Lawyering as Emotional Labour

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May I wish you all a happy mental health week.

Oliver Wendell Holmes once asked rhetorically 'how can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflicts over often sordid interests, make out a life?' Of course, he went on to debunk this description of the law as will Hal Wootten in a lecture at the University of New South Wales on 16 October. However, in the course of so doing he counselled students that it was only when they worked alone, when they had felt what he called 'the black gulf of solitude more isolating than that which surrounds the dying man' that they would achieve. I am surprised that such a grim recipe for success did not deter more would-be lawyers from pursuing a career in the law.

Since I took on the presidency of the NSW Bar Association I have been promoting the work/life

balance issue. On the odd occasion I have been taken to task for doing so. We are professionals I was reminded. It is not for nothing that barristers speak of being called to the Bar. My work is my life, so it is said. It is true that our work is generally interesting, often stimulating, and although there may be elements of routine, it is never monotonous and rarely boring. However, to the extent that the work may become overwhelming and we neglect our families and friends and our own physical and mental health, then we have lost our sense of proportion. It is in this respect that I approach the issue of work-life balance.

James, I note, is writing a book on "Work/Life Balance". Of course I have not seen the proofs. However, I guess his answer to the problem in the profession was to get out altogether. I like to think, however, that his, rather extreme, solution is not the only way.

The term "emotional labour" has been used to describe the management of emotions in the performance of work. It was an expression coined by an American sociologist, Prof Arlie Hochschild from the University of

California, Berkeley, and explored in her book "The Managed Heart:

Commercialization of Human Feeling", first published in 1983. It refers to work that requires the suppression or induction of feeling to sustain a particular outward appearance. It is an apt description of the work of all service occupations. Professor Hochschild showed that emotional labour could lead to an estrangement or disengagement with personal feelings. The sociologists tell us that the suppression of emotion and personal feelings is a key attribute of traditional notions of what it means to be a professional. Being a professional involves rising above one's own feelings. Disinterestedness is a particular feature of practice at the Bar where we have a duty to accept briefs to appear in matters in which we are competent and for which we are available, no matter what we may think of the parties or their causes, subject to only limited exceptions. Detachment from the client is necessary to fulfil our duty to the court and to cope with loss and grief. We are not unique in this regard but there are some worrying statistics that suggest we have

for too long neglected the effect that these and other features of our work may have.

Tonight I want to talk about the incidence of depression in the legal profession, consider some of the reasons for it, outline what we at the Bar Association are doing about it and explore what more might be done.

Last year the NSW Bar Association hosted a lecture by Professor Geoff Gallop, now Director of the Graduate School of Government at the University of Sydney and the former premier of Western Australia, who famously resigned from the parliament in January 2006 in order to recover from depression. After he spoke I received an email from one of our members in which he said, amongst other things:

> "It is very important for the Bar to foster understanding of mental illness in its members. Too often, discrimination occurs through ignorance or people are unfairly pigeon-holed because of negative impressions created by a condition over which a person has little control. When one considers the stresses we are under, it is hardly surprising that so many 'go under' so to speak. Too many favour the

> 'get over it' approach to mental illness or, worse still, the 'sweep it under the carpet' marginalisation approach."

I did not know it at the time but I later learned that that barrister had been diagnosed with bipolar disorder. He clearly spoke from personal experience. He is undeniably correct.

Since his resignation Dr Gallop has often spoken of his battle with depression. In so doing he has shown an enormous strength of character. In the legal profession, acknowledging mental illness of any kind has been perceived by many as a sign of weakness. It was not too long ago that my own Association would pretend it wasn't a problem. Dr Gallop and several others like him have shown us that owning up to depression is a sign of strength, nor a weakness and the earlier you do it, the sooner you can deal with it. As Dr Gallop put it:

> "Since my own decision to seek medical help for depression early in 2006 I have learnt a good deal about myself and the condition which we have appropriately labelled "The Black Dog"
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> "However, in order to learn these things I had to acknowledge that I had a problem. Self help only follows when there is self awareness. By its very nature depression is a secret for whom there is no story-teller. Not talking about it is part of its definition. We hold it in as it tears away at our senses and our sensibility. It's very personal and its very deep. We disconnect from the world and from others, with

