

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

NO. 003/2011

BETWEEN: CHIEF REGISTRAR

Applicant

A N D: DIVENDRA PRASAD

Respondent

Applicant : Mr A Chand & Ms M Rakai
Respondent : Mr R Naidu

Date of Hearing : 28th, 29th, 30th November 2011
Date of Judgment : 24th January 2012

JUDGMENT

COMPLAINT 1

1. The Complainant Sashi Raj was injured in a motor vehicle accident on 25th March 2009 and on 20th November 2009 he gave instructions to a solicitor in the employ of the Respondent to take action to recover damages.
2. The Complainant on 20th November 2009 executed a fee agreement with the Respondent which provided that the disbursements would be paid from any settlement and that the Respondent would be paid 30% of the "total settlement/judgment figure plus VAT and disbursements OR such other fees maybe agreed to between the parties."
3. The agreement also provided in clause 3 "*as the authorized signature for the above-named, **I DO RETAIN AND EMPLOY DIVEN PRASAD LAWYERS** to act my/our solicitors in the above matter, and to act for me/us either on specific instructions or in a manner as **Diven Prasad Lawyers** with absolute and unfettered discretion sees fit as being in my/our best interests."*
4. The Complainant met with the Respondent on the 3rd of March 2010 when a file note [Ex A61] records that the Complainant gave to the Respondent the copy of the police report and some receipts for his medicine. It also records that a statement of claim was completed and that the Respondent advised the Complainant that action would be

taken in the Magistrate's Court where there is a jurisdictional limit of \$50,000 and that the Complainant agreed. The file note is signed by the Complainant.

5. Prior to that meeting a meeting is recorded in a file note as having taken place on 26th of February 2010 [Ex A6k]. That file note records that Releshni Karan was also present and that the Complainant was informed that various reports were still being awaited to facilitate the matter being filed in court.
6. The statement of claim was filed in the Magistrate's Court, Nausori [No 63 of 2010] on 3rd June 2010 and was listed for first call on 3rd August 2010 at 9 O'clock [Ex A6n].
7. The statement of claim, claims special damages totaling \$1,120.11, general damages, interest and costs up to the jurisdictional limit of the Magistrate's Court.
8. At the time of the accident the Complainant was a resident of Nausori however following the accident and his discharge from hospital he became a resident of the Old People's Home at Samabula.
9. The Complainant says that he contacted the Respondent about his claim but only spoke to employees.
10. By order dated 7th September 2010 the statement of claim was amended with respect to the registration number of the motor vehicle.
11. By letter dated 9th June 2010 the Respondent wrote to the Claims Manager Sun Insurance Co Limited enclosing the "Plaintiff's submission on General Damages." This submission claimed the sum of \$30,000 for pain and suffering, loss of amenities of life, \$1,000 by way of special damages and \$2,000 by way of costs being a total of \$33,000 [Ex A16].
12. By letter dated 6th September 2010 Siwatibau & Sloan, solicitors, wrote to the Respondent on behalf of Sun Insurance [Ex A61]. In that letter an offer in the sum of \$20,000 was made in full and final settlement of the claim.
13. On the 7th September 2009 the Respondent and his clerk Dinesh attended upon the Complainant at the Old People's Home. The Complainant confirms that this visit occurred but says that the Respondent said to him that he was then going to the insurance company and would come back and see him on Friday the Complainant also says that whilst Dinesh was present he did not say anything. He further says that the Respondent did not come back on the Friday.

