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LAW INSTITUTE JOURNAL

OCTOBER 2016

EFFECTIVE EXPERT WITNESSES

13TH VICTORIAN LEGAL AWARDS
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October 2016

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ILLUSTRATION: PAT CAMPBELL

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LAW INSTITUTE VICTORIA

13TH VICTORIAN LEGAL AWARDS

Nominations for the 13th Victorian Legal Awards open Monday 3 October in the following categories:

Access to Justice Award
Accredited Specialist Achievement Award
Community Lawyer/Organisation of the Year Award
Deal of the Year Award
Top 10 Rising Legal Stars
Government Lawyer of the Year Award
In-house Counsel of the Year Award
Innovation Award
Boutique Law Firm of the Year Award (<5 Principals)
Medium Law Firm of the Year Award (6-19 Principals)
Large Law Firm of the Year Award (>20 Principals)
Law Student of the Year Award
Legal Reporting Award
Mentor of the Year Award
Regional Lawyer of the Year Award
Suburban Lawyer of the Year Award

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Have your say on policy

In adopting a position, the LIV relies primarily on its sections and committees.

Earlier this year a member objected to a policy announcement I made on behalf of the LIV, saying it did not represent his views. It was a legitimate concern, but showed there may be an incomplete understanding of how the LIV determines and advocates a position on an issue. As a representative body, the LIV has an advocacy role as outlined in its constitution. It requires the LIV to foster the rule of law, promote improvements and developments in the law, act as a public voice for the expression of members' opinions and represent the professional interests of members.

On this basis, the Council of the LIV has formally adopted policies and advocated on a number of serious or sensitive issues. These have included opposing the death penalty, access to justice for asylum seekers, cultural diversity in the legal profession, Indigenous issues and the removal of discrimination against people on the basis of gender or sexual orientation. Those policies represent a fraction of the issues on which the LIV is asked to provide expert legal opinion.

In 2015-16, the LIV directly influenced eight legislative changes to Bills before Parliament. It provided expert opinion and policy positions on Bills in response to 74 requests from Members of Parliament, resulting in more than 80 references to the LIV in Hansard in 2015. It provided 127 submissions to government authorities and other bodies, 80 per cent in response to requests from external legal stakeholders and 20 per cent proactive suggestions of law reform to legal stakeholders. In adopting a position, the LIV relies primarily on its sections and committees to formulate an informed, reasoned and relevant response. These are reviewed by the section/committee chair and then by the Council liaison member. It is only once this position is seen to be in line with the LIV constitution, to relate to a legal (and not only a social or moral) issue, and confirmed as not politically partisan, that the president agrees to sign off on the position.

The LIV has an obligation to provide positions and show leadership on behalf of its members, but these decisions are not uninformed, or made on a whim. It is inevitable not every decision will be unanimously supported by members. There is always room for members to articulate different opinions, and these are most usefully discussed at the time a policy is being made. A key way to contribute to a policy position is to join a section or committee. I invite members to contact me directly if you wish to discuss specific LIV policy positions further. Your opinion is welcomed and valued. ■

Steven Sapountsis
LIV PRESIDENT *president@liv.asn.au* *@livpresident*
BLOG *www.liv.asn.au/Staying-Informed/Presidents-Blog*

EMBRACE CHANGE

LAWYERS NOW AND IN THE FUTURE CAN BRING VALUABLE SKILLS TO BEAR.

I was recently at a lunch with Rimsky Yuen SC, Secretary for Justice, Hong Kong hosted by Corrs Chambers Westgarth, on behalf of the LIV. Hong Kong faces many challenges and is seeking better models of alternative dispute resolution as well as building a seat for international arbitration as a bridge into and out of China. Many of the dispute system design issues he spoke about have been resolved in Australia, although others are difficult and complex. The lawyers in attendance had much to offer to the discussion. These interactions show the great opportunities for Victorian lawyers in Asia.

I have been asked many times by young lawyers about their future in the law. Publicity about robot law and "Google law" is scary. Algorithms will take us only so far and problems are not finite – they evolve just as the technology evolves. The key will be having a network of cooperative and skilled people to work with, whether they be lawyers or people from other disciplines to solve what will be many-faceted issues. Lawyers will bring skills in understanding how interactions in business work and so will be able to map a path for clients. They know how conflict can be managed and resolved and how complexity itself can be broken down and steadily worked through. On this view, technology is just an aid that offers better capacity to focus on the issues at hand. It also frees people to form their own ways of working and to eschew traditional bricks and mortar structures.

Finally, I encourage you to think about nominating for LIV Council. You have until **5 pm Wednesday 7 October 2016**. These are challenging times for the LIV and we need the best people. Find the details at www.liv.asn.au/About-LIV/LIV-Management-Governance/LIV-Council-elections/Frequently-Asked-Questions. ■

Nerida Wallace LIV CEO *ceo@liv.asn.au*

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AI and the law

It was a pleasure to read your special issue on Technology and the Law (*LIJ* June 2016) and especially about lawyers eyeing artificial intelligence. Sadly, no mention was made of our pioneering work on using AI to assist in legal decision-making.

In 1993, we used rule and case-based (arguing by analogy) to produce a system for Allan Moore and Co that advised on the Victorian *Credit Act*. In 1996, we built Split Up, a system that used machine learning to predict and give advice on property distribution following divorce. In 2001, we built GetAid, an expert system that provided Victoria Legal Aid with advice about eligibility for legal assistance. In 2005, we constructed Family-Winner which used game theory and heuristics that supported negotiation (via trade-offs) in family disputes. We also built systems that advised on sentencing and copyright.

All of these systems were at the forefront of the use of AI in law. Family-Winner won its heat of the ABC *New Inventors* program in November 2005.

Despite these and other early advances in AI, the legal profession has been notoriously slow to adopt it, compared with sectors such as manufacturing, finance and communications. However, this is changing and the legal profession has begun to engage with AI.

Basically, I believe there are two reasons for this change:

a) Efficiency – the legal community and the courts have moved away from the taxi meter approach to charging and have become concerned with providing efficient advice.

b) Acceptance of the use of the internet – legal professionals finally accept that the internet can be a safe way of conducting transactions and can be used to provide important advice and collect useful data.

