Re-Wiring the Law

The College of Law 2016 National Wellness for Law Forum
4 February 2016

Opening Address

Anna Katzmann[1]

I acknowledge we are gathered on the land of the Gadigal people of the Eora Nation and I pay my respects to their elders, past and present.

If someone had said to me when I was a young barrister in the 1980s that one day I would be addressing a forum focussing on structural change in the profession, let alone, structural change to promote mental wellbeing, I would have said: "Tell 'em they're dreamin'".

Why? you may ask.

Well, for a start, with the exception of the church, it is difficult to think of an institution more steeped in the past and more resistant to change than the law. The doctrine of precedent has much to commend it but not when it is relied on to justify prejudice or entrench unhealthy or outmoded practices. Take the law's attitude to women, for example. When in 1872 Myra Bradwell applied to the judges of the Supreme Court of Illinois for a licence to practise law she was refused, although she had been found on examination to possess the necessary qualifications. The Court said that if women were to be admitted it would be exercising its authority in a manner that parliament never contemplated. The Court noted that the relevant statute adopted the common law of England, that female lawyers were unknown in England at the time of James I, and that "God designed the sexes to occupy different spheres of action,

[1] Justice of the Federal Court of Australia and Additional Justice of the Supreme Court of the Australian Capital Territory.

and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth".[2]

In Australia the first woman to graduate with a law degree was only permitted to study law because the dean, who opposed entry to women, was on sabbatical leave at the time.[3] When she did graduate — in 1902 — she was refused admission to practise because of her sex and it was not until 19 years later, following the passage of the *Women's Legal Status Act 1918* (NSW), that she was finally permitted to do so.[4]

Writing over 60 years ago, one American academic observed:

> When we study Roman as well as Anglo-American legal history, we find it to be true as a general proposition that the most far-reaching changes and fundamental innovation in the structure and fabric of the law were brought about, not by the actions of the legal profession, but by the efforts and acts of men or groups of men outside its ranks.[5]

He was speaking of the law rather than the way law is practised or the conditions under which lawyers work but the same is true in this respect — and little has changed over the years.

After all, in many courts barristers still wear the attire introduced in Britain as the result of a royal decree made in 1635.[6] At that time, wigs were fashionable, but for a long time court dress has had nothing to do with fashion; wigs survived for centuries after they ceased to be fashionable.

---

[2] *In re Bradwell*, 55 Ill 535 (1869) [The judgment was upheld (8–1) on appeal to the US Supreme Court, albeit that the majority did so, at least ostensibly, for different reasons: *Bradwell v Illinois* 82 US 130 (1873)
[3] This was Ada Evans. See *Australian Dictionary of Biography*, vol 8, 1891–1931, MUP, Melbourne, 1981
[4] Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession*, OUP, Melbourne, 1996, p 48
[5] Bodenheimer, Edgar (1948), "The Inherent Conservatism of the Legal Profession", *Indiana Law Journal*; Vol 23: Iss 3, Article 2. Available at: http://www.repository.law.indiana.edu/ilj/vol23/iss3/2.
[6] Victoria Law Foundation (March 2010), "Wigs and Robes: A lasting tradition", available at www.victorialawfoundation.org.au/sites/default/.../Wigs_and_Robes.pdf

Changes to the structure of the profession in New South Wales, at least, were forced upon a largely resistant body of lawyers. I well remember the outcry at the Bar when (more than a decade after the Law Reform Commission had recommended it[7]) the State Government proposed introducing legislation to remove such restrictive trade practices as "the two counsel" rule by which senior counsel were not permitted to appear without a junior and "the two-thirds rule" under which junior counsel were entitled to charge two-thirds of a silk's fee, regardless of the size of the fee and the amount of work they had done. Astonishingly, the decision in 1992 by a conservative government to no longer submit names to the Governor for conferral of the commission of Queen's Counsel was vehemently opposed by the Bar[8] and more than 20 years later a majority of NSW barristers (along with its counterparts in Queensland and Victoria) apparently favour a return to the past.

That brings me to the issue at hand.

For far too long the profession has been in denial about its high levels of mental ill health. We considered it critical to our success that we presented an image of strength and invulnerability at all times; anyone who did not fit the image was expendable. Consequently, those who battled with mental ill health did so in silence, at great cost to themselves and their loved ones. As I have previously observed, we have all struggled to a greater or lesser extent with the pressures of legal practice: the demands of clients and partners, boorish judges, hard cases, the fear of failure, and the humiliation of defeat. To manage the stresses and disappointments we took to alcohol and other drugs. Heavy drinking after court was par for the course. Few paused to consider whether this was as it should be. As one member of the Bar once put it to me, "too many favour the 'get over it' approach to mental illness or, worse still, the 'sweep it under the carpet' marginalisation approach".