14. The Respondent in his evidence says that he attended the Old People's Home on two occasions in the company of Dinesh. This is supported by the evidence of Dinesh but is rebutted by the evidence not only the Complainant but also Luisa Finau, the nurse in charge at the Old People's Home.
15. A form of discharge [Ex A6v] purports to be executed by the Complainant on the 7th of September 2010 by fixing his left thumb print. The execution of the document is confirmed by the Respondent and his clerk Dinesh. The Complainant in his evidence says he has never seen the document before and denies that he was told that the matter was to be settle for the sum of \$20,000 and further that he gave no instructions to settle the matter for that amount of money.
16. Apart from the denial by the Complainant that he executed the certificate of discharge there is no evidence before the Commission as to the authenticity or otherwise of the thumb print on the document.
17. Dinesh Goundar made a file note of the visit to Sashi Raj on the 7th of September 2010 [Ex A6u]. The Respondent says that the file note was made at his request. The file note records that the Complainant was informed that Sun Insurance was ready to settle his claim and that the Complainant agreed to accept the terms of settlement which were explained by the Respondent to him.
18. The Complainant says that he had a further visit sometime later and was given a cheque of \$3,000 but that he never received the full settlement monies. The Respondent says that discussions were had with the Complainant who did not want the monies paid to the Ministry of Health and wanted them retained by the Respondent and paid to him when he requested money.
19. Payments were made by the Respondent to the Complainant each time a request was made and this is acknowledged by the Complainant.
20. On or about 9th of May 2010 the Complainant attended upon the Respondent in a taxi and sought the sum of \$500. He stayed in the taxi in the car park and after discussions with the Respondent received a further cheque in the sum of \$500. On that occasion the Complainant was accompanied by a nurse from the Old People's Home and a Fijian boy. This is confirmed by the taxi driver, Arun Kumar, in his evidence.
21. The Complainant and the nurse in their evidence say that the Respondent put pressure on the Complainant to withdraw his complaint. The taxi driver, Arun Kumar says that the Respondent said to the Complainant "why you make a complaint" and the Complainant replied that he would withdraw the complaint. The taxi driver also says that the Complainant asked the Respondent to retain the balance of the money and said "when I need it I come and collect it from you".

22. The Respondent in his evidence says that he had a discussion with the Complainant in the car park when the Complainant was sitting in a taxi and said to him that if he had no complaint then he should withdraw the complaint and that the Complainant replied that he had not made any complaint and he would withdraw it.

COMPLAINT 1A

Professional Misconduct: Contrary to section 82(1)(a) of the Legal Practitioners Decree 2009

Particulars

Divendra Prasad a legal practitioner, since the 6th day of September 2010, having been instructed by one Sashi Raj to institute proceedings for damages in a personal injury matter as a result of the injuries the said Sashi Raj sustained following a motor vehicular accident which occurred on the 25th of March 2009, acted without instructions from the said Sashi Raj when he wrote to the solicitors for the defendants in the matter between Sashi Raj v Dharmendra Singh, Mahesh Prasad Nausari Civil Action No. 63 of 2010 and proposed the settlement of the matter.

23. The elements of this allegation are that the Respondent did not have instructions from the Complainant to put the settlement proposal to the insurers by letter dated 9th June 2010 [Ex A16].
24. The Respondent submits that he in fact had instructions to put a settlement proposal to the insurer or the Defendant by virtue of clause 3 of the fee agreement executed by the Complainant on the 20th of November 2009. This agreement authorized the Respondent "...to act...either on specific instructions or in a manner as Diven Prasad Lawyers with absolute and unfettered discretion sees fit as being in my/our best interests".
25. In addition it is submitted by counsel for the Respondent that counsel has implied authority to do many things including to agree to a compromise of the action [*Halsbury's Laws of England Fourth Edition Volume 3(1) at 518*]. It then becomes a question as to whether the work being carried out by the Respondent at the time was indeed the work of the solicitor or the work of the barrister and whether the implied authority is available to the Respondent.
26. It is not in issue that the Complainant executed the fee agreement giving the authority to the Respondent to conduct the matter "with absolute and unfettered discretion" in the best interest of the Complainant. What is the effect of this authority?
27. There is no evidence before the Commission that the settlement sum was unsatisfactory or that a greater amount would have or should have been recovered should the matter have been litigated.

28. The evidence of both the Respondent and his clerk Dinesh Goundar is that the Complainant executed the certificate of discharge and that it was explained to him. It is this document that accepts the sum of \$20,000 in settlement of the claim. The Complainant denies executing the document however there is no evidence before the Commission to suggest that the thumb print on the document is not the thumb print of the Complainant.