> despair occasionally descending into a living hell. Imagine a world in which every second feels like a year and a world in which the ability to laugh has been extinguished . . .
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> "However, what I have also learnt is that liberation is possible.
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> "Depression can be treated and well-being sustained. Indeed my research tells me (and my over experience confirms) that sixty to seventy percent of patients with depression will respond to initial treatment with monodrug therapy (usually after four to eight weeks of treatment) or to a completed course of psychotherapy (usually 12 to 20 sessions or about 12 weeks). Of the 30% who do not respond to initial treatment, the majority will improve on an alternative approach, and upward of 90% will eventually recover fully. From these statistics we can see that the prognosis of major depression is among the best of any medical illness of similar severity."
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> "Spreading this message will not prevent depression. Genetic endowment and personal circumstances determine that some of us will be depressive. But what it can do is prevent crisis by countering prejudice and offering hope through a range of treatment options."

Dr Gallop was then speaking at the launch in April last year of the results of the Annual Professions Survey conducted by Beaton Consulting. In that survey, law scored the worst of all the professions for depression in Australia. Nearly 16% of those lawyers who responded had moderate or severe symptoms of depression and nearly a third used alcohol or other drugs to deal with the problem. Another survey conducted by the *Australian Financial Review* revealed that 45 per cent of young lawyers are thinking about quitting their job in two years. One in 100 said they intended to leave the law.

Last Thursday I hosted a panel discussion of the Law Deans from Sydney, UNSW, Wollongong and UTS that followed the third Tristan Jepson Memorial Lecture.

For those of you who were not there and who do not know, Tristan Jepson was a bright young solicitor with a great deal of promise and everything to live for who took his own life after a long battle with depression. Interestingly, he was not without a work/life balance. His mother told Damien Carrick on the *Law Report* earlier this year he lived life to the full. He was also a talented sportsman, actor and comedy writer. His parents, George and Marie, for the last three years have staged a lecture in his memory to raise awareness in the profession about mental health problems. This year the lecture was given by Professor Ian Hickie of the Brain and Mind Institute who, at the behest of Mr and Mrs Jepson, and with financial assistance from the NSW Bar Association, no doubt amongst others, conducted a survey of solicitors, barristers and law students. The survey canvassed 2,413 lawyers included 738 students from 13 law schools nationally, 924 solicitors and 751 barristers. None of its findings were surprising. In the

case of practicing lawyers the survey confirmed what we had seen from the earlier research. But the high incidence of depression amongst students was quite alarming.

Not long ago, a survey of professions conducted in Boston Massachusetts ranked lawyers number 1 for depression.

And a longitudinal study of almost 1000 young New Zealanders carried out in Dunedin and published in August last year concluded that work stress appears to precipitate diagnosable depression and anxiety in previously healthy young workers.

In a radio interview the morning the results of the most recent survey were publicly released Professor Hickie spoke of the apparent paradox of the high incidence of depression in the legal profession. He stated that as professionals we should have better mental health. He observed that lawyers:

> . . . have strong achievement, they have good socio-economic standings, they have high social status, and they often have led very successful lives. They don't face many of the chronic difficulties that other people face.
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> So in reality they shouldn't have higher statistics, they should definitely have lower statistics and, therefore, that's a challenge really to the law schools and our professions, and the legal

> profession, as to what's going on, what environment do these young people exist in that really doesn't capitalise on their capacity and their opportunity?

In a speech she delivered in Sydney two years ago Canadian psychiatrist, Associate Professor Dr Mamta Gautam, declared that "most lawyers have three times the risk of depression than the general population" and "25% are known to suffer from elevated feelings of psychological stress". Her view is that "something is happening with the practice of law, and the sense of stress perceived by lawyers is certainly increasing". She went on to point out that there is a disproportionate number of lawyers taking their own lives and one study showed that 11% of lawyers contemplate suicide on a monthly basis. 15% of lawyers, she said, meet the criteria for alcoholism.

