Towards Wellbeing: How to be a Human Being and a Lawyer too

The County Court is the major trial court in Victoria. We hear all serious crime, except murder and treason. We deal with other cases involving unlawful killing: causing death by driving or workplace negligence. We deal with the consequences of unlawfully injuring somebody, whether by driving, workplace negligence, or by assault. Some people can make a complete recovery physically and psychologically from their injuries. At the other end of the scale we see people who have suffered catastrophic head injury, are left paraplegic, have lost limbs, or are left with disfiguring scarring or debilitating internal injuries. We deal with major drug importations, large-scale drug trafficking, clandestine laboratories and grow houses. Then there are the armed robberies. Some are sophisticated, well planned operations involving the use of firearms, where significant amounts stand to be obtained from payrolls or the safes of gaming venues or banks. Others are less well-planned but often more terrifying for the victims, when drug impaired people armed with a syringe, knife, baseball bat or a gun - which may or may not be real - reap meagre gains from a service station, convenience store or pharmacy. Then there are the aggravated burglaries, the run-throughs or home invasions, major frauds, thefts and deceptions with a pen - or these days more likely a computer keyboard - which enables fraudsters, accountants and bookkeepers to steal money from under the noses of people who have reposed their trust in them to assist in the management of their affairs. We see the ram raiders, the ATM skimmers, the extortionists and blackmailers, and those who defraud the revenue, be it tax or Social Security, and in amounts significant enough to have them dealt with in our court rather than the Magistrates Court.

And that's before we get to sexual offences, including child sex offences and pornography, and family violence. By child sex offences I mean not only those cases where the complainants are still children, and speaking about something in the recent past, but also those cases where the complainants are now adults, but are speaking of what happened to them as children.

Where a person pleads not guilty, the trial is conducted before a judge and jury. So we hear the evidence presented to the jury in real-time. Sometimes we hear it more than once. We all know a lot more about sexual activity than most of the community. We know things we don't want to know but find hard to forget.

If a person pleads guilty, or is found guilty by a jury, we must sentence them.

Just to give you a sense of the numbers, last year, we heard over 300 trials, and over 1,500 guilty pleas. Just under half, 44% of all trials were for sexual offences. By contrast, only 13% of guilty pleas were to sexual offences.

Sentencing involves an analysis of the factual foundation for the guilty plea or verdict of guilty, consideration of the impact on the victim, and consideration of the personal circumstances of the offender. In most cases we are provided with victim impact statements. The victim impact statement sets out, sometimes in distressing detail, the impact of the offending on the victim. For some victims, particularly adults who were sexually abused as children, and the surviving families of people killed in motor vehicle or industrial accidents, the effects are profound and lifelong.

We see cruelty, depravity, and brutality. We see families divided and lifelong friendships ruptured. Mothers alienated from their children because they continue to support partners who admit abusing their children. We see parents consumed with guilt because they didn't know their child was being abused by someone they trusted. We see good people who had the misfortune to be in the wrong place at the wrong time, and good people who made a wrong decision or a mistake with devastating consequences for their victims and themselves. We see people who can forgive and people who can't.

Some offenders come from a background of appalling disadvantage, neglect and deprivation. Others who had every opportunity, but haven't benefitted from it. Some who will carry the burden of their guilt forever, others who impress as being without remorse. Some look to have excellent prospects for rehabilitation. For others, the prospect of changing their ways seems bleak. Some are lucky enough to have family support, a home and a job to look forward to. Others have nothing and nobody. For the many who present with a history of substance abuse, we face the reality of disgracefully inadequate detox or long-term rehabilitation facilities which may help them to become and remain substance free. For the many who present with a history of mental illness or psychological disturbance, we face the reality of an overstretched and under resourced mental health sector which simply cannot meet the needs of all who could benefit from mental health services. Housing, or rather lack of it, is a perennial problem for people who come to be sentenced in our courts. Homelessness compounds all these other problems offenders face.

For many of the people we come to sentence the reality is, under our sentencing laws there is no option but imprisonment. The combination of tighter restrictions on release on bail and on release on parole has resulted in a vastly increased prison population and a vastly reduced cohort of people who are subject to conditional release, involving supervision by way of bail conditions or parole. We know that supervision in the community encourages rehabilitation and reduces the risk of repeat offending. The opposite of this is obvious. Unsupervised or unconditional release is itself a significant repeat offending risk factor. And that risk factor is compounded by the matters I have already identified: homelessness, no income, and no real access to alcohol or drug abuse related services or mental health services.