COMPLAINT 1B

Professional Misconduct: Contrary to section 82(1)(a) of the Legal Practitioners Decree 2009

Particulars

Divendra Prasad a legal practitioner, since the 6th day of September 2010, having been instructed by one Sashi Raj to institute proceedings for damages in a personal injury matter as a result of the injuries the said Sashi Raj sustained following a motor vehicular accident which occurred on the 25th of March 2009, failed to consult the said Sashi Raj about the settlement offer proposed on behalf of the defendants in the matter between Sashi Raj v Dharmendra Singh, Mahesh Prasad Nausori Civil Action No. 63 of 2010.

29. The essential element of this allegation is that the Respondent did not consult the Complainant prior to accepting the settlement proposal for the sum of \$20,000.
30. As it is detailed above there is a certificate of discharge dated the 7th of September 2010 purportedly executed by the Complainant by fixing his left thumb print to it. The execution of this document is also supported by the evidence of the Respondent and his then clerk Dinesh Goundar.
31. There is also evidence from the Respondent of the discussions he had with the Complainant with respect to the receipt and disbursement of the monies where the Respondent says the Complainant asked that the money be retained by the Respondent and disbursed to the Complainant when he requested it.

COMPLAINT 1C

Professional Misconduct: Contrary to section 82(1)(a) of the Legal Practitioners Decree 2009

Particulars

Divendra Prasad a legal practitioner, since the 6th day of September 2010, having been instructed by one Sashi Raj to institute proceedings for damages in a personal injury matter as a result of the injuries the said Sashi Raj sustained following a motor vehicular accident which occurred on the 25th of March 2009, despite the request made by the

said Sashi Raj, failed to inform the said Sashi Raj of the settlement sum, being \$20,000, proposed on behalf of the defendants in the matter between Sashi Raj v Dharmendra Singh, Mahesh Prasad Nausori Civil Action No. 63 of 2010, which amount was subsequently accepted on the said Sashi Raj's behalf.

32. The elements of this allegation would appear to be the alleged failure of the Respondent to inform the Complainant of the proposed settlement sum.
33. The Complainant in his evidence says that he was not informed whereas the Respondent and his then clerk Dinesh Goundar both give evidence that they attended on the Complainant at the Old People's Home on the 7th of September 2010 and informed him of the proposed settlement following with acceptance of the settlement was communicated to the solicitors for the Defendants.
34. The evidence of Dinesh Goundar and the Respondent is supported by the file note made by Dinesh Goundar at the request of the Respondent on the 7th of September 2010 [Ex A6y].

COMPLAINT 1D

Unsatisfactory Professional Conduct: Contrary to section 81 of the Legal Practitioners Decree 2009

Particulars

Divendra Prasad a legal practitioner, between the 20th day of November 2009 and the 19th day of September 2010, having been instructed by one Sashi Raj to institute proceedings for damages in a personal injury matter as a result of the injuries the said Sashi Raj sustained following a motor vehicular accident which occurred on the 25th day of March 2009, failed to keep the said Sashi Raj informed of the progress of the instructions given.

35. The elements of this allegation are the failure of the Respondent to keep the Complainant informed from time to time.
36. The Complainant says that he enquired from time to time in the early stages following the giving of instructions the Respondent says that he communicated with the Complainant by telephone and he also relies upon file notes of 26th February 2010 [Ex A6k] and 3rd March 2010 [Ex A6l].
37. Both of these file notes purport to be executed by Sashi Raj the Complainant.
38. There are no letters tendered on behalf of the Respondent evidencing a communication

by him with the Complainant.

39. It is submitted on behalf of the Applicant that the Respondent had an obligations to furnish copies of the pleadings and other documents to the Complainant from time to time and to keep him informed of the progress of the matter.

