

Quick cautionary tales for a better practice

Episode 81

Years later the file spoke

Have you ever worried that a decision you made during a matter could come back years later as a negligence claim?

That's exactly what happened in the NSW Supreme Court decision of *Boensch v Bingham*.

A former client brought six separate professional negligence claims against his solicitor years after the matter concluded. This included the allegation that the solicitor should never have allowed the client to pursue a High Court matter because it had little prospect of success. However, the court found the solicitor had sought and relied on counsel's advice about prospects and because that advice was not "obviously or glaringly wrong", it was reasonable for the solicitor to rely on it.

The client also alleged the solicitor had failed to act in relation to bankruptcy proceedings. Again, the court found the documentary evidence showed that work fell outside the scope of the retainer.

The remaining claims relating to costs, a cross-claim, exemplary damages and forfeiture of fees were also dismissed. The solicitor successfully defended all six claims.

The outcome of professional negligence claims often turns on whether a solicitor can prove what advice was given, what risks were explained, and what work was, or was not, included in the retainer. Even where a solicitor has acted appropriately, poor records can make defending a claim far more difficult.

To help protect yourself:

- Define and document the scope of the retainer.
- Confirm instructions in writing.
- Document reliance on specialist counsel where appropriate.
- Maintain comprehensive file notes; and
- Keep clients informed throughout the matter, particularly where responsibilities change or certain work falls outside the scope of your retainer and document those communications.

Years after the events in question, the solicitor wasn't relying on memory. He was relying on his file. Because when a matter is scrutinised years later, your file may be speaking on your behalf.

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Boensch v Bingham (No 2) [2026] NSWSC 529