We also deal with people who are by reason of mental illness or intellectual impairment unfit to participate in a trial, or to be held criminally responsible for their conduct. That involves making decisions about whether it is safe to release them into the community, or whether they must be detained in a mental health facility or prison. Although the government has recently announced an expansion of the one secure mental health facility in this state, Thomas Embling, people who should be there are being held in jail because there are insufficient beds there.

We also must decide whether people who, having completed a term of imprisonment for sexual offending, are at such risk of committing like offences that they should be subject to a supervision order after their release.

This is our day-to-day reality. We know that in the context of a criminal trial and criminal sentencing it is rare that everybody involved in the case will be happy with or accept the outcome. It is understandable that those directly involved may be unhappy

about the outcome. Their lives will never be the same. Trials and sentences cannot right the wrongs that led to a person being charged or sentenced. The hope that the trial or sentence will bring closure is not often realised.

Such work takes a toll. If we acknowledge we are human beings, you cannot help feeling at times, repulsion, horror, dismay, anger, despair, distress. It can shake your faith in humanity. It can feel unremitting.

That is just our criminal work. The single largest part of our civil work involves dealing with applications for compensation arising out of workplace or motor vehicle accidents. The daily fare for a judge in serious injury applications involves consideration of whether and if so the extent to which a person's life has been permanently changed, for the worse, by reason of a workplace or motor vehicle accident.

And whilst consideration of commercial work does not normally provoke discussion about the personal toll on litigants or the court, we know many litigants in commercial cases face financial ruin if they are unsuccessful. They may have staked everything they owned. Spouses, parents and others may have backed them and also stand to lose. Others risk significant reputational damage harming their prospects for future employment in their chosen field if their conduct is found wanting or they are not believed on their oath.

It is not surprising, in addition to the well-known and documented risks to mental health and well-being that lawyers face, that those in court system also face a real risk to their mental health and well-being as a result of stress and vicarious trauma.

There has been until now limited research into vicarious trauma experienced by judges, court staff and criminal lawyers. Carly Schrever, lawyer, psychologist, JCV judicial well-being project advisor and PhD candidate is conducting an Australia first study into judicial well-being. When her PhD research is concluded, we should be much better informed. Much of what I say tonight, and much my learning about this area I have learned from Carly and I am very much in her debt.

Vicarious trauma can be defined as the consequence to a person of exposure to the traumatic experiences of others. Symptoms of vicarious trauma can include: profound loss of pleasure in life, whether work home family or leisure; impairment of judgement and capacity to think clearly; overreliance on coping mechanisms such as alcohol or other substances; isolation; intellectualising problems, to protect against feelings and emotions; working harder, so limiting time to think; seeing the world as unsafe; loss of trust in self and others; disturbed sleep; withdrawal from intimacy; depression and anxiety; compassion fatigue or burnout; decreased motivation, efficacy and empathy; and PTSD type symptoms such as exhaustion, heightened arousal, avoidance, numbness to reminders of trauma, and re-experiencing of victims traumatic events.

The most obvious, but by no means only cases which expose those in the court system to the risk of vicarious trauma are sexual offences involving children, by which I include adults speaking of what happened to them as children, and exposure to child pornography. Anecdotally, judges and others involved in the criminal justice system speak of the added impact seeing an image of abuse of a child, as opposed to hearing a person speak directly of it, has on them.

Although the evidence is scant, what little we do know suggests that lawyers may experience higher rates of vicarious trauma than mental health workers and social workers. High caseloads, lack of education about the effect of working with traumatised people, the absence of support, in particular the absence of multidisciplinary teams and collaborative work practices, the need to be objective and impartial and to maintain confidentiality, and the absence of debriefing mechanisms built into court processes are likely contributing factors.

In the County Court, we have over recent years been talking more openly about the potentially harmful effect on judges and court staff of the nature of the work we do, particularly in the criminal jurisdiction and particularly in child sex offence cases. They account for an increasingly high proportion of the workload. This has been a real culture change. Most judges come from a background where legal training, and practice at the bar, involved no exposure to, or for that matter respect for, the learnings from the social sciences about how this might affect us not as lawyers, but as human beings. We prided ourselves on our ability to maintain objectivity, not to show our true feelings when exposed to deeply distressing material in court, and to be impartial.

