suffered by a plaintiff at the hands of a negligent solicitor who has lost a cause of action. The reasoning is as follows:

1. Damages awarded for torts are essentially compensatory so that the plaintiff should be awarded that which but for the negligence he/she would have received.

2. As over 85 per cent of civil causes of action (the original cause of action) settle, it is the 'settlement figure' which would more often than not properly and fairly quantify the damage suffered by a plaintiff.

3. There is authority to support this approach and no authority that would exclude such an approach.

Authorities dealing with the principles of recovery for a negligently lost cause of action

In *Johnson v Perez* the High Court dealt at length with the nature of the claim for damages of cause of action lost by the negligence of a solicitor who failed to prosecute within a reasonable time.

Mason CJ (at 355) observes that: 'The guiding principle in the assessment of damages is compensatory'.

The object is to award the plaintiff an amount of money that will, as nearly as money can, put him or her in the same position as if he had not been injured by the defendant.

Wilson, Toohey and Gaudron JJ (at 363) refer with approval to the judgment of Lord Evershed MR in *Kitchen v Royal Air Force Association* [1958] 2 All ER 241, which concerned the negligence of a solicitor who allowed a matter to become statute barred stated. Lord Evershed stated (at 251):

> In *my* judgment, what a court has to do (assuming that the plaintiff has established negligence) in each such 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 it can* (emphasis added).

As Wilson, Toohey and Gaudron JJ observe *Kitchen v Royal Air Force Association* was a case in which it was by no means certain, the plaintiff would have succeed had the matter not become statute barred. Their Honours quote Lord Evershed with approval (at 364) where he stated:

> 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 damages lost by the failure to bring the action originally. On the other hand, if it be clear that the plaintiff never had a cause of action, there was no 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 solicitor's negligence.

Their Honours comment:

> Because in his Lordship's view, the case before him fell into neither category, it was necessary to make the inquiry to which he referred in his judgment.

They then consider the decision of the Supreme Court of South Australia in *Tutunkoff v Thiele* (1975) 11 SASR 148 where Bray CJ held (at 150-151):

> Mr Fricker, for the plaintiff, contended vigorously that I was only at liberty to assess the plaintiff's chances of success in the lost action on the basis of evidence before me. In principle I do not think this is so because what I have to decide is what has the plaintiff lost by the defendant's negligence and what he has lost is what a court would have awarded him in an action by him against his employer…

Both Bray CJ and Lord Evershed MR were faced with a dual inquiry, namely, what the plaintiff's prospects of success were had the action not been statute barred and an inquiry into the damages to which he was entitled to by reason of the solicitor's negligence.

However, in *Johnson v Perez* it was common ground that the respondent would have succeeded in each of the claims against his employers (at 364). The court was thus not concerned with valuing a chance or prospect that the respondent might have lost. The joint judgment therefore considers only the second component in the assessment of damages, namely the manner in which the court would have assessed damages where the prospects of success of the lost action would have been certain.

Brennan J in *Johnson v Perez* considers the issue of valuing such claims more generally. He, like Wilson, Toohey and Gaudron JJ, quotes with approval the dicta cited above from *Kitchen v The Royal Air Force Association*. His Honour then states that where the plaintiff's chance of success in the action against the original defendant can be estimated at a particular percentage, that is not to say that the plaintiff's loss is to be calculated as a corresponding percentage of what would have been the assessment of damages if he had wholly succeeded in a trial of his lost cause of action. His Honour continues (at 372):

> The value of the lost cause of action cannot be assessed as though there were a market for doubtful causes of action in damages for personal injury. The value of the lost cause of action is not what a speculator would be prepared to offer the plaintiff as a price of an

* Michael Joseph SC, Maurice Byers Chambers.

> assignment of the cause of action. The plaintiff's loss being whatever monetary compensation he would have received at the time he would have received it but for his solicitors' negligence, the court must find whether or not he has lost something of value…*if the action would have been compromised, he lost what he would have been paid in settlement at the time when he would have been paid* (emphasis added).