COMPLAINT 1E

Professional Misconduct: Contrary to section 82(1)(a) of the Legal Practitioners Decree 2009

Particulars

Divendra Prasad a legal practitioner, since the 9th day of September 2010, having received instructions from one Sashi Raj to institute proceedings for damages in a personal injury matter as a result of injuries the said Sashi Raj sustained following a motor vehicular accident which occurred on the 25th day of March 2009, failed to disburse to the said Sashi Raj the full amount of money he was entitled to, following the settlement of the matter between Sashi Raj v Dharmendra Singh, Mahesh Prasad Nausori Civil Action No. 63 of 2010, in the sum of \$20,000.

40. The element of this allegation is the failure of the Respondent to disburse the total settlement monies to the Complainant upon their receipt by him.
41. The evidence of the Complainant is that he from time to time sought money from the Respondent and received it. The evidence of the Respondent is that he discussed with the Complainant the dispersal of his money and that the Complainant informed the Respondent that he wished him to retain the money and to disburse it to him from time to time as he requested.
42. There appears to be no dispute that the monies were in fact disbursed by the Respondent to the Complainant when requested.
43. It is also not disputed that the Respondent currently holds the sum of \$1,600 on behalf of the Complainant and that he has sought to pay this money to the Applicant but has been advised that the Applicant will not accept such payment at this time.

COMPLAINT 1F

Professional Misconduct: Contrary to section 82(1)(a) of the Legal Practitioners Decree 2009

Particulars

Divendra Prasad a legal practitioner, on the 9th of May 2011 having been instructed by one Sashi Raj to act on his behalf in claiming for damages in respect of a personal injury matter as a result of the injuries the said Sashi Raj sustained following a motor vehicular accident, attempted to unduly influence the said Sashi Raj to withdraw the disciplinary complaint he had filed with the Office of the Chief Registrar against the said Divendra Prasad.

44. The elements of this allegation are that the Respondent attempted to unduly influence the Complainant to withdraw his complaint.
45. It is common ground that the allegation relates to the events which occurred in the car park of the Respondent's premises when the Complainant attended to collect some money and remained seated in the taxi in the company of the taxi driver and a nurse from Old People's Home together with a Fijian boy.
46. The Respondent saw the Complainant when returning to his office and had a conversation with him the result of which was that the Complainant sought a further cheque in the sum of \$500 that is he received two cheques in the sum of \$500.
47. The evidence of the Respondent as to the conversation that took place with respect to the complaint is confirmed by the evidence of the taxi driver Arun Kumar.
48. Counsel for the Respondent submits that the onus rests with the person asserting undue influence to establish that it was in fact undue influence and relies upon the decision of the Fiji Court of Appeal in *Ho v Ho [1997] FJCA 53*.
49. It would appear necessary, on the basis of the submission made on behalf of the Respondent, for the Applicant to show not only that the Respondent attempted to influence the Complainant to withdraw his complaint but that he used undue influence in so doing.
50. The evidence of the nurse Neelam Reshma Kishore was that the Respondent was "a bit bossy and that he demanded that the Complainant withdraw the case". This version of the events is not supported by the taxi driver Arun Kumar who describes the conversation as the Respondent saying to the Complainant "why did you make a complaint" and the Complainant replying that he would withdraw the case. He further says that the Respondent said to the Complainant "you are spoiling my name".
51. The Respondent in his evidence says that he asked the Complainant why he had complained and he said he hadn't. The Respondent then said to him that if he had no complaint then he should withdraw his complaint.

52. The issue for determination is whether the Respondent "attempted to unduly influence the Complainant."

COMPLAINT 3

53. The Complainant Ramendra Singh is the father of Ramendra Singh who was injured in an accident on the 6th of December 2004 when he was electrocuted by an electric wire which snapped when a container truck tangled with it near his house at Fletcher Road, Vatuwaqa.

54. The Complainant attended upon the Respondent on the 17th of December 2004 and executed a document titled "Instructions to Act" [Ex A83a]. This document provided for the payment to the Respondent of a retainer of \$200 and that the Respondent would accept the sum of 30% of the total settlement or judgment plus VAT and disbursements in satisfaction of his fees.