But the reality is, you cannot keep on being exposed to material of this nature without being affected by it. And awareness of that has led to an awareness that exposure on a repeated basis to other peoples' traumatic experiences, not confined to child sexual offences, is also likely to have a negative effect on our sense of well-being. Given what we now know about the prevalence of child sexual abuse and family violence, and its demographic spread, it is statistically likely some people exposed to these cases have themselves experienced sexual abuse or family violence.

I am proud of the progress the County Court has made. We accept we have a responsibility to judges, and court staff, to protect them from the risk of harm from repeated exposure to other people's traumatic experiences. We have taken significant steps to look after judges and court staff. We may be ahead of other courts, but we are I think in the early stages of a voyage of discovery. Initiatives include a judicial reflective practice program (following a successful pilot), to enhance the capacity of judges to manage stress and exposure to vicarious trauma, a peer support program for court staff, mandatory training at induction and in continuing professional development each year in identifying and managing stress and vicarious trauma for judicial staff, a better directed judicial and employee assistance program, regular on site counselling, and a range of programs directed at enhancing physical and mental health and well-being.

Whilst the Bar, the OPP, VLA and the LIV all offer some measures of support for the barristers and solicitors involved in court proceedings who are likely to be exposed to the risk of vicarious trauma, there is clearly more work to be done. There are some excellent initiatives, but it is fair to say neither preventative nor crisis care programs are embedded in the cultures of those organisations.

The reality of the risk of vicarious trauma, particularly for those practising in criminal law, and more particularly for those exposed to cases involving child sexual abuse or child pornography, can no longer be ignored. No individual, employer or briefing agency can justify waiting until a person is actually harmed as a result of exposure to

the work we do to think about what to do, or could have been done, to avoid the risk or help that person manage better.

Individuals, organisations and briefing agencies must identify the events or risk factors that can cause vicarious trauma, provide education or educate themselves about vicarious trauma and how to manage it, actively look at ways of managing exposure, and of building resilience. They must ensure there are mechanisms for supervision and debriefing, and the means to recognise vicarious trauma when it does manifest itself. And they must be ready to provide, or access help with managing vicarious trauma. The information is all out there, easily discoverable, and easy to implement. It just needs awareness and commitment.

I want to turn now to the broader topic of what I described earlier as the well-known and documented risks to mental health and well-being that lawyers face. All lawyers, not just those exposed to the traumatic experiences of others. Until recently everything that I had read and heard about that suggested that lawyers were different. That law students, lawyers and judges experienced stress, psychological disstress, anxiety and depression at levels significantly higher than that experienced by students and practitioners in other professions or in the population at large.

There has been much written or hypothesised about why that is so. Consideration has been given to the personality types who are attracted to the law or who make successful lawyers. Ever since I first heard that lawyers, particularly barristers and judges, had high levels of obsessive-compulsive tendencies, I have felt liberated. I could accept that attention to detail, the insistence on uniform procedure or routine, even that feeling of pleasure at seeing every page in the ring binder perfectly lined up, helped make me good at what I did even if it made me very difficult otherwise.

As lawyers we are taught to question and to challenge everything we are told. We are catastrophisers or pessimists. We need to think of the worst possible outcome and prepare for it. Wearing my advocacy teaching hat I am constantly telling young lawyers to assume the worst when they are preparing a cross-examination, not to think that the witness will give them the answer most favourable to their interests. They should assume the opposite will happen.

Because we represent the interest of others, we are dealing with the consequences of other people's behaviour. We are not responsible for the client's behaviour, or the consequences, but we take on the responsibility for managing the legal consequences. That can lead to levels of emotional detachment, a sense of powerlessness, or even futility.

The philosophical basis for an adversarial system appeals to fundamental notions of fairness – that he, she or it who accuses proves. But all too often adversarialism is equated with aggression. They, and a winner takes all approach to competitiveness are treated as interchangeable ideas. It is a mindset or culture which in my view has not only infected litigation, but has spilt over into other aspects of legal work, and into legal practice.

These factors, or some of them have led, it appears to me, to a widespread acceptance that a combination of the personality types attracted to or successful in the practice of

the law, what is described as the inherent nature of the job, work practices which treat working long hours as something itself to be valued, the way workplaces are organised, the criteria by which success and promotion are assessed, and uncertainty about or lack of security in employment are likely contributing factors to heightened risk of depression, anxiety, and psychological distress in law students and lawyers.

It is tempting to accept this and to say we are different (read special). It is in our nature or it is the nature of our work which predisposes us to these high levels of anxiety and depression. We are like artists treading a fine line between creative genius and madness. That is to accept that this is just part of what goes with the job if we want to be successful.