At the Law and Courts in an Online World Conference on 8-9 November I will expand on these views. ■

John Zeleznikow, *Professor of Information Systems, Sir Zelman Cowen Centre, Victoria University*

LETTERS TO THE EDITOR

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We reserve the right to edit letters and to republish them in their original or edited form on the internet or in other media. Letters must include a phone number and address for authentication.

tweets

Drug court in AUS is "first time for many that police, corrections & magistrate express concern about their welfare"
NADCP @_ALLRISE_

Great advice from our very own general counsel Marian Chapman #auslaw #womeninlaw
@TreasuryVic

Wonderful piece on ABL lawyer Nyadol Nyuon
@ABLLaw

Sure I've a book review in this edition but far more important is the story of Nyadol.
@eliza_b

Excellent article by our Jonathan and Caroline regarding foreign property investment in Australia
@rcohen_lawyer

Life-changing results for offenders & the community http://bit.ly/2cuxJla Profile of @MagCourtVic Drug Court | via @theLIJ
@SACvic

Succinct County Court judgments? We can thank Helen Garner and Gideon Haigh, part of @CountyCourtVic reforms http://bit.ly/2boPL8N @theLIJ
@VicLawReform

ICYMI this month, Helen Fatouros asks @theLIJ: is our youth justice system broken? www.liv.asn.au/Staying-Informed/LIJ/LIJ/September/Is-our-youth-justice-system-broken-
@VicLegalAid

@theLIJ can it not be a little inspiration from both? Why choose when both featured integrity and honesty and a bit of star quality
@karenfinchLY

Are you channelling Atticus Finch or did Elle Woods inspire your career? #auslaw #whylaw @theLIJ

LAW INSTITUTE VICTORIA

Workplace Relations Conference

Save the date for this year's Workplace Relations Conference, where you will hear from an exceptional line-up of experts in workplace relations and employment law. Our well-known presenters include John Chisholm of Chisholm Consulting and David Rennick of Pinsent Masons Australia.

This will be a full day of unparalleled legal education, panel discussions and networking opportunities with influential members of the legal profession. You will get a better understanding of substantive law issues such as complex transfers of business, understanding mental health impacts on an employee's fitness for work, as well as what to do when a WorkSafe inspector calls.

TOPICS INCLUDE:

- practice management for workplace relations lawyers, including a panel discussion of value-based pricing and client experience management
- navigating pregnancy, parental leave and return to work
- a practical guide for WorkSafe investigations
- an examination of complex transfers of business
- mental health and fitness for work.

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LIV URGES PM TO DROP PLEBISCITE

The federal government should withdraw plans for a plebiscite and amend the *Marriage Act* to allow same-sex couples, intersex and transgender people to marry, the LIV has said in an open letter to Prime Minister Malcolm Turnbull.

LIV president Steven Sapountsis

"The LIV encourages the government not to hold a plebiscite, but instead to introduce legislation amending the *Marriage Act* without delay," LIV president Steven Sapountsis said in the letter. "The LIV has supported marriage equality for many years. Along with other commentators, the LIV considers that the Act, which defines marriage as between a man and a woman, contravenes the notion and attainment of equality by preventing same-sex couples from marrying."

The LIV opposes a plebiscite because: equality before the law is not dependent upon public opinion, a plebiscite is not necessary to change the Act. It will be expensive, time-consuming and may cause social dislocation.

"Equality before the law is a fundamental requirement of the rule of law, and not a matter of public opinion.

"Legally, historically and practically, protection and promotion of equal rights of and for minority groups in Australia is a matter for Australian law and the Parliament. These rights cannot be subject to popular opinion at a point in time, and unless they are subject to a constitutional limitation, do not require a plebiscite or a referendum to be changed or enforced.

"The Act currently effectively discriminates not only against same-sex couples, but also other couples – including intersex or transgender persons – and denies to them the protections and benefits that marriage brings.

"Parliament has the power to legislate for marriage equality under section 51(xxi) of the Commonwealth Constitution.

"That Parliament has the power to decide who may enter the social and legal union of marriage was comprehensively affirmed by the High Court of Australia in *The Commonwealth of Australia v The Australian Capital Territory*.

"The High Court's interpretation of the Commonwealth's power under s 51(xxi) confirms that a plebiscite on marriage equality is not necessary to change the Act."

Mr Sapountsis called on the government to give effect to Recommendation 1 of the 2015 Senate inquiry into the plebiscite: that a bill to amend the definition of marriage in the *Marriage Act* to allow for the marriage between two people, regardless of their sex, should be urgently introduced into Parliament, and that all parliamentarians should be given a conscience vote.

Mr Sapountsis said the LIV is concerned about the expense – estimates range from $160 million to $525 million – and possible social dislocation associated with such a popular vote. "The unnecessary incurring of such costs, especially when the government is calling for budget repair as a national priority, and where the results of a plebiscite will not be binding on Members of Parliament, is now questionable," he said

See the letter at http://tinyurl.com/zmp5a9z.

NEW CARJACKING SENTENCES 'OUT OF KILTER'

The LIV has expressed concern that legislation introduced by the state government to create statutory minimum sentences for aggravated carjacking and aggravated home invasion constitutes a form of mandatory sentencing and skews the existing sentencing regime.

The new legislation has been introduced in response to reports of a spate of carjacking and aggravated burglaries in Melbourne and Geelong in recent months that have caused panic in local communities.

The *Crimes Act* 1958 has been amended to create the new offences of carjacking, aggravated carjacking, home invasion and aggravated home invasion. The new offence of carjacking will carry a maximum penalty of 15 years and those convicted of aggravated carjacking face a maximum penalty of 25 years. A statutory minimum non-parole period of three years will also apply to aggravated carjacking.

CARJACKING WILL CARRY A MAXIMUM PENALTY OF

15 YEARS

AGGRAVATED CARJACKING CONVICTION WILL CARRY A MAXIMUM PENALTY OF

25 YEARS

Home invasion will have a maximum penalty of 25 years and aggravated home invasion will attract a statutory minimum non-parole period of three years.

"The LIV remains opposed to any form of mandatory sentencing/statutory minimum terms," LIV president Steven Sapountsis said. "Mandatory sentencing is not conducive to just outcomes, nor does it lead to a reduction in crime."

The sentences for the new offences would also appear to be out of kilter with sentences for current offences that cover the same or similar proscribed conduct. For instance, the offence of carjacking contains the same elements as a 'robbery', except that a car has been taken. In light of that, the statutory minimum terms of imprisonment of three and five years seem disproportionate to the offending, Mr Sapountsis said.