His Honour therefore considered it appropriate to consider the fact of settlement even in circumstances where the plaintiff had good prospects. He then goes on to consider those cases where it is doubtful that the plaintiff would have succeeded in the original cause of action. In respect of these, his Honour stated (at 372) that the valuation should still proceed even if it was probable that the action would not have been compromised by the solicitor's delay.

Brennan J returned to this issue when he stated (at 377):

> The damages which a court assesses in an action for a solicitor's negligence are not identical with the damages which the court would assess in an action for the tort which caused the plaintiff's personal injuries. In both cases, the court may have regard to relevant losses which have occurred prior to the assessment or which are then foreseeable. But in the former case, the relevant losses are the amount which would have been received as compensation by the plaintiff if his action for damages for personal injury had earlier been tried or compromised ... together with the losses of delay in receiving the amount…*The solicitor cannot be called upon to underwrite a deterioration in the plaintiff's condition which was not foreseeable or not wholly foreseeable at the time when the original action should have been tried or compromised* (emphasis added).

I think that the possibility of a reasonable compromise must not be forgotten in assessing the value of the lost right to bring an action.

It is submitted that it is clear from the judgment of Brennan J that the damage for a lost cause of action could well be the sum that would have been received on settlement.

The remaining judgments of the High Court, namely those of Deane J and Dawson J, neither add to (nor detract from) the general principles outlined above by the other members of the High Court.

In *Nikolaou v Papasavas Phillips & Co* (1989) 166 CLR 394 the High Court was also concerned with a personal injuries action lost by the solicitor's negligence in allowing the matter to become statute barred. In the joint judgment of Wilson, Dawson, Toohey & Gaudron JJ, their Honours stated (at 404) that the injured client's damages should have been assessed:

> by reference to the loss at that date of the right to claim damages. That loss would ordinarily be quantified by the trial judge taking a broad brush approach to the several matters that in a particular case may require to be resolved ... in order to arrive at a figure representing the loss suffered by the plaintiff when his action against the defendant was dismissed.

I am of the view that there is nothing in either of these decisions of the High Court which is in conflict with my thesis that that the settlement figure would be the damages that a plaintiff has suffered in respect of a lost cause of action. In fact, there seems to be much by way of general comment and in Brennan J's specific comments in *Johnson v Perez* which supports my thesis.

The judgment of the full court of South Australia in *Dolman v Penrose* (1983) 34 SASR 481 was referred to in the joint judgment in *Johnson v Perez* with approval. Although the reference was a different issue, no criticism was made of the judgment. In *Dolman* the full court considered the manner of assessing damages where the original action was an action under the *Inheritance (Family Provision) Act 1972* (SA) which had not been commenced within time.

Bollen J, with whom Wells J agreed (and who formed the majority), noted that :

> For what is he to be compensated? Put in a rough but convenient way it is the lost chance to litigate. More precisely stated it is that which might reasonably have been expected to gain by litigation. In the word 'gain' I include the fruits of a judgment or a compromise. But the compromise contemplated must be one genuinely made i.e. the compromise of a claim recognised as arguable. Nothing should be taken into account for 'nuisance value.

Later his Honour stated (at 494):

> Those cases demonstrate what it is that must be assessed in an action against a solicitor for 'letting a right of action die'. The chance of success and its value, as best can be determined must be assessed. *I think that the possibility of a reasonable compromise must not be forgotten in assessing the value of the lost right to bring an action* (emphasis added).

Zelling J, in a dissenting judgment (on an issue not relevant to these comments) (at 483) observed that 'a court must always consider the fact that the plaintiff might have settled out of court for a lesser sum than the court would ultimately have given'.

This decision lends significant support to my thesis.

