

DANGERS IN OVER-RELIANCE ON COUNSEL

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Solicitors, particularly those in general practice, are entitled to rely on advice from counsel who specialise in the relevant area of law. However, the solicitor must take steps to ensure counsel is adequately briefed. The obligations on solicitors to form their own independent views cannot be shifted to counsel briefed to advise, except in exceptional circumstances.

A solicitor cannot adopt a passive role in passing on counsel's advice, or submissions or correspondence settled by counsel, to the client.

The Full Federal Court in *Yates v Boland* (1998) 157 ALR 30 held that counsel, not having alerted the solicitors to any deficiency in the experts' reports, did not absolve the solicitors from their obligations. In *Heydon v NRMA & Ors* (2000) 51 NSWLR 1 the issue was whether the solicitors had expressed their doubts to counsel on counsel's views. In *Wakim v McNally* (2002) 121 FCR 162, the Federal Court held that the solicitor, experienced in the area, had a duty to consider the relevant authorities in considering counsel's advice.

The more specialist the nature of the advice from counsel, the more reasonable it will be for a solicitor in general practice to accept and to act on it. A solicitor with experience in the particular area of law in which advice is sought cannot rely on counsel to the same degree. The English Court of Appeal held that a solicitor with specialist expertise must bring their experience to bear: *Langsam v Beachcroft LLP* [2012] EWCA Civ 1230.

The mere act of retaining counsel will not of itself protect against a finding of breach of duty. Reliance on counsel's advice must be proper and reasonable in the circumstances. The English High Court held that a solicitor who reasonably relies on counsel is not negligent if counsel instructed is competent, experienced and properly instructed: *Hellard & Anor v Irwin Mitchell* [2013] EWHC 3008.

Snapshot

- Solicitors, whatever their level of expertise, must give attention to the issues considered by counsel and not blindly accept counsel's advice.
- If the solicitor reasonably considers that the barrister's advice is obviously or glaringly wrong, the solicitor has a duty to reject it.
- A solicitor is not entitled to shrink from raising doubts on counsel's advice, even from eminent counsel.

Under the proportionate liability regime in the *Civil Liability Act 2002* (NSW), the Court will consider whose acts or omissions caused, independently of each other or jointly, damage or loss. The solicitor is liable for the extent to which their breach of duty contributed to the loss or damage, not necessarily the full extent of the loss. In *Pritchard (t/as Pritchard Law Group) v DJZ Constructions Pty Ltd* [2012] NSWCA 413, the NSW Court of Appeal, in apportioning liability between counsel and solicitors, took into account that counsel's involvement had been to a far more limited extent than the solicitor's and his liability was proportionally less. The following are examples that Lawcover has dealt with in its claims experience where solicitors were alleged to have failed to turn their minds to the correctness or adequacy of advice from counsel:

- Conveyancing solicitors, acting for borrowers on a loan in proceedings by a lender, relied on counsel's opinion without considering *Contracts Review Act* defences;
- A sole practitioner received instructions to dispute a builder's payment claim. The solicitor did not consider the relevant legislation. Counsel gave advice outside the time limit;

- Solicitors in general practice briefed counsel to appear who did not have the requisite expertise and was not prepared for a final hearing.

A solicitor should not assume that counsel is considering all relevant issues. In preparing for a hearing, a solicitor should not assume that counsel will advise of all relevant factors, such as risks or settlement opportunities. Counsel's focus on a brief to appear is likely to be on matters intimately connected with a hearing rather than the overall conduct. It is the solicitor who retains the day-to-day conduct of a matter and is responsible for directly advising the client.

In briefing counsel, prudent solicitors will:

- ensure counsel is adequately briefed. Inform counsel of all relevant factual circumstances. Provide counsel with all relevant documents and client instructions. Make clear the issues on which counsel is requested to advise;
- keep counsel updated on any developments that could affect counsel's advice;
- come to their own view on an issue. The solicitor may need to research the issue and consider any changes in legislation or recent and relevant authorities;
- consider whether there is a basis to doubt the correctness of counsel's advice. Does counsel's advice need to be clarified? Has counsel understood the factual background, the intention of the parties in a transaction and the client's instructions? Is counsel's advice a sufficiently comprehensive response to the questions upon which counsel had been briefed to advise?;
- expressly state to both counsel and the client if they are relying on counsel's advice. If they are in general practice and are relying on counsel's expertise in a particular area of law or on certain points, make clear to clients in providing them with counsel's advice that they do not have expertise in the particular area and that they are relying solely on counsel's advice. **LSJ**