---

[7] In the *First Report on the Legal Profession: General Regulation and Structure*, Report 31, April 1982.
[8] LG Glanfield: "The Bar — In the Public Interest" in Lindsay, Geoff & Webster, Carol (ed), *No Mere Mouthpiece: Servants of All, Yet of None"*, LexisNexis Butterworths, 2002, p 43.

Not at law school, not during practical legal training, not on entry into the profession was any attention paid to the hazardous nature of legal practice.

What's more, rarely did we reflect on the effect our behaviour had on others — our workmates, our clients, our solicitors, our families. When preparing to give this speech I asked some young lawyers to tell me of their experiences. Much of what I heard was indicative of a lack of civility, arrogance, or thoughtlessness. I heard about a partner throwing a stapler at a junior lawyer, a partner yelling at junior lawyers in the foyer of the court for not answering their phones while they were going through security, and partners failing to acknowledge the very presence of junior lawyers. Seemingly trivial incidents like these can have substantial repercussions. Few who watched the Resilience at Law DVD can forget the account of the solicitor who, already struggling with depression, was driven to attempt suicide after a barrister lost his temper with him in court.

When, in middle age, Dante figuratively passes through the gates of hell, he was warned. "Abandon all hope, ye who enter here" read the inscription before him.[9] But what warning were we given when we entered the legal profession of the conditions under which we would be expected to work and the impact they might have on our physical and mental health? What advice did we receive about how we might look after ourselves and our clients at the same time?

Is it any wonder then that this young barrister would have thought fanciful the idea of a conference on refashioning the practice of law to promote mental wellbeing?

No doubt much of the poor behaviour of which I spoke was a manifestation of the effect of the stress under which those senior solicitors were working. Sitting on professional conduct

[9] "Lasciate ogni speranza, voi ch'entrate", Dante Alighieri, *The Divine Comedy*, *Inferno*, canto III, l 21.

committees at the Bar for many years I quickly recognised the effect that stress could have on barristers.

While judges no doubt contribute to the stresses of practitioners, we are by no means immune from stress ourselves and many a cantankerous judge is a judge under stress. We face the relentless pressure to get our judgments out, the sometimes excoriating remarks of the appellate courts, increasing media scrutiny and ill-informed media commentary, and the difficulties of dealing with querulous litigants in person. Some judges have the additional misfortune of hearing appalling accounts of the worst kinds of human behaviour. Many are poorly resourced, with little, if any, control over their workload. Some work in isolation with little peer support.

Only comparatively recently has the profession come to acknowledge the prevalence of depression, anxiety and related disorders amongst lawyers at all levels — solicitors, barristers and judges — as well as law students and to recognise that the practice of and preparation for a career in the law can aggravate underlying conditions, if not cause disease. Many have suffered while the rest of us either stood by and did nothing or made things worse.

While the practice of law has always been stressful, some of the conditions productive of ill health are of comparatively recent origin. I expect this has exacerbated the problem. I had the good fortune to finish university at a time of low unemployment and when this State had only two law schools. But the proliferation of law schools has led to increased competition for legal jobs, particularly in the firms. This has increased pressure on law students to excel and the possibility that they will despair when they do not realise their sometimes unrealistic ambitions.

Then there is the scourge of the billable hour.

It has been said that in the business of the law, "no institution rivals the billable hour in the generation of large-firm partner wealth—or associate misery".[10] One commentator blamed the justices of the US Supreme Court for this innovation after it ruled in 1975 in *Goldfarb v Virginia State Bar*[11] that Bar Association minimum-fee schedules violated federal antitrust law.[12] But the practice is older than that. Time costing was introduced by some law firms in 1940 following the publication in the US of a monograph on law firm management by one Reginald Heber Smith, who recommended that time sheets be kept in 6 minute units.[13] During the ensuing decades it was promoted to the legal profession in the US by management consultants.[14] But the process gathered momentum following the Supreme Court's judgment. Doubtless it was in response to the US development that hourly billing was introduced in Australia but, according to a report commissioned by the NSW Law Society, it was the deregulation of fees in NSW in 1994 and the general abolition of scale costs which led to time billing becoming the norm in this State, and its consequential infectious adoption across the country.[15]

Writing in *The Atlantic* magazine in October last year, Leigh McMullan Abramson queried why the billable hour prevails when it has been criticised as "inefficient, needlessly punitive,

---

[10] Paul M Barrett (December 04, 2014), "How Billable Hours Changed the Legal Profession" in *Blomberg Business*, http://www.bloomberg.com/bw/articles/2014-12-04/how-billable-hours-changed-the-legal-profession (accessed 18 January 2016)

[11] 421 US 773.

