

Bar Association of Queensland 2009 Annual Conference

LAWYERS, EMOTIONAL DISTRESS AND REGULATION

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The session was advertised as being about work-life balance but seems to have morphed into a discussion about the prevalence of emotional distress among lawyers and what we can and should be doing about it. My interest of course stems from the presumption that emotional distress among lawyers reveals itself in behaviours that fall short of the standards of competence and diligence and the ethical standards that members of the public and the profession are entitled to expect of them.

There has been a lot of research that describes the prevalence of emotional distress among lawyers but none as I understand it that describes or measures its impacts on their professional standards.¹ We can be pretty sure there's a link, however, even if we don't know the extent of it. Lawyers rely heavily on their good judgement and capacity to think clearly and dispassionately, for a start, and emotional distress by its very nature impairs those intellectual functions. Furthermore I don't doubt for a moment that emotional distress is the elephant in the room in a large proportion of the matters we deal with at the Commission and it's explicit in many of the matters that come before the disciplinary bodies.

We have nothing like accurate data, but my best guess is that it features in 30% of the disciplinary matters we deal with. I'm comforted making that estimate by the fact that the professional indemnity insurers for Queensland solicitors tell me quite independently their best guess is that it features in about 30% of professional negligence matters as well.

PREVALENCE

The prevalence figures are deeply troubling. The BeyondBlue and Beaton Consulting Annual Professions Survey of April 2007 found that lawyers are two and a half times more likely to suffer from clinical depression than other professionals.ⁱⁱ Late last year Sydney University's Brain and Mind Research Institute put it at four times more likely. That research involved 2400 lawyers and found that one in three solicitors and one in five barristers report depression.ⁱⁱⁱ And it seems lawyers are more likely to turn to non-prescription drugs and alcohol to manage their depressive symptoms than their professional peers, and that about one in three 'self-medicate' in this way.^{iv}

The local data closely mirrors the data elsewhere. Various North American studies show that lawyers are twice as likely to suffer from depression than the general population^v; three and a half times more likely than other employed people^{vi} and four times more likely than other professionals.^{vii} Studies show that lawyers are twice as likely to become alcoholics^{viii} and, if they are male lawyers, twice as likely as men in general to commit suicide.^{ix} According to one leading Canadian psychiatrist, one in every eleven lawyers contemplates suicide every month.^x

Let's get real about what this data means. There are several hundred barristers in this room and it means that more than a few busloads of you are struggling to cope and at least some of you are at life-threatening risk. I'm not going to ask you to turn to the person next to you and ask them to bare their soul but there's a fair chance if you did and they were honest that you'd discover they're doing it tough.

The problem is not that a certain percentage of lawyers are anxious and depressed and vulnerable to self-harm. Lawyers suffer the slings and arrows of outrageous fortune just like everyone else. The problem and it's confronting is that the percentage of lawyers who are anxious and depressed is so much higher than the percentage in the population at large, and by a factor of at least several times.

So what is it about the legal profession or legal culture that puts lawyers at such risk? Why is doing law so toxic to so many lawyers? Is it that a certain sort of person is

attracted to do law? Does it attract a disproportionate number of people with a predisposition to anxiety and depression? Do they self-select?

It might appear at first blush that the law recruits more than its share of vulnerable people. Law students are significantly more likely to suffer emotional distress than other students. The Brain and Mind Research Institute surveyed 738 law students as part of the research I've just mentioned and 40% of them reported distress severe enough to warrant clinical or medical assessment compared to 13% of the general population.^{xi} I note that Professor Prue Vines of the University of New South Wales Law School reports research findings at her university demonstrating that 'law students' attitudes put them at greater risk than other students.' She says they 'place an extremely high emphasis on marks and studying law to please others, which gave them less of a feeling of control over their lives.'^{xii}

Interestingly however detailed empirical studies in North America point the finger squarely at legal culture and the way it's taught. Let me read to you from the report of a comprehensive review of clinical legal education in the US.^{xiii} It describes 'clear and growing data that legal education is harmful to the emotional and psychological well-being of many law students.' It describes a lengthy longitudinal study which found that incoming law students were happier, better adjusted and more idealistic and intrinsically oriented than a comparison undergraduate sample. It found however that while 'students enter law school healthier and happier than other students [they] leave law school in much worse shape.'

The report cites another study which found that 'levels of psychological distress rose significantly for first year students and persisted throughout law school and for two years after graduation' and that that the findings were 'particularly strong because they remained consistent regardless of age, gender and law school grades.' It described symptoms including depression, obsessive-compulsive behaviour, feelings of inadequacy and inferiority, anxiety, paranoia, social alienation and isolation. It concludes that the empirical evidence 'refutes the idea that problems in law school and the profession result from self-selection by people with skewed values or who are already unhappy.'