I want to challenge that. The working hypothesis of the title of this talk "how to be a human being and a lawyer too" is that the two are not mutually exclusive.

I mentioned before my debt to Carly Schrever. It was she put me onto a paper by Professors Lawrence Krieger and Kennon Sheldon, "What makes lawyers happy? A data driven prescription to redefine professional success" published in the George Washington Law Review.[1]

They said:

> Simply stated there is nothing in these data to suggest that attorneys differ from other people with regard to their prerequisites for feeling good … lawyers, and their teachers and employers should banish any notion that law-trained people are somehow special … In order to thrive, we need the same authenticity, autonomy, close relationships, supportive teaching and supervision … that promotes thriving in others.

It is hard to let go of the idea that we are special and for those of you who are wrestling with that remember, you will always be special to those who love you, and not being special doesn't mean you are insignificant or even ordinary.

Fortuitously, just before Carly introduced me to this radical thought by Krieger and Sheldon, The Saturday Paper published a piece provocatively entitled "What Counts as Rich Now", written by Mike Seaccombe.

Seccombe quoted from research conducted by MLC last year which found that most Australians don't think $180,000 – the level at which the top marginal tax rate cuts in – makes you rich. According to the MLC survey 50% of the respondents thought a household needed an income of $150,000 to live comfortably.

And more arrestingly the MLC research showed that the more people earned the more they wanted. 33% of people earning between $40 and 69,000 aspired to greater wealth. 45% of those earning between $70 and 99,000 wanted more. 55% of those earning between $100 and 149,000 wanted more, and a staggering 71% of those earning over $150,000 wanted more.

[1] February 2015 Vol 83 No 2.

Let me illustrate this by some other research:

https://www.youtube.com/watch?v=qbXM3_XQD2o

Seccombe also relied on the work of Professor Roger Wilkins, economics professor at Melbourne University, and the Deputy Director of Research for the HILDA survey, and Dr Jill Shepherd from ANU School of Politics and International Relations. HILDA stands for household income and labour dynamics in Australia survey. It has been following the lives of more than 17,000 Australians each year since 2001. The survey collects information on many aspects of life in Australia including household and family relationships, income and employment, health and education.

According to the HILDA survey, middle income earners earn between $40 and $80,000 a year, and annual earnings of $94,000 put you in the top 10%. However the top 10% covers a very wide range of incomes. By the time you are earning $237,000 you have hit the top 1%. And by the time you have made just over $600,000 you are in the top 0.1%. But remember in the top 1% are also Australia's richest people, the richest of whom according to the Forbes 2016 ranking is worth $8.8 billion. You have to fall to number 28 on the list to miss the $1 billion mark.

Their thesis is that if you are a middle income earner, you tend to mix with people at work and socially in the same income bracket. However once you hit the top 10% you tend to work and mix with people in that top 10%, but whose incomes could be multiples of yours. Thus the relative sense of what you need to be comfortable is calibrated not by your own income but by the higher incomes of those around you. That is why people in the top 10% of earners feel poorer than they are.

Or I would say, less contented.

A week after Mike Seccombe's article was published, The Age reported on a report "Happy Workers: How satisfied are Australians at work?" written by researchers from Curtin University Business School based on analysis of HILDA data.

The results are startling, to those who like me have grown up in a legal culture where diligence and commitment are all too frequently measured by reference to the number of hours worked, where there is often a direct correlation between income, career advancement and hours worked, and where success is all too often measured by those standards.

The Happy Workers survey revealed that people who worked more than 40 hours a week were much less happy than those who worked 40 hours or less. Or, working longer hours might help make you more successful, but it is also more likely to make you miserable.

What the Curtin University study revealed made people happy in their work was to do work that was meaningful to them, to have a level of freedom and autonomy in their work, and to have supportive colleagues and bosses. These findings replicate the advice given by everyone I have ever heard present to lawyers about wellbeing. It also replicates the results of our recent court staff satisfaction surveys. Court staff are not highly paid compared to their private sector colleagues. But they report high levels of

work satisfaction, because they believe their work is meaningful, and the environment supportive.

It is worth thinking carefully too about these conclusions from the Happy Workers study. People who work for themselves or in small businesses, in the not for profit or government sector and who can do some of their work from home are more likely to be satisfied in their jobs. For these happy people, pay was far from being the defining measure of happiness. In fact those who reported being very satisfied with the job overall earned a lower average amount each week than those who reported being satisfied.