"In comparison, the offences of 'intentionally causing serious injury' and 'recklessly causing serious injury' in circumstances of gross violence attracts a four year starting point – which may be argued as more serious offences than 'aggravated carjacking' which attracts five years."

13TH AWARDS TO RECOGNISE DIVERSITY OF LEGAL PROFESSION

LIV president-elect Belinda Wilson

Nominations for the 2017 Victorian Legal Awards are invited across more categories which recognise the diversity of the legal profession, LIV president-elect Belinda Wilson said.

New awards are:

- In-house Counsel of the Year Award
- Innovation Award
- Boutique Law Firm of the Year Award
- Law Student of the Year Award
- Top 10 Rising Legal Stars
- Legal Reporting Award
- Lawyers who have been members of the LIV for 20 and 30 years will also be recognised at the gala presentation on 19 May 2017.

The new categories are part of the LIV's three-year plan to diversify the awards to match the changing nature of legal practice.

"We looked at our membership base to see what our members are actually doing and realised we are moving away from the traditional law firm," Ms Wilson said.

"We're seeing the rise of the in-house counsel, and we have lots of innovative entrepreneurs who are challenging and changing the way we think and practise the law. We wanted the awards to recognise those different sectors."

The awards were an opportunity to nominate Victorian lawyers doing inspirational work, providing access to justice, changing the way lawyers practise and helping the profession as a whole through mentoring and motivation, Ms Wilson said.

"As a profession we are not used to getting thanked for the stress and hours that go into being a lawyer. It's important to recognise this and give your colleagues a pat on the back and a thank you. To be recognised by your peers is the highest form of flattery."

The LIV has partnered with the Victoria Law Foundation to jointly implement the Legal Reporting Award as a way of recognising the specialist skills needed to report on courts and the law in the media. "Unfortunately, with all the pressures on journalists these days, those with the skills to report on the law are almost a dying breed," Ms Wilson said. "We want to encourage excellence in this area."

Nominations for the 13th Victorian Legal Awards are invited from 3 October to 4 November. Certificates of Service nominations close 12 December. The Awards gala dinner is at The Atlantic, Docklands on 19 May 2017.

13TH VICTORIAN LEGAL AWARDS

WELCOME TO LAW BOOKS

The LIV bookshop has a new name – Law Books.

The unique retail outlet has been renamed to better reflect the titles it carries for lawyers and law students.

Law Books is the only specialist legal bookstore in Australia and has been a part of the LIV since the early 1980s when it was established by then executive director Gordon Lewis, later to become a County Court judge. It carries a wide range of publications from legal forms and legislation to student texts, crime novels, biographies, the *Law Institute Journal* and books on the art and business of lawyering.

The bookshop, which is managed by Owen Hyde, is open 9am-5pm Mon-Fri, and books can be ordered online via the Law Books tab on the LIV website.

BRIEFLY

$3 million for legal services

Sixteen organisations will receive more than $3 million for projects that improve education and access to legal services under the 2016 round of Victorian Legal Services Board grants.

LCA calls for detention reviews

Images of alleged mistreatment in Townsville's Cleveland Youth Detention Centre and Brisbane Youth Detention Centre, aired on the ABC in August, emphasise the need for all jurisdictions to conduct independent reviews of their juvenile detention systems, says the Law Council of Australia (LCA).

Reporter referred to DPP

Sydney Yahoo 7 News online reporter Krystal Johnson could face contempt of court charges after her August report on a murder trial caused the trial to be aborted. The report included material that had not been put before the jury in a Victorian Supreme Court trial. The matter has been referred to the DPP.

Women's prison turns 20

The Dame Phyllis Frost Centre has turned 20. Victoria's only maximum security women's prison houses 400 prisoners, with an extra 150 beds and other facilities currently being developed as part of the state government's response to the Royal Commission into Family Violence.

Parental leave milestone

Gadens' new parental leave policy offers staff up to six months paid leave, which it says is the highest of any law firm in Australia. CEO Grant Scott-Hayward said Gadens was committed to workplace flexibility. .

New VEOHRC chair

Lawyer Moana Weir has been appointed chair of the board of the Victorian Equal Opportunity and Human Rights Commission.

CHILD PROTECTION CHANGES UNDER REVIEW

Unsuitable placement of Aboriginal children, unrealistic time frames for parents to achieve family reunification, prevalence of litigants with neurodisabilities and little recognition of children's rights – these were some of the concerns raised at the Children's Matters seminar in August.

The concerns stem from legislative amendments to the *Children, Youth and Families Act 2005* (Vic), which came into effect in March, changing the way child protection matters are handled by the Children's Court and the Department of Health and Human Services.

As a result of the reforms, parents with children in out-of-home care (OOHC) now have two years to respond to protective concerns in order to achieve reunification, before a permanent alternative is sought. The reforms were intended to give children in OOHC greater stability by reducing the delay in obtaining a permanent care order, but they have raised concerns due to the difficulty in achieving reunification of children with their parents inside two years.

Many of these parents are required to undertake treatment (such as drug and alcohol services and men's behaviour change programs) before their children can return to their care. Due to the current wait times for these services, it will be unrealistic for many parents to achieve this during the two year period. Once the period expires, their children are permanently removed from their care, even if the parents are taking active steps to resolve the issues that led to their children being placed in OOHC and the delay is outside their control. The power of the Court to take such factors into account has been removed under the reforms.

Victorian Aboriginal Child Care Agency CEO Professor Muriel Bamblett said the issue was particularly troubling for Aboriginal children who are overwhelmingly overrepresented in OOHC and who were usually placed with non-Aboriginal carers. Only 9 per cent of Aboriginal children are currently placed with Aboriginal carers.

A review of the reforms began in September. Conducted by Victoria's Commissioner for Children and Young People Liana Buchanan, it will address whether the reforms are meeting their objectives and if there are unintended consequences as a result.

NEW BENCHBOOK ON FAMILY VIOLENCE

The first stage of a new online bench book for judicial officers dealing with domestic and family violence related cases has been published.

Federal Attorney-General Senator George Brandis welcomed the release in August of the Commonwealth-funded National Domestic and Family Violence Bench Book by the Australian Institute of Judicial Administration (AIJA).

It will provide comprehensive guidance on issues relating to domestic and family violence for judicial officers in all jurisdictions.