[12] *Ibid.* The case is *Goldfarb v Virginia State Bar* 421 US 773 (1975)

[13] In *Law Office Organization:* see Stuart Westgarth & Raja Balachandran, "Review of Billing Practices — The Way Forward" https://www.lawsociety.com.au/cs/groups/public/documents/.../522591 (accessed 18 January 2016). Interestingly, Martin CJ, speaking extra-judicially, has pointed out that Smith did not recommend time costing as a method of billing or pricing but as a method of cost accounting: "Billable Hours — past their use-by date": address by the Hon Wayne Martin, Chief Justice of Western Australia, at the Perth Press Club on 17 May 2010, launching Law Week 2010.

[14] *Ibid.* Martin CJ said that the efforts of the management consultants were helped along by studies showing that lawyers who kept time-sheets had an after-tax income almost equal to the before tax income of those who did not.

[15] *Ibid.*

and susceptible to abuse" and when "attorneys have likened living under its regime to a 'living hell'".[16]

Much has been written about the scourge of the billable hour and its devastating effects on lawyers, particularly junior lawyers. Launching Law Week in 2010 the Chief Justice of Western Australia, the Hon Wayne Martin AC, provided an incisive analysis of the pros and cons of time costing. Noting the impact of time costing on quality of life, he said:

> The literature is replete with complaints from young practitioners about the unsatisfying nature of legal work in a time billing environment. High levels of dissatisfaction are evident in surveys, computer blogs and in the high number of young lawyers who leave the profession. The emphasis upon the production of billable hours creates a working environment which … discourages professionalism and reduces work satisfaction to unacceptable levels. Clever young lawyers are leaving the profession in droves, or shifting to corporate, government and NGO roles where their motivation is provided, and their performance assessed by outcomes other than the production of billable hours. High levels of depression and substance abuse have also been detected amongst legal practitioners.

He proceeded to observe that working long hours to meet billable hour targets results in alienation from family members and the community.

The Chief Justice went so far as to conclude that time costing was detrimental to the rule of law and called for an inquiry into billing practices with a view to reducing the prominence of the model and canvassed several alternatives.[17]

Steven J Harper, a former partner in a law firm and now an adjunct professor at Northwestern University in the United States, writing in *The New York Times* in 2013, observed:

> There's a way out of the mess. But it requires clients to press harder for alternative fee arrangements, courts to back away from policies that embed the billable hour, law firm

[16] Leigh McMullan Abramson (Oct 15, 2015), "Is the Billable Hour Obsolete?", *The Atlantic.*

[17] Focussing on value, event billing, fixed fee arrangements, blended billing rates (where a single hourly rate is charged, regardless of the level of practitioner, "reduc[ing] the incentive to have low level work carried out by highly experienced and over-priced practitioners", contingency rates, and hybrid methods.

> leaders to stop rewarding excessive associate hours and senior partners to consider the deleterious consequences of their myopic focus on short-term profit-maximizing behavior.[18]

Ultimately, it is likely that market pressure will see, if not an abandonment of the system, at least some modifications. In the meantime, however, many of our best and brightest will fall by the wayside. This is not only shortsighted, it is cruel.

Fortunately, there is cause for optimism in Australia. In part this is due to the work of the Tristan Jepson Memorial Foundation and its Executive Director, Marie Jepson. In part it is due to the efforts of courageous individuals who have chosen to speak publicly about their own struggles to achieve mental wellbeing in the hope that they might spare others the pain they have experienced.

As many of you know, the Foundation developed a set of Best Practice Guidelines directed to those in the profession and those working with it, as well as students, to heighten awareness of mental health issues within the profession and to promote initiatives and management techniques which assist in the creation and maintenance of safe and supportive legal workplaces. The Guidelines are designed to assist employers to set standards against which they may measure their commitment to the welfare of their employees. They identify the workplace factors that can contribute to a psychologically healthy workplace and offer a framework for developing such a workplace. They include an environment in which there is a culture of trust, honesty and fairness, where employees support each other, where there is effective leadership, where civility and consideration for others prevail, in which there is some flexibility for staff and employees are encouraged and supported in the development of all their skills, including their emotional skills, and their efforts are recognised and appropriately rewarded, where staff have some control over how they organise their work,

[18] Stephen J Harper (March 29, 2013), "The Tyranny of the Billable Hour".

where their views are respected, and where they can freely communicate their concerns to management.