I have a hunch that the high figures do not necessarily show that lawyers are more vulnerable to depression and anxiety and related disorders than other professionals or other members of the community working in high stress occupations but that they underscore how much we have neglected the problem in the past.

In a radio interview he did last Thursday Professor Hickie said:

> "Well I did give an interesting talk once with the Bar Association which was held next to the bar and the publican of the bar told me that he was the major counsellor in the Association. So I think there was a very traditional way of doing these things."

I pointed out to Professor Hickie that his remarks were of historical interest only. We haven't had a barman for 6 years for a start. More importantly, we have taken a range of measures to deal seriously with the emotional impact of the work we do. The days of hiding our heads in the sand and pretending this didn't apply to us are well and truly over. We owe it to each other to speak up about the issue and develop and promote ways to deal with it.

It has been said that lawyers are prone to depression because we are trained to be pessimistic and when you think about it there is something in that. We are always warning our clients or our solicitors of the worst-case scenarios and we half expect the worst outcome much of the time. We earn our living profiting from the discomfort, misfortune and misery of others.

Practice at the bar is particularly stressful. That is in part because of the nature of the work, partly because of the way it is carried out, partly because it involves running a small business and partly because of who we are. We compete for work with each other (and with solicitors, too) and fight with each other in court. The adversary process alone, I suspect, operates as a stressor.

As barristers we have to master a brief in a limited time and satisfy the hopes and expectations of multiple parties. It is not easy to please the client, the solicitor, the judge and, in some cases, the jury when also juggling duties to the client and the court which may not coincide. Work is either too slow or too busy. Either way anxiety follows. We have enormous difficulty refusing a brief even when we are drowning in work because we fear we may never be offered another. We agonize over the free days in our diary, wondering whether we will have enough money to pay tax or meet our other financial commitments or whether our careers are coming to an end all too early? Each of us does it, although our individual concerns may differ. Hon Roger Gyles, who just retired from the Federal Court,

was a hugely successful barrister and a former president of the NSW and Australian Bar Associations, once said that to the day he was appointed to the bench he always worried where the next brief might come from and was tormented by the sight of a blank space in his diary. And what happens when the Government decides to change the law with the result that a huge chunk of your practice is no longer available and your specialist knowledge is no use to anyone?

Many of us have perfectionist tendencies or obsessive traits. Frequently we are dissatisfied with our own efforts, let alone the work of others.

The nature of the job means that outcomes are often unpredictable and uncertainty adds to stress. Performance anxiety is a feature of our daily lives. I remember once being horrified to hear a colleague and friend – a silk and now a judge - relate how every morning before going to court he would spend time in the toilet throwing up. I soon discovered that his experience was not unique.

When a stressor in our personal lives, such as marriage breakdown, illness, death of a loved one or money

trouble is superimposed on the ordinary stress of work, the pressures can become overwhelming.

What makes things worse, is that too often lawyers struggle with stress in both their professional and personal lives without seeking proper assistance. We tend to see our struggles as a symbol of our own failings. We regard it as a sign of weakness to admit to ourselves, let alone anyone else, that we need help.

I don't know how many of you watched *Australian Story* last week and heard the heart-rending story of Hannah Modra who committed suicide at the age of 17. The story was called "The Girl Least Likely" and illustrated the point that beneath many overtly successful people lurks many an angst ridden individual. The only clues to her inner thoughts were in her diary. There she wrote: "Depression is not a sickness; it's a weakness".

How wrong she was.

Depression is a disease of the mind. Like all diseases it can be treated. Like all diseases, the longer it remains untreated the more difficult it is to treat and the longer it takes to remedy.

Early intervention may prevent an acute crisis from turning into a chronic medical disorder. It may divert, if not prevent, a practitioner from appearing before a disciplinary body. It reduces the risk of civil and criminal liability.