It will also assist other service providers and legal professionals who are working with victims and perpetrators of domestic and family violence.

The development of the bench book implements a key recommendation of the joint Australian Law Reform Commission and NSW Law Reform Commission report, "Family Violence – A National Legal Response".

The first stage provides information about the dynamics of domestic and family violence, guidelines for courtroom management, information about referrals for victims and perpetrators of domestic and family violence and reference to specific matters judicial officers should consider when making decisions in domestic and family violence related cases.

This resource will promote best practice in domestic and family violence related cases across jurisdictions and will assist judicial officers with their decision-making and writing of judgments.

The first stage of the bench book is available on the AIJA website at www.dfvbenchbook.aija.org.au.

The second and final stage of the bench book is scheduled to be launched by June 2017.

The bench book is being developed by the AIJA in partnership with the University of Queensland, TC Beirne School of Law. ■

Court on camera

DAVID JOHNS

1

2

DAVID SICKERDICK

3

DAVID SICKERDICK

4

DAVID JOHNS

5

DAVID JOHNS

6

Victorian Golden Gavel

1 Victorian Golden Gavel competition runner-up Jack Madigan-Manuel (Clayton Utz) and winner Catherine Dorian, (Corrs Chambers Westgarth) with the award. Ms Dorian will represent Victoria at the National Golden Gavel competition in Tasmania on 7 October.

Student engagement session on Careers in Law

2 Keynote speakers High Court Justice Michelle Gordon, City of Hume mayor Helen Patsikatheodorou, Supreme Court Chief Justice Marilyn Warren, Victorian Bar President Paul Anastassiou QC and some of the 200 local year 11 and 12 students who attended the event at the Hume Global Learning Centre, Broadmeadows.

Mildura County Koori Court launch

3 Loddon Mallee Regional Aboriginal Justice Advisory Committee executive officer Paula Murray at the opening of the Mildura County Koori Court.

4 Parliamentary Secretary for Justice Ben Carroll and Ms Murray award Jarrad Peterson who won first prize in the Mildura County Koori Court art competition.

LIV Young Lawyers Charity Ball

The 2016 LIV Young Lawyers Charity Ball helped raise funds for the WATL Foundation, a joint initiative of the LIV and Victorian Bar to supporting mental health and wellbeing in the legal profession.

5 LIV Young Lawyers manager Cassandra Piacentini and Ernst & Young financial services manager Jessica Hall.

6 LIV Young Lawyers executive members Burgess Paluch Legal Recruitment consultant Thomas Hobbs and State Trustees senior compliance adviser Adam Wakeling. ■

LAW INSTITUTE VICTORIA

Legal Fun Run & Walk 2016

Monday 21 November

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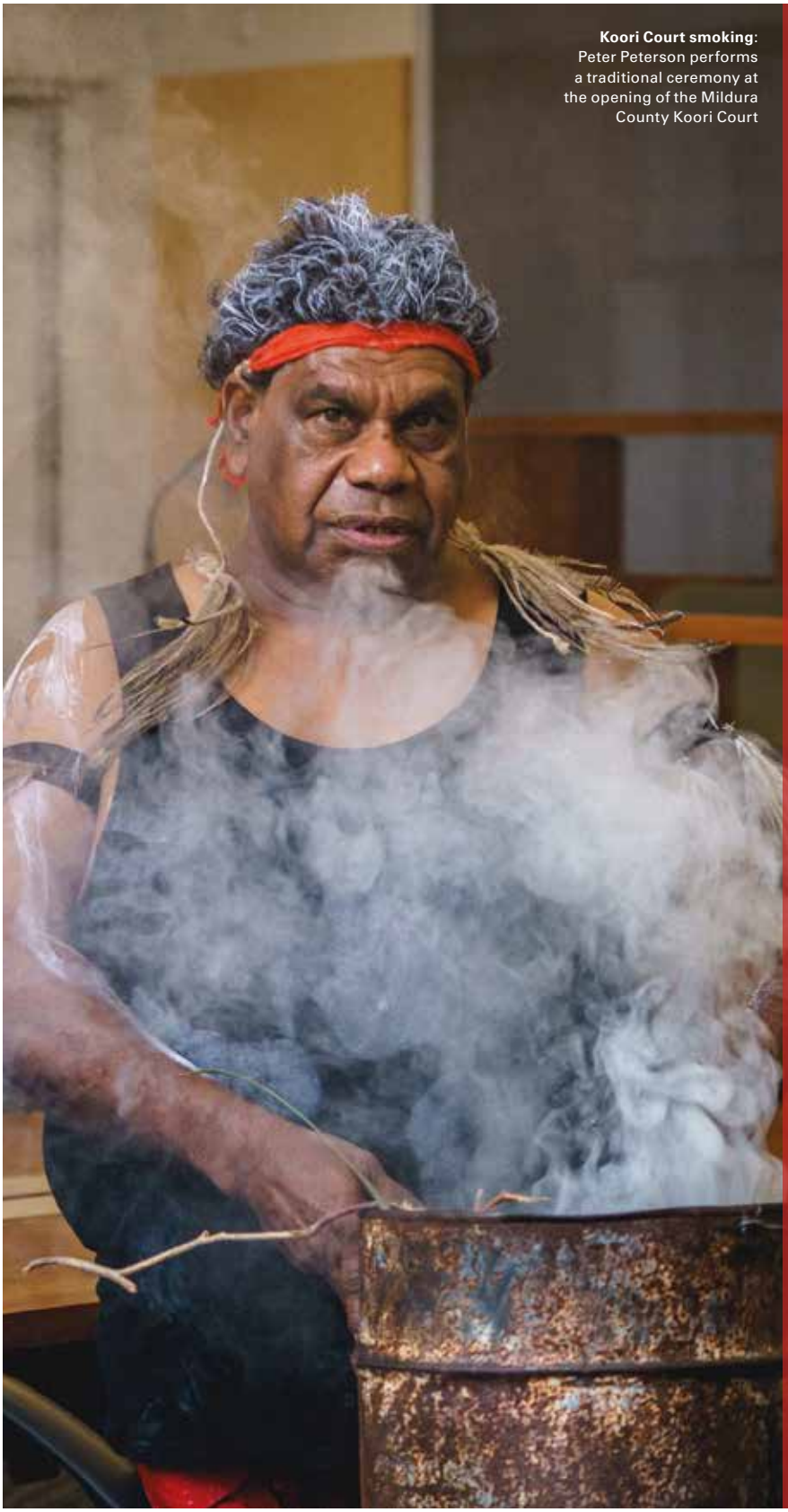


Koori Court smoking: Peter Peterson performs a traditional ceremony at the opening of the Mildura County Koori Court

KOORI COURT NO SOFT OPTION

The opening of a new County Koori Court in Mildura is helping give communities ownership and accountability in the justice system. **BY KARIN DERKLEY**

Brandon* is a Murri man from Brisbane. He's before the County Koori Court on armed robbery and property break-in charges. Judge John Smallwood listens to the offences read out and Brandon sits quietly. The judge, legal team, accused, Koori court officer and Aboriginal elders then reconvene, informally dressed, around a table. The traditional owners of the land are acknowledged and Brandon is reminded that the Court respects Aboriginal culture and has been smoked according to traditional customs.