55. The instructions contained in clause 3 an authority to the Respondent "to act with absolute and unfettered discretion" in the best interests of the client.

56. The Complainant in his evidence acknowledges that he executed the Instructions to Act.

57. In November 2005 the Complainant says he went to the Respondent and the Respondent told him he had come at the right time and then sent him to another office for purpose of executing a document. This document was identified by the Complainant as being an Affidavit in Support of a Notice of Motion for approval an infant settlement [Ex A83k].

58. The Respondent caused a Writ of Summons to issue out of the Magistrate's Court Suva on the 16th of September 2005 wherein the claim was pleaded claiming \$777.50 by way of Special Damages together with General Damages including costs up to the maximum jurisdiction of the Magistrate's Court, \$15,000.

59. By letter dated 7th October 2005 from the Respondent to Munro Leys solicitors on behalf of the Defendants the Respondent put forth a settlement proposal in the sum of \$10,000 and in doing so said "we are instructed to accept the global sum of \$10,000 out of court settlement provided the settlement takes place within 14 days" [Ex A92]

60. A further letter was written by the Respondent to Munro Leys dated 18th October 2005 seeking a response to the earlier proposal [Ex A93].

61. By email transmission of the 4th of November 2005 [Ex A94] Mr Tuitoga of Munro Leys confirmed settlement in the sum of \$3,000 inclusive of costs/interest. It would appear that this email followed a conversation between the Respondent and Mr Tuitoga.
62. By letter dated 4th November 2005 the Respondent advised Munro Leys that "our client has agreed to accept the sum of \$3,000 in full and final settlement" [Ex A95]. It would appear from the evidence that this letter was written after the visit by the Complainant to the Respondent in November 2005.
63. The Complainant says there was never any discussions about settling the claim and that the claim should have gone to court. The Complainant however acknowledges that he attended the offices of another solicitor executed a document which he identified as being an Affidavit in Support of a Notice of Motion seeking approval of an infant settlement.
64. The Notice of Motion went before the Magistrate's Court of 14th of November 2005 when the settlement sum was approved by the court.
65. The Complainant acknowledges that he received a cheque in the sum of \$2,000 from the Respondent after the court had made the order approving the settlement. The sum of \$2,000 appears to accord with a settlement amount of \$3,000 and deduction of 30% by way of fees in accordance with the instructions given by the Complainant to the Respondent.
66. Evidence was given before the Commission from Daniel Singh solicitor who witness the execution of the affidavit by the Complainant. Whilst Mr Singh could not possibly recollect the circumstances surrounding the execution of the affidavit he gave evidence of his normal practice which included having a clerk present together with the clerk from the Respondent's office and explaining the contents of the document to the deponent prior to its execution. He also emphasised that he did not and does not take the execution of affidavits lightly and that they were at all times sworn on the relevant holy book.
67. The Complainant says that he was contacted by Dinesh Goundar a clerk to the Respondent asking him to come to the office to withdraw his complaint after it was made. Dinesh Goundar in his evidence denies that this took place and says he has never met the Complainant.
68. The Complainant also complains that there was no award or amount by way of damages for his house. The statement of claim and the instructions only relate to the personal injuries to his son.

69. The complaint was lodged by the Complainant in 2008 notwithstanding that he executed the affidavit in Support of the Notice of Motion for approval of the settlement sum and received the sum of \$2,000 in November 2005.
70. The Complainant says that the complaint was prepared by his brother-in-law a resident of America.