In *Julie Phillips v Bisley & Ors* (New South Wales Court of Appeal, Unreported, 18 March 1997) the court was concerned with a claim against a solicitor who negligently allowed a matter against one defendant to become statute barred. The plaintiff had received a settlement against the other concurrent tortfeasor in the sum of $30,000. One matter the court had to consider was whether that sum or some other sum was the plaintiff's true loss assuming the solicitor had been negligent.

Mason P (with whom Meagher JA and Dunford AJA agreed) quoted with approval the passage of Brennan J's comment in *Johnson v Perez* (at 373) in which he referred to the need to consider the prospect of possibly compromising the lost cause of action. The President noted that in both *Nikolaou* and *Johnson* there was no dispute that the plaintiff had lost something of value. Mason P then summarised the law as follows:

> In *Johnson* and other recent cases, the High Court has emphasized the court's duty in cases such as the value of the plaintiff's lost chance. [See also: *Sellers v Adelaide Petroleum* NL (1994) 171 CLR 332 at 354 and 362]. The lost chance has value even if the court reviewing the facts with 20:20 hindsight assesses the plaintiff's prospects of less than 50 per cent: *Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64 at 119; *Allied Maples Group Limited v Simons & Simons* (1995) 4 All ER 906 at 916, 928. This is because the plaintiff may have lost, through the lawyer's negligence, *the prospect of the favourable settlement offer*. The critical issue, now not clearly addressed in the cases, is how to distinguish between the derisory or 'nuisance value' offer which Lord Evershed MR in *Kitchen* would disregard and the situation where a case has sufficient 'prospects' for the court trying the negligence claim to be able to say that the plaintiff would have been likely to have attracted *a valuable offer of settlement* (even if worth considerably less than 100 per cent of the plaintiff's actual loss); [See: *Yeoman's Executrix v Ferries* (1967) SLT332].

> Difficult and elusive though the distinction may be, the court trying the issue of the lawyer's negligence must proceed on the evidence before it ... it also involves looking at the likely response of the other party or parties in the lost proceedings. (i.e. those which would, but for the lawyer's negligence, have been prosecuted in a timely way). *Among other things this requires the court trying the negligence claim to make dual allowance for the fact that a less than well informed or overall cautious lawyer for the defendant faced with a claim in the lost proceedings might have made a valuable settlement offer.*

This passage was recently approved in *Feletti v. Kontoulas* (2000) NSWCA 59 at paragraphs 37 and 38). In my opinion the judgment clearly supports the view that the settlement figure (which in *Phillip's* actually been reached and received) was a relevant benchmark as to the value of the lost cause of action.

Turning to overseas case law, there is some support for my thesis. English authority includes the decision *Malyon v Lawrence Messer & Co* (1968) 2 Lloyd's Rep 539, at 544 where Brabin J considered that the plaintiff was 'entitled to the lost fruits of the action or settlement of that action...'. The fact that settlement was unlikely was considered in *Dickenson v James Alexander & Co* (1990) 6 Lloyd's Rep PN 205, at 207. The plaintiff obtained a disadvantageous settlement in divorce proceedings because her solicitors negligently failed to obtain full disclosure of the husband's assets. In the subsequent professional negligence action, Douglas Browne J assessed damages against the solicitors on the basis of what a court would have ordered the husband to transfer to her. It was argued on behalf of the defendants that the original action might have been compromised for less than the amount the court might have awarded. The judge considered that the husband was not a man likely to have settled the original litigation and that therefore there should be no discount to the assessed damages.

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The Scottish courts have more consistently taken settlement into account. In *Yeoman v Ferries* (1967) S.C. 255 (Outer House of the Court of Sessions) cited by Mason P in *Julie Phillips*, the defendants failed to issue proceedings in relation to an industrial injury claim. Lord Avonside held (at 264):

> I am of the opinion that an employer would have been advised to make an offer (to the plaintiff) ... I am at a loss to see why, in the appropriate case, that factor should not be taken into account.