A tipstaff plays a video of CCTV footage of Brandon pulling a 30cm long knife on a terrified young female shop assistant. Elder Uncle Steve Delaney glares at Brandon. "Well, what do you think of that?" he demands. Brandon looks chastened: "It's disgusting," he acknowledges.

"I'm so upset that you have come on to Kulin nation country and done that terrible thing," says elder Aunty Jacqui Stewart, fixing him with an unflinching stare. "You've terrified those young women."

Uncle Steve doesn't let up.

PHOTO: DAVID SICKERDICK

"Do you realise each of those people you terrorised is only ever going to look at Aboriginal people in future as an attacker?"

What makes Uncle Steve and Aunty Jacqui particularly upset is that this is Brandon's second time before the County Koori Court. He's one of just five of the 80 or so Aborigines who have reoffended since the County Koori Court first opened in Melbourne in 2013.

Brandon's excuse that the rampage happened after he went off his medication cuts no ice with the elders: "This court was set up to stop people like you coming around for a second go – yet here you are again, taking up someone else's time."

The recriminations are harsh, but there are also words of guidance: Brandon has to stay on his medication for the rest of his life, he has to seek out help when he feels things are going bad, and he has to reconnect with his community and the culture that he lost when he was taken from his family at the age of two.

"Your culture is not lost just because you were stolen," Uncle Steve tells him. "You'll always find someone who knows your family history."

It's almost certain Brandon will return to prison for his latest offences. Koori Court is no soft option – offenders receive the same penalties they would get in the mainstream court. The elders play no part in the sentencing – their role is to ensure the offender accepts responsibility for the crime, to understand what led to it and seek out ways of preventing it happening again.

The first County Koori Court opened in the Latrobe Valley in 2009, the Melbourne County Koori Court four years later. Judge Smallwood headed up the courts until September, when Judge Paul Grant took over as Judge-in-Charge.

In August, a new County Koori Court opened in Mildura, alongside its Koori Magistrates' and Children's Courts. The Koori community in Mildura has welcomed the new court with open arms.

"This court has been a long time coming and we're glad it's here," local elder Aunty Janine Wilson said at the County Koori Court opening. "It's a service that is well-needed for our people in this community and we hope it has a success rate like the Koori Magistrates' Court has had."

Elder involvement in the courts was always the cornerstone of the system Rob Hulls envisaged when he established the Koori Courts in Victoria after becoming Attorney-General in the Bracks government in 1999. After observing how the justice system was failing Aboriginal communities in his eight years working at the Mount Isa Aboriginal Legal Service, Mr Hulls says he wanted to give Koori communities in Victoria ownership in the system.

"Based on my experience in Mount Isa, I knew how powerful elders can be in Aboriginal communities. Involving Koori elders was a way of ensuring that Aboriginal people took ownership, respected it and recognised it could be used for good."

Despite critics who described the Koori Courts as "soft justice" and insisted they wouldn't work, the first Magistrates' Koori Courts in Broadmeadows and Shepparton proved so successful they were extended around the state, with the Koori Children's Courts introduced in 2005.

In 2009 the courts were extended to the County Court. Victoria is the only jurisdiction in Australia that has indictable courts.

The Koori Courts meet according to demand. To participate in the Koori Court process, offenders must be

Community power: Traditional dancers Nayte Yates, 6, and Ethan Chilly of the River Warriors at the Mildura County Koori Court opening

identified by the Koori community as Aboriginal, and must plead guilty. Offenders are subject to the same penalties as in the mainstream courts, with around 70 per cent receiving a custodial sentence. The big difference is in the sentencing conversation conducted by the elders that follows the more formal arraignment.

There are around 80 elders across the Magistrates' Court, and 19 in the County Court. Elders are appointed on their cultural and community connections to the region in which they sit. Many of those who sit in the County Court have worked previously in the Magistrates' or Children's Koori courts.

One of the longest serving elders in the County Court is Aunty Pam Pederson, a Yorta Yorta woman. She has been an elder of the Koori Courts for 11 years, with eight years on the Melbourne County Court. "I have a passion for the courts and for our people," she explains. "It is important to me."

Aunty Pam says the process forces offenders to face up to the impact of their actions on their victims and their community. For many, that can be devastating. "We are very firm with our people. When someone is before me they have to stand up and face the court and face their victims. We tell them how they have let down their people, their family and themselves."

Along with impressing their accountability on the offender, the elders perform another important role – of reconnecting them back with the community they have offended, says Judge Smallwood.

"A lot of offenders who come before the courts have lost their connection with community," he says. "A lot of their problems are about that lack of identity and self-understanding. The elders are just brilliant at sorting that out. I've never seen them not be able to find a connection – it might take them an hour. They'll say: 'I went to a wedding once in Orbost and there was a woman there and I reckon she might have been your aunty. How do you think she'd feel about what you've done?'"

In an evaluation of the Latrobe Valley court, offenders said it was the first time they could remember what had happened in the courtroom, Judge Smallwood says. "Prior to this – when you were sentencing a Koori they'd just stare at the floor, not listening to you. But in the Koori Court, every time I've sentenced someone they've not taken their eyes off me for the whole sentence, they are actually listening to what is being said. They say it's the first time they felt they were treated with respect."

It will be a few more years before the courts can collect long-term hard data that shows how successful they are in preventing reoffending. But early results show that Aborigines who have come through the County Koori Courts are far less likely to reappear before the court.

New court welcomed: Local elder Aunty Janine Wilson at the Mildura launch

The accused senses that, because you are sitting there with elders, they can have faith in you.