COMPLAINT 3A

Professional Misconduct: Contrary to section 82(1)(a) of the Legal Practitioners Decree 2009

Particulars

Divendra Prasad a legal practitioner, between the 25th day of September 2005 and the 7th day of November 2005, having received instructions to institute a claim for damages on behalf of one Ramendra Singh f/n Dip Singh in the said Ramendra Singh's capacity as guardian and next friend of his son also known as Ramendra Singh as a result of the injuries the younger Ramendra Singh sustained after a container truck owned by Carpenters Fiji broke an electrical power line near the said Ramendra Singh's home in Suva, leading to the electrocution of the younger Ramendra Singh which caused him to sustain injuries, failed to inform the said Ramendra Singh f/n Dip Singh of the settlement proposal offered by Munro Leys on behalf of the defendants in the matter Ramendra Singh v Sushil Chand and Carpenters Fiji Ltd Suva Civil Action No. 322 of 2005,

71. The elements of the allegation are that the Respondent failed to inform the Complainant of the settlement proposal offered by Munro Leys.
72. The evidence of the Complainant is that he was informed of the settlement proposal offered by Munro Leys when he attended the office of the Respondent.
73. There is no evidence that the Respondent had specific instructions, apart from clause 3 of the instruction sheet, to put any settlement proposal to Munro Leys however this is not the subject of this allegation.
74. The Complainant acknowledges that he executed an affidavit in support of a Notice of Motion for approval of the settlement sum.
75. Daniel Singh solicitor gives evidence that his normal practice is to explain and read to the deponent an affidavit prior to its execution whilst he has no specific recollection of the execution of this affidavit by the Complainant.

76. The Complainant does not deny executing the affidavit nor visiting the Respondent and being told of the proposed settlement but says that he did not have his glasses with him and was unable to read the document.

COMPLAINT 3B

Professional Misconduct: Contrary to section 82(1)(a) of the Legal Practitioners Decree 2009

Particulars

Divendra Prasad a legal practitioner, between the 3rd of July 2009 and the 31st of August 2009 being the subject of a pending disciplinary complaint made by Ramendra Singh f/n Dip Singh lodged with the Office of the Chief Registrar pursuant to the Legal Practitioners Decree 2009 attempted to influence the said Ramendra Singh f/n Dip Singh to withdraw his complaint and in exchange the said Divendra Prasad would re-open the civil case against Carpenters Fiji Limited and Sushil Chand in the Suva High Court at no cost to the said Ramendra Singh.

77. The elements of this allegation are that the Respondent attempted to influence the Complainant to withdraw his complaint. It is not alleged that the Respondent attempted to "unduly" influence the complainant.
78. The Respondent denies having met the Complainant subsequent to the complaint being lodged. Dinesh Goundar denies having at any times spoken to the Complainant.
79. The infant settlement having been approved by the court it seems somewhat improbable that an offer would be made to re-open the case by the Respondent.

STANDARD OF PROOF

80. The relevant standard of proof to be applied to disciplinary proceedings was considered at length by The Court of Final Appeal of the Hong Kong Special Administrative Region in *A Solicitor and The Law Society of Hong Kong* Final Appeal No. 24 of 2007 (Civil). There the court considered inter alia relevant authorities from the Privy Council, the High Court of Australia and the High Court of New Zealand (whose decision in *Z and Dental Complaints Assessment Committee*, [2007] NZAR 343, was subsequently confirmed by the Supreme Court of New Zealand [2008] NZSC 55).
81. The Privy Council in *Campbell v Hamlet* [2005] UKPC 19 held that the criminal standard of proof was to be applied in all disciplinary proceedings concerning the legal profession.
82. The High Court of Australia in *Rejtek v McElroy* (1965) 112 CLR 517 held that the civil standard of proof applied but said at paragraph 10:

"The "clarity" of the proof required where so serious a matter as fraud is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved: see Briginshaw v Briginshaw (1938) 60 CLR 336 per Dixon J.."

83. And at paragraph 11 the court said:

"No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge: see Helton v Allen (1940) 63 CLR 691 per Dixon, Evatt and McTiernan JJ."

84. The Supreme Court of New Zealand in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 in applying the flexible application of the civil standard said at paragraph 116:

"We acknowledge the serious impact that adverse disciplinary decisions can have on the right of individuals to work in their occupation and on personal reputations. The flexible application of the civil standard will, however, give all due protection to persons who face such proceedings."