Often at the Bar Association the first we know that a barrister is in difficulty is when a complaint of professional misconduct or unsatisfactory professional conduct is made about him or her or when he or she notifies an act of bankruptcy or a conviction.

By that time the emotional or psychiatric problems that have contributed to the conduct may have become intractable. The lodgment of a conduct complaint or the entering of the conviction only serve to make the underlying condition worse.

The Bar Council's statutory function makes the disciplinary process largely inevitable in such cases, but we are developing other ways to safeguard both the public interest and the health and welfare of vulnerable barristers before the situation gets out of hand.

As members of a profession we have a responsibility to send out the clear message to our colleagues that

depression is avoidable, that help is available and that it is a sign of strength, not weakness, to seek it. That is what we have been trying to do at the NSW Bar. Tackling the problem of mental illness is a priority for us. The first step is to encourage barristers to acknowledge its existence, to raise awareness of the problem and to show that it can be overcome.

Some years ago, in order to divert barristers away from the disciplinary process, we sought and secured amendments to the *Legal Profession Act* that give the Bar Council and the Law Society the power to impose conditions on practising certificates, such as requiring practitioners to undergo counselling or medical treatment or to act in accordance with medical advice.

Those powers have been exercised in a number of cases. At times, however, barristers have reacted very badly to their use, perceiving the process as unfair and little more than a thinly disguised form of discipline. That may have been because we neglected to market the new powers at the time or have never really explained how they actually benefit the practitioner. Still, they are a valuable tool in the armoury of weapons we have to

look after the welfare of our colleagues and safeguard the interests of the public and the reputation of the profession at the same time.

Sometimes, just knowing that someone else cares about you can make all the difference.

Some years ago the Bar Council established BarCare as a confidential counselling service for barristers who need or might benefit from professional assistance.

This year we went further and appointed a psychologist as director of care and assistance, responsible for the triage of enquiries regarding barristers with emotional or psychiatric problems. Her work is entirely confidential and financially supported by the Barristers Benevolent Fund.

Barristers are encouraged to seek her out whether for their own needs or (and this is a critical part of our strategy) to seek advice about how to help, or assistance for, one of their colleagues. She will contact a barrister whom she has been told may be in trouble. After the tragic suicide of one of our members earlier this year she arranged for a clinical psychologist to attend chambers to minister to the grieving barristers and staff.

Through our website we also help our members to identify the warning signs of depression and provide them with rudimentary advice.

We also support ongoing research into the nature and extent of mental health problems amongst members of the legal profession.

We participated in a study of the incidence of depression in the legal profession, conducted by the University of Sydney's Brain and Mind Research Institute, the results of which will be disclosed at a forum in Sydney next month.

We formed a partnership with beyondblue, the national depression initiative. We have had a workplace trainer from beyondblue speak at each of our CPD conferences this year as part of our sustained effort to raise awareness of depression and encourage action to avert it or to treat it, as the case may be. We have also conducted seminars for clerks and heads of chambers to help them recognize the warning signs and to implement early intervention programmes. Prominent barristers and judges have spoken publicly of their own

battles and how they overcame their demons. It has been immensely valuable.

We have also offered lectures on nutrition and actively encouraged the pursuit of exercise and other stress management techniques.

I hope that the elevation of Justice French to the position of Chief Justice of Australia will see that message sent to more lawyers. Before he ascended to the highest judicial office in the land, Justice French fronted a video camera to extol the virtues of physical exercise as a means to manage a busy and stressful worklife. According to the "be active wa" website upon which his video message appears, "being active helps maintain his work-life balance, and his programme can help you plan a month of activity around and within your workday. I hope and expect that his example will see more people take up physical exercise as an essential part of their lives. Justice French came to make his announcement in the context of the WA Premier's Physical Activity Taskforce, established by the former premier of Western Australia, Geoff Gallop in 2002, to address physical activity in Western Australia after local research had shown a

decline in physical activity levels consistent with what other research had demonstrated was happening elsewhere in the world. Justice French was one of 18 "be active ambassadors" who came from different walks of life.