In the Latrobe Valley there have been no breaches of a CCO by Aboriginal offenders for nearly two years.

"It's the enormous respect in which the elders are held in Koori culture that makes this work so well," says Judge Smallwood. "They have the determination not to reoffend out of respect for the elders. For Kooris that's a powerful motivator."

The way the Court is conducted completely changes the way the judges are regarded by offenders too, Judge Grant says. "The accused senses that, because you are sitting there with elders, they can have faith in you. They think: I'm prepared to listen to this bloke or this woman."

The process also works better for victims, he says. "Of all the court systems we have, the Koori Court gives most credence to and hears victims more than any other. The victim impact statement is read out, and the accused can't block it out. They've got to sit at a table and have what they did to that person said to them from a couple of feet away. The effect of that on the majority is absolutely devastating."

The impact on Koori communities has been as significant as the impact on the offenders themselves. Along with the elder involvement in the sentencing conversation, Kooris are now represented on the court staff. Where once the only reason Kooris would go to a courthouse was to get locked up or have their children removed, the courts are now seen as having a role in protecting the community.

"People feel so much more comfortable now going to the court to ask for an intervention order or make an application for crimes compensation," Aunty Pam says.

The other marker of success is the embracing of the courts by the mainstream justice system, particularly the police, as well as by the broader local communities.

Judge Grant says that when the Magistrate's Koori Court was first set up in Mildura "there was a bit of hostility at first among the police and the community. But by the time we set up the Children's Court one of our strongest champions was the police prosecutor who came to a public meeting and said: 'This is a fantastic process and we should be supporting it'." ■

*Not his real name

PHOTOS: DAVID SICKERDICK

THE RIGHT SKILLS FOR FUTURE-FIT LAWYERS

IN A PROFESSION UNDER CHALLENGE, THE WINNERS WILL BE THOSE WITH THE PROFESSIONAL AND PEOPLE SKILLS TO ADD VALUE FOR THEIR CLIENTS. **BY KARIN DERKLEY**

As a young personal injury lawyer, former LIV president and director of Burke & Associates Lawyers Tony Burke was convinced his clients expected him to demonstrate his legal knowledge on the matters they consulted him on.

"Many were non-English speaking migrants, and they'd come in with their interpreter and I'd spend a lot of time explaining the law. Then one day the interpreter said to me: 'Tony, you don't need to convince these people you know about the law – they know that. Just talk to them about what's important, show them you care, that you're on their side, that you'll fight for them'".

It was a lightbulb moment for Mr Burke: "I realised I'd been doing it all wrong. I ditched my ritual discussion about the law, and instead I let my clients tell their story and really listened to them. It was amazing what a difference it made in terms of the quality of the conversation and the level of their trust and confidence in me as a lawyer."

Clients referred their relatives and friends, but Mr Burke knew the stream of new clients was not because of his superior mastery of that particular jurisdiction. "It had everything to do with their confidence that I was listening to them and on their side."

That was a few years ago, but Mr Burke says many lawyers coming into the profession still underestimate the importance of relating to the clients they will rely on for their living. That's even though law is essentially a people profession and a service industry, he says.

"Lawyers might be highly qualified and they might be good at knowing how to think, but too few of them know how to deal with people."

People skills are just one of a number of what are variously called soft skills, professional skills or even life skills, that have been identified as crucial to the successful careers of lawyers at a time when legal knowledge has become highly commoditised and threatens to be taken over by technology.

It's all about how you engage with your client . . . to such a degree that your business is going to be seen as the place to go.

A capability framework developed by the LIV identifies communication skills and emotional intelligence, along with business management skills, commercial acumen, and digital literacy as part of the professional skills toolbox that today's lawyer needs to be "fit for the future".

LIV training and specialisation general manager Kate Freemantle says it's a given that lawyers need strong technical skills and knowledge in the substantive law areas. "But given the challenges that are happening now and in the future, especially with new technologies, there's a lot of other knowledge and skills you need to be successful in the law today.

"It's all about how you engage with your client and communicate effectively to such a degree that your business is going to be seen as the place to go. It's the ability to pick up not just the spoken but also the unspoken issues that permeate client discussions."

Calling these kinds of qualities "soft skills" undersells them, says College of Law Victoria executive director Madeleine Dupuche. "They may be less measurable, and they're not black and white – but they're absolutely crucial and they're quite hard to acquire."

Some lawyers may be inclined to dismiss the notion of emotional intelligence as requiring them to be "emotional", says Ms Dupuche. "But what it means is being able to read and anticipate someone's response and adjust the delivery of a message in a way that is appropriate to that person." That ability to relate on someone's level extends not just to clients but also to members of one's team, she points out.

Law firms agree that with technical excellence a given, people and professional skills are paramount to success as a lawyer in today's world.

K&L Gates director human resources Nick Grant says that being able to relate well to clients and other team members is a fundamental skill for its lawyers. "Strong interpersonal skills are a must. We need lawyers who can build trust with clients and be able to work well with the team internally as well."

At Madgwicks, HR manager Sonia Masini says the firm looks for people skills as well as business skills when it hires new lawyers. "We need people who can talk to clients and who can behave in a way that fits in with our values. They need a sense of cultural awareness and an understanding of global politics and issues. And they need to have financial and marketing ability."

At Allens, staff partner for graduate recruitment

Promoting life skills: Madgwicks HR manager Sonia Masini, lawyer Tony Burke and College of Law Victoria executive director Madeleine Dupuche

Miriam Stiel says that while lawyers need academic achievement and intellectual ability to get "through the door", after that "interpersonal skills, communication skills, and relationship building are actually what we are looking for.

"Gone are the days where junior lawyers were hidden away reviewing documents. We want people who can build relationships with clients, who can work well with other team members, who have focus and resilience. Without these skills you are never going to achieve."

Mr Burke says professional and people skills are so crucial they should be integrated into the law school curriculum. "The lack of these skills is a primary driver of professional misconduct and negligence complaints made against lawyers each year," he says.

"Misconduct complaints are rarely to do with a lawyer's lack of knowledge – they're invariably about a failure to communicate and a failure to be clear about what the lawyer was being asked to do. So if we want to reduce risk and improve the standing of the profession, these skills should be front and centre of legal education before lawyers are let loose on the public."