No doubt there is a lot more research to be done, and to be done locally, but the available evidence is all deeply troubling. So what is it about legal culture or doing law that makes it so toxic to so many lawyers and that puts lawyers even baby lawyers at such risk?

LAWYERS AND LEGAL CULTURE

This is what the North American report I've just quoted has to say: 'thinking like a lawyer converts students into people who define people primarily according to their legal rights, who learn to resolve legal problems by linear application of legal rules to those rights, and using competitive approaches to resolving problems. Thinking like a lawyer is fundamentally negative. It is critical, pessimistic and depersonalising. It is a damaging paradigm in law schools because it is usually conveyed, and understood as a new and superior way of thinking rather than an important but strictly limited legal tool.'^{xiv}

Professor Ian Hickie of the Brain and Mind Research Institute observed following the research I've mentioned already that 'attributes common to lawyers such as perfectionism, anxiety and obsessionism put them at high risk of depression.'^{xv} The same theme emerges in the candid things lawyers have to say about being lawyers and doing law almost every week in newsletters and magazines and the legal affairs pages of the Friday newspapers. Here is a random selection:

- 'the traits that make people good lawyers, such as argumentativeness, workaholism and egotism predispose them to anxiety and depression.'^{xvi}
- 'lawyers are taught to aim for perfection, to be aggressive and to be emotionally detached. They intellectualise, rationalise and displace problems on to others... They tend to have fairly elaborate denial mechanisms. And they tend to challenge anything they've been told... Pessimistic lawyers tend to excel in their job but the same trait can create havoc in their personal lives.'^{xvii}

- it's an integral part of [a lawyer's] job to trawl through documents, proposals and statements made by opponents and to search for flaws but this style of thinking becomes automatic and carries over in to non-working hours and effects families and friends who do not enjoy their ideas being picked apart.^{xviii}
- 'pessimists tend to flourish in the legal profession because pessimism is associated with prudence. That means by natural learning and certainly by the cultural environment and even by training in university, we're trained to see the worst in things';^{xix}
- Lawyers 'are very conscientious. We aim to do the very best we can. We pay attention to every little detail. We are unrelentingly perfect. We come as close as mortals can to being perfect. We are functioning at a very high level but then take on the pressure to maintain the standard.'^{xx}

It may well be that personal attributes of these kinds reflect the inherent realities of the work lawyers do every day and will inevitably become deeply ingrained in a lawyer's persona. It's hard to imagine lawyers being otherwise. Professor Hickie notes however and he's right that while lawyers' personal attributes such as those we've just described may be difficult to change 'other aspects of the profession like its competitive and individualistic nature could be changed in favour of a more collegiate approach.'

So let's turn from what lawyers have to say about the personal attributes of lawyers to what they have to say about legal culture. They say some extraordinarily candid things. I'll mention just a few of them beginning with what numerous commentators including a number of Chief Justices have called 'the tyranny of the billable hour'.

This is a tyranny for solicitors rather than barristers under this guise but I don't doubt for a moment that barristers face the same or similar tyranny and I'll leave you to do the translation. The tyranny ultimately is what Brett Walker SC has referred to as lawyers and their love of money.^{xxi}

One dimension to the tyranny, of course, is the increasingly long hours that lawyers are working, at some cost to themselves and their families. I understand for example that 12% of the legal profession worked fifty hours a week or more four years ago and that two years ago the number had risen to 29%.^{xxii} That aspect aside, the time-costing method of billing has been widely criticized. The criticisms are well documented - that it rewards inefficiency and the like - and I will not repeat them here.

But listen to this: the pressure to achieve billable hours targets means that 'the temptation, and worse than that, the common practice... is to mask such inhumane pressure by inflating time sheets, undertaking unnecessary work, exaggerating the need to review everything during discovery, undertaking overzealous due diligence processes and other practices readers will be familiar with. In other words, we cheat and lie to make ends meet. We act dishonestly as a matter of course... Everyone does it.'^{xxiii}

The references to 'common practice' and to the fact, apparently, that 'everyone does it' are disturbing. They may well be exaggerated but they find some support in the results of empirical surveys. A recent survey of young lawyers in New South Wales found, for example, that 'billing pressure is pushing many young lawyers to fudge their time sheets. Only 38% of respondents said they always recorded their time accurately, citing billing pressure from senior staff.'^{xxiv} It seems, if the results were correctly reported, that 62% of young lawyers in New South Wales admit to having lied at least once in a way that effectively defrauded a client. That will not have been an emotionally neutral event. It will have come at a psychological cost.