So what does that mean for us as lawyers and human beings too? I want to pose some questions for you to ponder.

How do you define and value success? Is your work meaningful to you? What hours would you like to work? Do you need to work the hours you do, to do your job well? How much do you want or need to earn to be comfortable? How much stock do you place on working with people you like or whose values you share? Do you feel valued in the work you do? Do you need to work this way forever or is it a short term proposition, a springboard for something else? Do you understand and accept the sacrifices you will have to make if you want or need to work longer hours in order to achieve your goals? Or if you want to work fewer hours or for less money? Apart from your work, what else you do want to do with your life? Who outside work is important to you? Do you spend quality time with them? How would you describe yourself now? How would you want to be described in ten or twenty years' time? What would you have liked to have achieved in your lifetime?

There are no right answers to these questions, and the answer for each individual will be different. What is important is to ask the questions, think about what is meaningful to you and accept the autonomy you have to make decisions about the way you want to work and live.

So I want to challenge the notion we lawyers are special, different, and destined to suffer higher levels of depression and anxiety and other mental illness and other professions of the population at large because of the nature of the personalities that make us good at what we do, or the nature of our work. Remember, as Professors Krieger and Sheldon concluded, we have the same human needs as the rest of the population when it comes to the authenticity, autonomy, close relationships, supportive teaching and supervision that promote thriving.

The CV that was used to promote this talk is an illustration (maybe in reverse) of the point of the questions I have posed.[2] And a confession I am a still long way from achieving my goals of being a lawyer and a human too. I didn't write it. I would never have dreamt of writing one as frivolous (and personal). And I did not send it to the organisers of this talk. They found it and asked if they could use it. Some years ago, I accepted an invitation to appear on Q&A. When I accepted, the producers asked me to send a CV. I did. They rang back. They wanted something funny. I couldn't think of anything. They said they needed it for the audience warm up. They may have said (or

[2] http://www.tjmf.org.au/2017-tjmf-victorian-lecture-melbourne/

at least implied) no one could be as boringly lawyerish as my official CV implied. So I told them some things about me. It was their attempt to "humanise" me. I'd forgotten about it until someone from the Tristan Jepson Memorial Foundation also thought I needed to be humanised. Thank you. It is a lesson for me.

This brings me back again to my starting thesis. No matter how objective we have to be as practising lawyers representing the interests of others or as impartial as we must be as judges applying equal justice to all, being a lawyer is just part of who we are. We don't stop being a human being when we go to work because of the requirements of objectivity or impartiality.

But it is difficult merging being a lawyer with one's whole self, or the other part of one's life. It is much easier to try to keep the two separate. Let me illustrate by an example. I love the opera. I love the music, the soaring voices, the costumes, the sets, the productions. I used to love that sense of being swept away into an entirely different and imaginary world. But then, as I tried to merge my different selves, not leaving my lawyer hat at work and my human hat at home, I started to think about the stories, looking at them with my 21st-century, first world, feminist, human rights, lawyer perspective. And it has ruined opera for me. For years I have not been able to see Madame Butterfly without thinking that had the Hague Convention on the Rights of the Child, and the Child Support Act been in existence, Pinkerton would have had to have paid child-support to Butterfly and the baby, they would not have to have lived in poverty, and he would not have been able to take the baby away. And in more recent years I can't see it without thinking of Pinkerton as a paedophile. Butterfly was only 14 years of age when he purchased her and she was tricked into believing she was married to him.

I can longer see Carmen as a tragic story of a man driven to madness by the love of a capricious woman. Carmen was entitled to have relationships with whomever she wanted, when she wanted, and to bring them to an end when she wanted, without having to lose her life because of the jealous rage of a former lover who would not accept her autonomy. It now reminds me of why I am proud that the recommendations of the Law Reform Commission, of which I was a member, to abolish the provocation defence were adopted.

Lucia di Lammermoor could have lived a long happy and sane life with the man she loved and probably had many babies with him, instead of descending into agonising mental illness by being forced to marry a man she did not love to satisfy her brothers dynastic aspirations, had the Married Women's Property Act been in existence and had she been able to get a Family Violence Intervention Order against her brother and husband-to-be.

And so on.

As you see, it's a journey. I'm not there yet, but I am trying. You can too.

Felicity Hampel
Tristan Jepson Memorial Foundation Oration
Melbourne
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