Ironically, "old school" lawyers who learned the trade doing articles in a law firm probably gained a better grasp of people and professional skills than modern law graduates who often do their legal practice training online, says Ms Dupuche. "You'd learn those skills under the wing of an older lawyer."

The College of Law offers students a 10 unit Legal Business Skills Series that aims to equip them with the skills to communicate effectively, develop a commercial mindset and build effective relationships. It helps plug the gap, says Ms Dupuche, but it's a lot to cram into a relatively short amount of time.

The current Priestley 11 law school curriculum dates back to a pre-internet world where lawyers were the keepers of legal knowledge, she says. "But there are robots being invented that can dispense that knowledge nowadays. What we need are lawyers who can bring the professional judgment that robots don't yet have, and be able to work with that knowledge to provide clients with value."

Assessment in law school still rewards students' ability to apply law in a technical way rather than to think in terms of what the client needs, she says. "It's generally accepted that spending more time dealing with clients during law school is the best way of learning, but the reality is that there's relatively little opportunity for clinical practice until they come to someone like us for practical training."

One of the first tasks the College's students undertake in legal training, writing a letter of advice, demonstrates law schools' lack of client focus, Ms Dupuche says. "They invariably read like a law essay, exploring all the possible outcomes. You have to remind them that they have to actually offer a recommendation to the client."

Commercial nous is another essential skill that is neglected at law school, says Ms Masini. "A sense of commerciality should be obligatory. Students need to be prepared for the realities of today's law firms. They need to know what it means to run a business and understand what clients are experiencing in the economy."

However, there's an argument that the best place to develop people skills, problem-solving skills, and a sense of enterprise may be outside of formal legal education altogether.

At K&L Gates, Nick Grant says that life experience outside of university coursework is where lawyers best forge their people and professional skills. "What we look for are people who have had the opportunity to interact and build relationships with people – through extra-curricular activities, through volunteer work, internships, part-time work in retail or customer service, sport, travel, student politics, drama classes, public speaking."

In fact, the tendency for law students to rule out part-time work and other activities to focus purely on their studies can be counterproductive to them developing as an effective well-rounded lawyer, says Ms Dupuche. "Parents say they don't want their kids to work part-time because they need to focus on their course, but that's where they learn the most. That's where they learn to deal with people, learn to problem solve, learn to commit and to turn up."

Says Allens' Miriam Stiel: "Experience in part-time jobs in retail, hospitality, or child care – that's where you actually develop a lot of these interpersonal skills, as well as the resilience and ambition that is going to be the key to future success".

It's the "McDonalds University" concept, says Mr Burke, where people who have had a job in a service environment are more likely to have developed the kind of customer service skills and independence needed in today's profession. "It's a buyers' market out there, and what we need is a service culture." ■

FIRMS BECOME SOCIAL MEDIA SAVVY

USING SOCIAL MEDIA IS A VITAL PART OF BUSINESS PRACTICE FOR LAWYERS.

Who would have predicted just a few years ago that the Supreme Court of Victoria would have its own Facebook page and Twitter account or that one of its senior judges would regularly tweet on subjects as diverse as marriage equality and whether Led Zeppelin plagiarised the tune of *Stairway to Heaven*?

Many of Victoria's law firms, both big and small, have recognised that entering the social media space is no longer optional because that is where clients do business, share information, find products and get news.

The tectonic shift in the way we communicate is confirmed in a report based on Deloitte Consulting's media consumer survey for 2016, which found that social media is now the dominant force across media consumption.

According to Deloitte, the social media platforms are the media super powers for all age groups in Australia, with 84 per cent of us engaged with social media networks, two-thirds of us interacting with social media every day and 27 per cent of us checking our accounts four or more times a day.

The LIV has been active for a number of years, through initiatives such as the Social Media Taskforce and social media courses, in helping law firms get into the space. LIV 2015 president Katie Miller strongly advocated that lawyers use social media and during her presidency travelled to the US and around Australia before producing a report on emerging and new technologies (http://tinyurl.com/gpc2kr5).

Outgoing LIV general manager of public affairs and legal policy Kerry O'Shea says lawyers in Victoria are becoming increasingly aware that social media is an important business tool.

"When we started it was 'why do we need to know about this social media stuff?' Now it's 'how do I use this social media to my best advantage?'

"Lawyers had to learn because their clients demanded it. It became very obvious through the Social Media Taskforce that they had to know how it was being used in litigation, in family law, in criminal law, in the courts.

"It can't be ignored and should be embraced."

Some lawyers are sceptical initially but eventually the use of social media becomes part of their business practice, Ms O'Shea says. But there are dangers and firms should have clear guidelines about what should and shouldn't be posted and shared.

"In the old days people would gossip at Friday drinks after work. Now they are gossiping on social media. It's an important part of staff induction for firms to make it clear what their expectations are on social media as well as in the office."

Communications and media specialist Mick Paskos says sole practitioners should not despair at the thought of becoming active in social media. "I am told by clients that they are too busy working in the business to work on the business," says Mr Paskos, director of ONmessage media.

"You don't have to be on every social media platform. Start with what you are comfortable with in terms of setting up the account and posting tweets and then over time step it up if you feel comfortable," he says.

Social media should be viewed as an extension of the way lawyers have always operated within the profession and their communities and is simply networking in a different way, Mr

Paskos argues. "In the same way that lawyers traditionally networked through hosting drinks, having information nights, becoming part of Rotary, going on boards. Part of it was a social service and giving back to the community but part of it was networking."

Criminal lawyer Bill Doogue has been on board for eight years, using Twitter to share information, boost his business and keep up to date with the latest trends in the law from Australia and overseas.

He doesn't hold back in his views on the criminal justice system but Twitter's controlled settings allows him to vet who follows his account.

"I've found some really fascinating information we use in our practice about how people present things in court cases or practice management. Twitter spills over into the real world quite a lot," says Mr Doogue, a director of Doogue O'Brien George.

"For me it's just part of what I do and how I get information. This isn't the future, this is the now. If you are not considering these issues, fine, you can have a great practice but you are not really thinking about developing your practice."

Through his Twitter account Mr Doogue has engaged with lawyers in the US, learning how they prepare for trials and present their cases as well as sharing information on what juries are reacting to and evidentiary developments.

"I read an enormous number of articles that come through my Twitter account and there is so much change going on in the law – if you want to follow those trends and be slightly ahead you need to be looking at this material.

