

# BUT COUNSEL SAID SO . . .

Involving counsel is not a shield to a professional negligence claim.

Solicitors typically brief counsel for their specialist skills and expertise in particular areas of law and advocacy. While solicitors may rely on counsel's advice, they have independent duties to the court and to the client requiring them to bring independent judgment to that advice and the matter in which they are retained.

LPLC regularly sees solicitors trying their hand at unfamiliar or highly specialised areas of the law, hoping that counsel's guidance will see them through. The more specialised the area of law, the heavier the reliance likely to be placed on counsel's guidance. When things go wrong and the solicitor is sued in negligence or is subject to a claim for wasted costs, they are often heard to say "but I relied on counsel" or "I am unsure why we did it that way. You'll have to ask the barrister".

Solicitors have a responsibility for having a basic understanding of the law involved in any case they handle and for making a judgment about any advice they receive. However, solicitors are not bound to know all the law. Their duty is to exercise the reasonable degree of care and skill to be expected of competent and reasonably experienced solicitors.<sup>1</sup> In the words of the Hon Michael Kirby, it is "responsible conduct"<sup>2</sup> for a solicitor to seek advice from the specialised bar. Since the 13th century, there has been a division of function between barristers and solicitors reflecting the different skills each of these branches of legal practice will bring to bear: a "... solicitor will not usually have the experience or the skills possessed by the barrister. That is why the barrister is briefed".<sup>3</sup>

## Seeking advice

A solicitor who seeks the advice of counsel is normally justified in relying on that advice and is not negligent by doing so: the ordinary rule is that "... save in exceptional circumstances a solicitor cannot be criticised where he acts on the advice of properly instructed counsel".<sup>4</sup>

This ordinary rule is, however, subject to significant qualifications. And despite the ordinary rule, it is rare that a solicitor would avoid liability in negligence because they have relied on counsel.

## Duty to conduct proceeding

Unthinking reliance on counsel is not sufficient to discharge the solicitor's duty to the court to ensure the proceeding is conducted responsibly.<sup>5</sup> A solicitor who goes on the record as solicitor for a party is representing to the court that he or she has the necessary level of competence to act as solicitor in the proceeding: "[g]oing on the record is not a mere formality".<sup>6</sup>

While it is sometimes difficult, particularly for a junior solicitor, to gainsay counsel, the court still expects that from the time a person has signed the roll of practitioners, "they will exercise the independence of mind and commitment to the rule of law that is necessary for all lawyers".<sup>7</sup>

## Not a post box

The solicitor is not merely a post box, conveying counsel's recommendations to the client without consideration as to whether they will advance the client's interests. The solicitor retains a separate and independent duty to the client in tort and contract. Accordingly, "[t]he solicitor must exercise independent judgment to the extent that it is reasonable . . . having regard to the solicitor's reputed knowledge and experience, the complexity of the case and the skill and experience of the barrister who has been retained".<sup>8</sup>

Recent English authority suggests that a solicitor's relative inexperience compared to the barrister's, does not make the solicitor any less liable.<sup>9</sup> The solicitor is required to ensure that counsel's advice is properly reasoned and must be satisfied that the advice is tenable.<sup>10</sup> If the solicitor reasonably considers the advice is obviously wrong, the solicitor must reject the advice and advise the client accordingly. The solicitor may be required to advise about retaining a new barrister.<sup>11</sup> Where advice is right, the solicitor should also be able to explain why to the client, and to the court if required.

While briefing a barrister to provide expertise and advice is good practice, it does not absolve a solicitor from applying independent judgment and expertise and is not a solution to dabbling. ■

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1. *Regent Leisuretime Limited v Skerrett* [2006] EWCA 1184.
2. *Boland v Yates Property Corp Pty Limited* [1999] HCA 64.
3. *Harley v McDonald* [1999] 3 NZLR 545 (CA).
4. *Davy-Chiesman v Davy-Chiesman* [1984] Fam 48 per May LJ.
5. *Patel v Tailor* [2021] NZHC 3164.
6. Note 3 above.
7. *Re Albert (a barrister) and McLean (a solicitor)* [2021] VSC 297.
8. Note 2 above. See also *Bolitho v Banksia Securities Limited* [2021] VSC 666.
9. *Richard Terrence Percy v Merriman White* [2021] EWHC 22 (Ch).
10. Note 3 above.
11. *Boland v Yates Property Corp Pty Limited*.

## TIPS

- It is not an acceptable response to a negligence claim or a claim for wasted costs that you thought counsel knew what they were doing.
- Ensure you understand counsel's advice and the reasons for it. If appropriate, ask counsel to explain and justify their advice. Document relevant discussions about this.
- If you think counsel's advice is incorrect, advise the client. Consider alternative counsel.
- Ensure you can explain to the client, and to the court if required, the effect of counsel's advice and why that advice is justifiable.