The Guidelines have been endorsed by the NSW Mental Health Commission, which was one of 26 inaugural signatories, as were the College of Law and the university law schools. Thus far there are 130 signatories. Many legal institutions are well on the way to providing the kind of workplace we would all like to be part of.

There are obvious benefits of an approach like this.

Among them is the certainty that in a highly competitive legal environment employers improve their prospects of attracting quality lawyers and, equally importantly, of keeping them.

John Poulsen, the Australian managing partner of Squire Patton Boggs, an international firm of commercial lawyers and an inaugural signatory to the TJMF Guidelines, has spoken publicly of the changes to work practices at his firm. He is justifiably proud of them.

The firm established no fewer than nine task forces comprising partners, legal and support staff looking at such matters as governance structure, partner remuneration, client and staff strategies, and developed a framework based on the kind of principles that feature in the TJMF Guidelines. The result was that, within a couple of years, staff engagement increased significantly, there was a corresponding drop in staff turnover, a $14 million increase in revenue and a doubling of the profits. He says that he was told by many that it was impossible to move staff engagement to this extent in such a short time but he insists it can be done if you put people first. The firm has gone on to win several awards.[19]

[19] *The Australian*, 26 July 2013

Similarly, Terry McCabe of McCabes Lawyers recently boasted of a dramatic increase in retention rates at his firm with the introduction of formal programs focusing on mental wellbeing. Like John Poulsen, Terry has been open about his own battle with anxiety and depression and provides the kind of leadership law firms desperately need on this issue. His approach to his staff is inclusive and respectful. The firm is focused on their personal and professional wellbeing and development. It describes itself as offering "a collaborative workplace environment". Speaking in October last year at the launch of Jerome Doraisamy's excellent book, *The Wellness Doctrines*, Terry said:

> Our values [at McCabes] are the foundation on what we have built our firm: our commitment to quality and continuous improvement, our people, teamwork, life balance, integrity and last of all courage, because to be committed to the other values, you must have courage. We have put in place formal programs such as the People Inclusiveness Program which includes mentoring arrangements, leadership groups, boot-camp and team sports such as netball and quick time-out sessions with a masseuse we get to regularly visit our office.
>
> Our office is deliberately open plan, enabling clear lines of sight assisting with breaking down barriers between junior and more senior members of staff. It also allows for natural light to flood the building.
>
> We encourage and support all our employees to find a balance between what they enjoy doing professionally, and what they enjoy doing outside of work because those pursuits are equally worthwhile.

If you go to the firm's website you will see these programs used as a drawcard for prospective employees. McCabes is not alone in this regard. The staff benefits advertised by Swaab Attorneys also acknowledge the importance of factors that contribute towards mental wellbeing and their employees are also actively encouraged to have a balanced life. Carmel Mulhern, group general counsel for Telstra, announced last year that her company was

"adding the TJMF Guidelines to its suite of initiatives to encourage success through diversity, flexible working, support structures and maintaining a life outside of work".[20]

A little over a year ago, at the launch of an edition of the UNSW Law Journal which featured this issue[21], I said that I looked forward to a time when law firms competed for staff and business by advertising their work practices as ones which are designed to keep their workforce in the best of mental health, when employees in those firms sang the praises of their employers for their attention to their welfare, when psychological safety received the same level of attention as physical safety, when smart young lawyers were not consigned for months on end to discovery or other tedious or menial tasks, when employees were encouraged to be open with their supervisors about the stresses under which they are placed, and when those who reported unsafe work practices or their personal difficulties were thanked, even praised, for doing so, not criticised, rebuked or stigmatised, and when legal employers were acclaimed for their empathic approach to their staff.

Perhaps that day is not so far off after all.

We all have a responsibility to look after ourselves and, I would argue, to look out for each other. But, as Poulsen recognised, like fish, legal institutions rot from the head. Leaders and managers have the power to change the structure and culture which foster mental ill-health. What is more, it is both their moral – and legal – duty to do so.

The Prime Minister said on his election to the Liberal Party leadership in September last year that the Australia of the future must be a nation that is agile and innovative. The same can be said of the legal profession. We owe it to ourselves and to those who follow us to lead by example.

---

[20] *Lawyers Weekly*, 4 October 2014
[21] (2014) 37(3) University of New South Wales Law Journal

I thank the College of Law for its unflagging support for this important issue and for inviting me to speak to you. This is a significant conference for the legal community. I hope it will encourage the development of a new type of legal workplace which promotes a culture of mutual respect, which is actively interested in the mental wellbeing of its workforce, and in which the unhappy lawyer is an oxymoron.