Or consider this: the pressure to achieve billable hours targets nurtures 'extremely competitive [workplace] cultures in which it is very difficult to build any kind of team spirit... because of the extreme competition between members of the firm'^{xxv} and workplace cultures in which 'bullying and harassment are common.'^{xxvi}

I don't doubt that bullying and harassment are common, much more common than any complaints data might suggest, and that it causes the victims often significant emotional distress. Young lawyers often talk about being bullied and I note that some of them, 'unable to speak honestly to their colleagues in law firms', recently started a blogspot

they hope will encourage victims to seek help. It specifically links emotional distress among young lawyers to workplace bullying and harassment: 'lawyers at all levels face lawyers who yell, lawyers who set unrealistic deadlines; lawyers who give you a serious amount of work at 6pm on Friday and expect it to be on their desk first thing on Monday morning.'^{xxvii}

None of that will be unfamiliar to young barristers who tell stories about opponents, typically older and more experienced opponents, sighing or coughing or making faces during mediations and court hearings or making sarcastic and condescending remarks about their age or relative inexperience, presumably to put them off.

The claims about the prevalence of bullying and harassment might be exaggerated, too, but once again find some empirical support. A recent survey of lawyers in Victoria found that almost 70% of them reported having been humiliated during the previous year by sarcasm, criticism or insults from colleagues.^{xxviii} Furthermore I have been told privately by Law Care counsellors that bullying and harassment is one of the two most significant reasons solicitors give for seeking out their services. The other is economic uncertainty.

TAKING THE ISSUE SERIOUSLY

Lawyers often talk about ethics as if it's the stuff of learned texts or judgements of the courts or disciplinary bodies in relation to ethical matters and sometimes as if it's just another area of substantive law.

That's a very narrow way of looking at things. Ethics includes all of those things of course but should be conceived more broadly. Ultimately legal ethics is about how lawyers go about 'doing law'. As one text book puts it, it's about their – your - conduct and customs and cultures as lawyers, and how 'you lead your lives as lawyers, make decisions about your clients, your opponents, yourselves and your families, in your search to be 'good' lawyers and 'good' people.'^{xxix}

What I'm suggesting is that the prevalence of emotional distress among lawyers is one of the greatest ethical challenges facing the profession. It seems to me that an ethical profession confronted with the sorry facts I've just described will take the health and emotional well-being of its members very seriously indeed. Their lethargy and impaired judgment puts emotionally distressed lawyers at ethical risk and comes at a high cost to them and their families if their symptoms are left untreated, and potentially to their law firms and their clients as well.

So how should we respond? Some of the problematic facts I've described – the learned pessimism, for example – are likely to prove intractable at best and may well be inherent in the practice of law. But there's a lot that can be done.

Law schools for example need to find ways to equip their students with the emotional skills and strength and resilience they'll need to survive as lawyers, and to give those of them who remain vulnerable some good old fashioned vocational guidance directing them to areas of practice where they'll be least at risk or perhaps to another career path altogether.

The professional bodies need to find ways to equip their members similarly and, for example, to help them better make the transition from work to home where their learned pessimism and tendency to challenge anything they've been told can create havoc.

And clearly we need to look beyond the merely personal and seek to identify any underlying structural or cultural issues that contribute to the problem - the 'inhumane pressure' to achieve billings targets, for example, or excessive adversarial zeal or an acceptance of bullying and harassment, inflexible working arrangements, poor supervision practices, inadequate management systems and the like - and, if so, to devise remedial strategies. We need to talk about and research these issues and find and implement solutions.

And of course we all of us need to campaign to combat the stigma that prevents lawyers and others suffering emotional distress from acknowledging their difficulties and seeking help.

That all goes without saying. We also need however to develop more effective regulatory responses.

REGULATORY RESPONSES

The most obvious question is whether lawyers should be under an ethical duty to report their impaired colleagues to the regulator. It's not a novel idea. The professional conduct rules in every state in the US but for California and Kentucky already require just that.^{xxx}

It's a confronting question in this country however where 'dobbing' goes against the grain. I haven't yet been able to persuade the professional bodies that lawyers should be under an obligation even to cooperate with properly constituted investigations into suspected misconduct by their peers, let alone an obligation to pro-actively report suspected professional misconduct as is the case in England and Wales, for example, and as the *Legal Profession Act* already requires in relation to suspected irregularities in the handling of trust monies.