In *Siraj - Eldin v Campbell Middleton Burness & Dickson* (1989 S.L.T. 1242) the plaintiff was dismissed for taking alcohol onto a oil rigger and his solicitors failed to bring an action before the Industrial Tribunal in time. The Inner House of the Court of Session held that any action against the employers was bound to fail and that furthermore, on the evidence, there was no prospect of any settlement before a tribunal hearing. In *Kyle v P & J Stormath Darling* (1994) S.L.T.191(Inner House of the Court of Session) stated that:

> Factors that may be taken into account in arriving at the monetary value of the loss may well include ... the lost possibilities of a compromised settlement with the third party in the now lost negotiation.

In the USA, courts have tentatively been willing to measure the damages in a lost cause of action by recognising the settlement value of a claim. (See generally the article 'Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood', Bauman (1988) Vol. 61 *Temple Law Review* 1127, especially at 1148)

In *Duncan v Lord* 409 F.Supp 687 (1976) a US District Court considered expert evidence which firstly assessed the damages in a range in which a juror would have given a verdict and then in a range in respect of "settlement'. Because of the plaintiff's age and the nature of the injuries, it was more likely than not that her case would have settled short of trial. Interestingly the juror verdict range tendered on behalf of the plaintiff was from $150,000 to $300,000 and on behalf of the defendant from $100,000. In respect of settlement, the plaintiff suggested $125,000, being a 'low jury verdict', as the settlement range and the defendant suggested from $60,000 to $70,000. Judgment was entered for $122,000 which was well below the plaintiff's suggested jury verdict range. These ranges are indicative of the difference between the conventional method and the method I am proposing for assessment of the lost cause of action.

In some cases in the USA the acceptance of the proposed approach has been rather enigmatic. For example, in *Whitaker v State* (382 N.W. 2nd 112 lowa (1986), the court rejected a malpractice claim against the state attorney-general in charge of the Consumer Protection Division of the Attorney-General's Office. This was done in part on the ground that the client had not shown that any judgment obtained by the attorney-general against the alleged fraudulent business would have been collectible (at 115). However, the court also upheld the verdict for the attorney-general on the additional ground that the plaintiff had not shown that the business would have agreed to pay, or could have paid an acceptable settlement had the state attorney more fully advised the plaintiff of the progress of settlement negotiations (at 117). The language seems to suggest that the court might have been receptive to the claim based on the loss of a potential settlement if the plaintiff had shown that such an agreement was in the offering and that the settlement amount could in fact be paid.

Conclusion

There are neither recorded nor unreported Australian cases of which I am aware in which the question of settlement has been held to be irrelevant in considering the value of a lost claim. Indeed, in Australia and overseas, there are clear *obiter dicta* where the courts have regarded the question of settlement as relevant.

In establishing the likely settlement figure and thus determining what the plaintiff has lost, the courts would be adhering to the general principles of compensation law and would be applying the broad brush approach approved by the High Court of Australia in *Nikolaou*.

Practical implications

Firstly, the fact that the original action would have settled rather than been heard by the court would make significant differences to the running of a professional negligence action in a number of ways which are of practical importance:

1. The focus of the inquiry would not be on what would have

happened at the notional trial, but on what evidence would (or should) have been in the possession of the parties and as how the parties (and not the court) would have responded to that evidence.

2. Forensic points available to either side in settlement negotiations may not be the same as those that would be relied on at the trial.

3. The approach to the valuation of the lost cause taken by the parties would be likely to be more broad brush, rather than the detailed approach used by the courts in their assessments.

4. It is likely that the evidence available would be more limited, as the trial processes and the trial itself cause evidence to amass.

5. Credibility of witnesses would be of less significance in settlement negotiations as it would be difficult to estimate how a witness would have performed.