85. In *A Solicitor and The Law Society of Hong Kong* the Chief Justice at paragraph 116 said:

"In my view, the standard of proof for disciplinary proceedings in Honk Kong is a preponderance of probability under the Re H approach. The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability. If that is properly appreciated and applied in a fair-minded manner, it will provide appropriate approach to proof in disciplinary proceedings. Such an approach will be duly conducive to serving the public interest by maintaining standards within the professions and the services while, at the same time, protecting their members from unjust condemnation."

86. I am therefore of the opinion that the appropriate standard of proof to be applied is the civil standard varied according to the gravity of the fact to be proved, that is the approach adopted in amongst other places, Australia, New Zealand and Hong Kong.

CONCLUSION

Complaint 1A

87. The Respondent relies upon the instructions executed by the Complainant as giving him absolute and unfettered discretion to conduct the matter in the interest of the

Complainant. It is submitted on behalf of the Respondent that these instructions are sufficient to enable the Respondent to put a settlement proposal to the Defendant without instructions from the Complainant/Plaintiff.

88. The instructions seek to expand the provisions that are referred to on behalf of the Respondent detailed in [*Halsbury's Laws of England Fourth Edition Volume 3(1) at 518*]. These provisions have been considered on many occasions in many countries with respect to the conduct of litigation by Barristers and in particular the immunity from liability in negligence in the cause of litigation that is available to a Barrister.

89. The High Court of Australia considered the issue in *Giannarelli v Wraith 165 CLR 543* where Mason CJ said at 556:-

"The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case. And, if he notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground for appeal.

It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case."

90. The High Court of Australia has subsequently extended the immunity from suit to include solicitors when acting as advocates - *Boland v Yates Property Corporation Pty Limited 167 ALR 575*.

91. The very essence however of the immunity is limited to conduct of an advocate in the course of litigation. The conduct here complained of is conduct of a solicitor acting outside the environment of a court.

92. For the complainant to give away his rights as intended by clause 3 of the instructions would, in my opinion, require there to be independent advice in order that the Complainant was aware of the scope of the instructions being given to the solicitor at

that time.

93. In the circumstances therefore I am of the opinion that I cannot be satisfied that the Respondent had instructions from the Complainant to write to the solicitors for the Defendants proposing a settlement of the claim in the manner that he did.

94. I find the complaint established.

Complaint 1B

95. There is evidence before me that the Respondent in fact consulted the Complainant prior to accepting the settlement proposal in the sum of \$20,000. Acceptance of the settlement sum was not effected until such time as the certificate of discharge was executed by the Complainant on 7th of September 2010 by affixing his left thumb print to the document.

96. The only evidence rebutting the evidence of the Respondent and his clerk Dinesh Goundar is that of the Complainant who says that he did not execute the document. No evidence has been called as to the authenticity of the thumb print affixed to the document.

97. In view of the evidence that has been placed before me I cannot be satisfied that the Complainant did not execute the document accordingly I cannot be satisfied that the Respondent failed to consult the Complainant about the proposed settlement.

98. The complaint is not established.

Complaint 1C

99. The allegation in this complaint is limited to a failure to inform the Complainant of the settlement sum.

100. As it is detailed above I am satisfied that the Complainant executed the certificate of discharge on the 7th of September 2010 by affixing his thumb print to it. The execution of this document would clearly amount to the Complainant being informed of the settlement sum prior to or at the time of its acceptance.

101. The complaint is not established.

Complaint 1D

102. The allegation is that the Respondent failed to keep the Complainant informed of the conduct of the proceedings.
103. It is submitted on behalf of the Applicant that the Respondent had an obligation to regularly correspond and communicate with the Complainant and to forward to him copies of the pleadings and other documents generated from time to time.
104. The Complainant says that he had contact with the office of the Respondent in the early stages of the matter and the Respondent says that he communicated with the Complainant by telephone when required from time to time.
105. There are two documents [Ex A6k] and [Ex A6l] being file notes bearing the signature of the Complainant which confirm that there was in fact some communication up to at least the 3rd of March 2010. There is no evidence other than the oral evidence of the Respondent as to any communication between that date and the 7th of September 2010. A period of about six months.
106. I see no need for copies of pleadings to be given to clients as a matter of course and I do not think that a period of six months is an extensive period for there to have been no communication between the solicitor and his client particularly taking account of the slow progress of litigation in Fiji.
107. Having said that there is an obligation on a solicitor to keep a client informed of the progress of any matter and whilst I do not consider the Respondent's conduct to amount to a serious breach of that obligation it is however a breach and accordingly I find the complaint established.