At the NSW Bar we now offer yoga classes in our common room. It may surprise you to know that when we first sought expressions of interest nearly 100 barristers of both sexes and all levels of seniority responded. We have also secured discounts on membership of local gymnasiums for our members and are promoting the message of work-life balance. At each of our six regional conferences we included a panel discussion featuring successful barristers talking about how they do it. Our practice course for readers now includes a segment on looking after yourself. As one of my colleagues, an erstwhile cyclist, father of two, seasoned traveller and semi-professional photographer put it, none of us will ever die wondering what life might have been like if only we had read the latest volume of the Commonwealth Law Reports.

After the panel discussion at last week's Tristan Jepson Memorial Lecture, a young solicitor who had suffered depression for 15 years delivered a blistering attack on the system of time costing and what I call the scourge of the billable hour as a major contributor to depression amongst young solicitors. No-one who was present could fail to have been moved by her remarks. She was not the only person who has criticized the system of time costing. Bob Benjamin, now Justice Benjamin of the Family Court, then president of the Law Society wrote about it in the *Law Society Journal* 5 years ago. He referred to a complaint from a partner in a large city firm that if it were not for time sheets he would stay in practice for many more years but "they are just too hard".

The commercialization of the law over the last 20 or 30 years has undoubtedly contributed to the high levels of depression and related disorders in the profession.

I would like to see the solicitors' branch of the profession properly address the institutional factors that contribute to the high incidence of depression amongst their

members and look forward to some real initiatives in this area.

At the student level, in 2003 the UNSW Law School and students' law society introduced a Law Mentoring Support Network which it calls Law MSN, the purpose of which is to support first year law students. It is spearheaded by Professor Prue Vines, who is trained in both law and psychology.

Professor Vines also leads an e-network of academics in 16 law schools that discusses and shares experiences of combating depression in students.

Working in isolation is a particular factor that contributes to depression and was highlighted in Professor Hickie's survey. Sole practitioners, whether solicitors or barristers, are especially vulnerable but so are judges. They often work in isolation, particularly in rural and regional areas, but even on the higher courts. They are required to be independent, impartial and unemotional. Judges also have different pressures on them. They don't have to worry where the next dollar comes from but these days they are subjected to much more scrutiny than ever before. These days it is not

uncommon for a judge to be publicly humiliated not only in the media but also by an appellate court. Last year in a particularly insightful address the former president of our Court of Appeal, Hon Keith Mason AC, rebuked appellate judges who use unnecessarily hurtful language to describe the errors of those whose judgments they are reviewing. The speech was entitled *Throwing Stones: A cost/benefit analysis of judges being offensive to each other.* Curiously, though, his Honour did not at least expressly refer to the cost to the mental health of the judges from this sort of behaviour. Moreover, as Sharyn Roach and Kathy Mack point out in their study of magistrates' work, complying with ethical principles of impartiality, fairness and decorum depends on the extent to which the judicial officer is managing his or own emotions as well as those of other court users. How often can overbearing or bullying behaviour by judicial officers be attributed to their own poor mental health?

I would like the Judicial Commission to take an active role in promoting the good mental health of judicial officers. I would like to see judges in all courts given

time away from hearings to write their judgments. If that means that more resources are required then more resources should be allocated. I know that is easy for me to say. I am not in government. However, there is a real community interest in the mental health of the profession. Procrastination and inability to focus that can be symptomatic of depression can cause serious delays in the delivery of judgments. Justice delayed is justice denied, as the old adage goes. In some instances, however, giving judges writing time is not a sufficient solution. If the reason for the delay is a psychological or psychiatric disorder, then that needs to be treated first. It is no secret that we have had judges with serious substance abuse disorders. Yet, it usually takes a crisis before anything is done about it and often that is too late.

It is high time that we were all a little less demanding of each other and high time we face up to the fact that unless we are well both physically and mentally we cannot perform at our best. In the long term it will be much more cost efficient to put money and resources

into these matters up front than it has been to deal with the results of ignoring them.