6. Finally, the attitudes of the parties would be significant in ascertaining the potential for settlement. For example, a legally aided plaintiff might be able to obtain a better settlement because the defendant might perceive a difficulty in recovering costs even if he/she won the trial. Conversely, a non-legally aided plaintiff of moderate means might be averse to risk, so the settlement figure might reflect that fact.

Secondly, there is likely to be a significant difference between the value of an action which is settled and one that goes to trial. This is obvious where liability is seriously in issue. However, it is my experience that plaintiffs in particular will significantly compromise their claims, even where liability is not in issue. They will compromise not only the more esoteric heads of damages (e.g. *Griffiths v Kirkemeyer* and the 'new' *Sullivan v Gordon* claims) but also damages generally, for the following reasons:

1. to obtain a certain sum without the uncertainties of a trial and appeals;

2. to avoid the judicial lottery;

3. to avoid the possibility of being 'not reached' if the matter is listed for hearing;

4. to obtain judgment moneys earlier than they would if they had to wait for a 'reserved judgement';

5. to minimise legal costs particularly solicitor/client costs, especially if a lengthy trial might occur; and

6. to obtain an inclusive costs figure that generally benefits the plaintiff's lawyers both as to quantum and the fact that the monies are received earlier than a plus costs order and avoid often protracted arguments over the quantum.

Needless to say, notional defendants accommodate plaintiffs who are prepared to compromise their rights significantly for the reasons just outlined.

Thirdly, the value of a claim in the lawyer's negligence action may vary if the dates of notional trial and the date when settlement occurs differ. There are several factors to be considered, including the arbitration system and interest rates. Rates may be different and the period of entitlement to interest may be different as settlement would occur earlier than say a judgment. This outcome might be to the disadvantage of the negligent lawyer as the interest component would probably rise, although this would be assumed on a much lower base figure.

Evidentiary needs

I suspect that not much attention has been given to the proposed alternative method of calculation of the value of the lost cause of action because it possibly involves evidence additional to the conventional method of assessment. It is my opinion that evidence of the following matters needs to be considered by a court if it is to be proposed that the 'settlement figure' is the value of the lost cause of action.

1. What was the plaintiff's attitude to settlement?

2. What was the notional defendant's attitude to settlement?

3. What information did both the plaintiff and the notional defendant have in their possession on liability and damages at the notional date of settlement ?

4. What was the likely range of settlement offers which both the plaintiff and the defendant would make, given the information in their possession?

5. If the claim went to trial, what costs might the plaintiff have been at risk of paying if there was a verdict for the notional defendant?

6. What capacity did the plaintiff have to pay those costs?

7. What is the capacity of the defendant to pay a settlement verdict?

8. What legal advice would the parties have been given in the circumstances and what is the likelihood of that advice being accepted?

9. As large corporations or insurance companies are experienced litigants, unlike most plaintiffs, they would have available advice on matters such as settlement figures, independent of legal advisers. That such advice might need to be proven from such witnesses as claims managers and loss assessors including the likelihood of accepting legal advice.

Most of this evidence is of a non-expert kind. Some might consider it to be of such a kind as that of which a court would have 'judicial' knowledge. However, reports from experts would be required as to what legal advice would have been given to both parties given the state of the law and evidence. I doubt that 'general knowledge' as to the fact that most cases settle (a fact of which the courts themselves would have knowledge) would suffice in a given matter as to that matter's prospects of settlement.

Conclusion

It is submitted that the damage suffered by a plaintiff who has lost his or her cause of action because of the negligence of a lawyer can in fact be the loss of a settlement offer that the notional defendant was likely to have made and that the plaintiff was likely to have accepted. Authority would support this view.

The practical outcome is more likely than not for the verdicts in favour of plaintiffs will be less than is presently award in such cases.

Whether a court should prefer the conventional method of assessment or that proposed in this paper will depend of the state of the evidence before the court. However, the court in both events would be trying to predict the value of the 'lost chance', so there is the possibility of a court arriving at a compromise figure somewhere between the two outcomes.