Complaint 1E

108. It is not in dispute that the Respondent did not and has not disbursed the settlement monies to the Complainant. The Respondent says that the monies were disbursed in accordance with the Complainant's instructions and that the sum of \$1600 is still held on behalf of the Complainant. The Respondent says that he has attempted to pay these monies to the Applicant who has refused to accept the monies at this time.
109. The obligation on the Respondent with respect to the disposal of the settlement monies was to act in accordance with the instructions of the Complainant from time to time and on the evidence that has been placed before me I am satisfied that has occurred and accordingly I find that the complaint has not been established.

Complaint 1F

110. There is conflict in the evidences as to the content of the discussion between the Complainant and the Respondent that took place in the car park of the Respondent's office but there is no dispute that a conversation did take place that concerned the Complainant withdrawing his complaint.
111. The allegation against the Respondent is that he "unduly" influenced the Complainant to withdraw his complaint. This requires the Applicant to establish that there was in fact **undue influence - Ho v Ho [1997] FCA 53**.
112. The evidence of the nurse present at the time was that the Respondent spoke in a way that was "a bit bossy".
113. Whilst it might be that the actions of the Respondent attempted to influence the Complainant to withdraw his complaint I am required to be satisfied that in fact the Respondent attempted to **unduly** influence the Complainant to withdraw his claim.
114. On the conflicting evidence that is before the Commission I am unable to be satisfied that the Respondent in fact **unduly** influenced the Complainant and accordingly the complaint has not been established.

Complaint 3A

115. The element of this allegation is that the Respondent failed to inform the Complainant of the settlement proposal offered by the solicitors for the Defendants in the sum of \$3,000. The evidence of the Complainant is that he attended upon the office of the Respondent and was informed by the Respondent of the settlement proposal.
116. His evidence further is that he was then sent to another office where he executed a document which he later identified as being an affidavit in support of a Notice of Motion for the approval of the infant settlement.
117. There is also evidence from the solicitor before whom the affidavit was sworn as to his normal procedure in explaining the contents of such documents and the manner in which he causes them to be executed.
118. The Complainant says that on that day he did not have his glasses with him and was unable to read the document he does not however say that he was not informed on that day of the proposed settlement and the procedure that was taking place at that time.

119. He also acknowledges on that day, after the court approved the settlement, he received the sum of \$2,000.

120. In all of the circumstance I cannot be satisfied that the complaint is made out.

Complaint 3B

121. Unlike the earlier allegation here it is alleged that the Respondent attempted to influence the Complainant to withdraw his complaint. It is not alleged that he attempted to **unduly** influence the Complainant to withdraw his complaint.

122. The Complainant says he was contacted by Dinesh Goundar a clerk then in the employ of the Respondent asking that he come to the office to withdraw his complaint. Dinesh Goundar in his evidence denies ever having met or made contact with the Complainant.

123. The Complainant also in his evidence says that as an inducement to withdraw his complaint the Respondent offered to reopen the case at no cost. This is a somewhat improbable scenario in the light of the settlement having been approved on the basis of an affidavit executed by the Complainant.

124. On the evidence before the Commission I cannot be satisfied that the complaint s been established.

ORDERS

1. The Respondent is found guilty of professional misconduct with respect to Complaint 1A.
2. The Respondent is found guilty of unsatisfactory professional conduct with respect to Complaint 1D.
3. Complaints 1B, 1C, 1E, 1F, 3A and 3B are dismissed.



**JOHN CONNORS
COMMISSIONER**



24 JANUARY 2012