I don't ask the question to urge any particular answer upon you but simply to start a discussion. It's a good place to start because it forces the question, if we say 'no', of exactly how far we can retreat towards doing nothing before an obligation to do something cuts in. And sooner or later it does. We do the public and the profession no favours by turning a blind eye, and we do our emotionally distressed colleagues no favours either by letting them dig a hole for themselves and risking the consequences being a whole lot worse.

We all know the score. We've all had to ask ourselves just how much a friend has had to drink, and whether and when we should intervene to prevent them getting into their car.

These are not easy problems to deal with and it goes without saying that they're best dealt with quietly and informally and respectfully. But they shouldn't be ignored. An

ethical and caring profession will be at pains to have strategies and processes in place to deal with them, and ethical and caring members of the profession will think long and hard before turning a blind eye to a colleague's distress.

We can refine and arguably soften the question. We can ask, supposing lawyers should be under an ethical or some lesser duty to report, or supposing merely that an individual lawyer feels the need to bring their concerns about a colleague to attention, just who they should notify - the Commission or their professional body, the Law Society or the Bar Association?

The Commission's only powers in these circumstances are to bring and prosecute a discipline application. The professional bodies, on the other hand, have powers to require practitioners to undergo confidential health assessments and to impose conditions on and to suspend or even cancel their practising certificates. This is a much kinder way to solve the problem than humiliating distressed practitioners by requiring them to explain themselves in a public hearing before a disciplinary body.

Of course this option requires the professional bodies to bite the bullet. It would help I suspect if they came to see the exercise of their powers in this regard as a membership service as much as a strictly regulatory response, albeit a membership service of a tough love kind.

I do not make this remark lightly. I have seen practitioners struck off and others put at risk of being struck off when their conduct could and should have been nipped in the bud years earlier.

Endnotes:

ⁱ I am quoting private correspondence from two psychologists at Monash University, Dr Simon Moss and John Callanan, and a lecturer in law at Melbourne University and barrister, Dr Michelle Sharpe.

ⁱⁱ Ibid.

ⁱⁱⁱ The Tristan Jepson Memorial Lecture, 18 September 2008, reported in the Legal Affairs pages of the Australian newspaper of 19 September 2008 and in the Lawyer's Weekly of 26 September 2008.

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- ^{iv} Beyond Blue and Beaton Consulting Annual Professions Survey 2007.
- ^v Ibid.
- ^{vi} ABA Journal 18 February 2009
- ^{vii} Ibid.
- ^{viii} Ibid.
- ^{ix} Ibid.
- ^x Dr Mamta Gautam, *Towards Managing Mental Wellness in the Legal Profession*, Tristan Jepson Memorial Lecture, 26 September 2006.
- ^{xi} the Australian, 19 September 2008.
- ^{xii} Ibid.
- ^{xiii} Various researchers quoted in *Best Practices for Legal Education: a Vision and Road Map*, Roy Stuckey and others, Clinical Legal Education Association, 2007 at pp.29-37.
- ^{xiv} Ibid., at p.34
- ^{xv} the Australian, 19 September 2008.
- ^{xvi} WC Smith, *Pass the bar, flunk the rehab*, ABA Journal January 2003
- ^{xvii} ABA Journal, 18 February 2009
- ^{xviii} Lawyers Weekly 369, 21 December 2009.
- ^{xix} John Atkin, Managing Partner at Blake Dawson, quoted in the Australian, 19 September 2008.
- ^{xx} Dr Mamta Gautam, op.cit.
- ^{xxi} Brett Walker SC, *Lawyers and Money*, St James Ethics Centre 2005 Lawyers Lecture.,
- ^{xxii} *Substance Abuse and Mental Health Issues in the Legal Profession*, an issues paper prepared by the Office of the Legal Services Commissioner in New South Wales in August 2007.
- ^{xxiii} An anonymous former partner of a large law firm quoted in the Lawyer's Weekly, 266, 11 November 2005.
- ^{xxiv} The survey results were reported in the legal affairs pages of the Financial Review on 4 August 2006.
- ^{xxv} Another anonymous former partner of a large firm quoted in the Financial Review of 6 May 2005.
- ^{xxvi} Another anonymous former partner of a large national firm quoted in the Lawyer's Weekly, 265, 4 November 2005, and an anonymous correspondent in the subsequent issue, 11 November 2005.
- ^{xxvii} Lawyers Weekly 334, 20 April 2007
- ^{xxviii} The survey results were reported in the Financial Review of 15 July 2005.
- ^{xxix} Stephen Parker and Charles Sampford, *Legal Ethics and Legal Practice*, Oxford, 1995.
- ^{xxx} *Substance Abuse and Mental health Issues in the Legal Profession*, op.cit.