"Twitter has helped with general questions around cases we've run.

"We were contacted by an American firm who were defending a matter in relation to an alleged Anonymous [hacker activist] member.

"We were able to find the lawyer who had represented someone in Australia in a similar case. They were able to contact them to discuss what evidence was led in Australia and how the Americans were going to act in relation to issues of extradition."

Larger firms have the resources to use every tool in the social media arsenal to provide valuable extras for their clients.

Maddocks is an example of a firm that uses direct electronic communication, social media platforms like LinkedIn, Twitter and Facebook as well as blogs, its website and the traditional media.

Its communications manager Jason Silverii has worked in legal communications for 15 years and has watched the social media revolution unfold. He says that increased competition means law firms have to become more innovative.

"The most savvy lawyers now use electronic newsletters, their LinkedIn profiles, other social media accounts and blogs to position themselves as leaders in a certain area," Mr Silverii says.

"This is on top of the one-on-one business development work they are doing with clients and prospective clients. But to be heard in this increasingly noisy space lawyers need to either be willing to have an opinion or communicate in a very engaging way.

"The future of law firm communications rests with a content management system that allows firms to communicate personally and directly with their clients. You will also see law firms follow the trend of creating communications channels outside of their own brand."

Lander & Rogers communications manager Pippa Clark says social media gave the firm a way of both building brand and communicating with clients, using YouTube, LinkedIn and Lexology as its main platforms.

"Traditionally law firms have tended to be heavy on sending regular email updates to their clients. We are trying to move away from this model, and to be more conscious of how we distribute updates and content. Social media is certainly one channel that we are increasingly using to achieve this," Ms Clark says.

"We have also explored using independent social media aligned to particular practices or strategies. For example, during the last financial year our family and relationship law team undertook a campaign with Honeycombers in Singapore, a website that caters specifically to expats in Asian countries.

"The team ran an advertorial and advertising campaign to help build brand in the AsiaPac region, in particular with the expat community in Singapore."

Mr Silverii and Ms Clark agree that LinkedIn has been the most successful tool. When Lander & Rogers started operating its company LinkedIn page in 2013, it had about 700 followers and it now has nearly 6000.

The message is that social media is becoming the main method of communication across the community and law firms that want to grow need to be on board. ■

HOW TO GET STARTED

- Create an account with any number of social media channels.
- Choose Twitter to access latest news, Facebook for connecting with friends and colleagues, Instagram if you like taking images, LinkedIn for work related activity including achievements, connecting with colleagues and industry leaders.
- Start with one channel and explore the site.
- Follow people and business of interest (news, lawyers, courts,legal interest groups).
- Engage with other users' content by sharing, liking or commenting on their posts.
- Remember that comments on social media leave a footprint online. Even if you delete from your own page, someone may have screen grabbed it and shared it.
- Be aware of your firm's social media policy. Many prohibit certain activity even if you are using your personal account.
- The LIV runs courses on engaging with social media and how to avoid common pitfalls.

Tom Opasinis, LIV social media manager (TOpasinis@liv.asn.au)

WELLBEING FOR JUDGES

JUDGES ARE GETTING HELP TO MANAGE RELENTLESS EXPOSURE TO TRAGEDY.

Judicial College of Victoria wellbeing project adviser Carly Schrever

In May this year, the Judicial College of Victoria (JCV) launched a web resource offering a vast cache of research and advice on a theme that, until two years ago, remained off limits in Australian judicial circles: judicial stress.

The fact that judges might get stressed by their work should be obvious. Many of them spend their days immersed in the fine detail of the most heinous murders, rapes and assaults. They have a demanding workload. They also work in isolation.

The phrase "vicarious trauma" has been in use for 25 years to describe the stress experienced by clinicians who work with victims of rape and violence. But it was never applied to Australian judges.

On the contrary, according to former High Court judge the Hon Michael Kirby, judicial stress was regarded as an "unmentionable topic". The Great Dissenter was the first and, for many years, the only judge to acknowledge that stress might be an issue for judges. He wrote about it first in 1995 (in a paper that can be found on the JCV website) and again in 1997, defending his views against accusations of him "jumping on the stress bandwagon". And then there was silence.

But research was being done in the US on the topic. A 1994 study of work-related stress in 88 trial judges found 77 stressors specific to the judicial role, including highly emotional cases and cases involving intense public scrutiny. A 2003 study of 105 American judges found that two-thirds of them experienced symptoms of work-related vicarious trauma; a 2008 study examined the nature, prevalence and severity of stress symptoms among 163 American trial judges.

At the same time Australian researchers were looking at stress in the legal world: but only as experienced by law students, solicitors and barristers.

Finally in April 2014 the topic of vicarious trauma for judges got its first airing at a JCV day program on the subject. Chaired by the County Court's then Chief Judge Michael Rozenes, it featured psychologists talking about stress, vicarious trauma and strategies to build resilience.

The County Court then devised a pilot "resilience" program in which 20 volunteer judges had sessions with psychologists to debrief about the vicarious trauma they experienced in a job described by psychologist Dr Rob Gordon as "relentless exposure to one tragedy after another".

Meanwhile Carly Schrever, a lawyer, provisional clinical psychologist and the judicial wellbeing project adviser at the JCV, began work on the first Australian study of judicial stress: an investigation of the factors that both promote and undermine judicial wellbeing. She will use that evidence to identify measures to support judges' psychological health.

The Judicial Wellbeing web resource is the most recent initiative in the JCV's ongoing program of promoting judicial resilience.

Aimed at all Australian judicial officers, this combined effort by the JCV and the County Court of Victoria presents everything a judicial officer might need or want to know about judicial stress.

First, the site offers links to extensive academic research and commentary on the subject, including the American research cited and all available speeches by Australian judges on this topic.

Its Wellbeing section offers a huge variety of mental health self-help resources, from a TED talk on work happiness to links to mindfulness and stress management smartphone apps, and a link to Alain de Botton's *The Book Of Life*, which has chapters on "calm", "mood" and "self-knowledge".

Its Getting Help section offers the phone number of the Judicial Officers Assistance Program, a free confidential counselling service offering help 24/7. The section also presents an actual clinical tool for work stress: the self-care assessment worksheet. Used by psychologists to assess a person's vulnerability to vicarious trauma, its three pages of questions check a person's maintenance of their own emotional, physical, psychological, spiritual and workplace health. There are also links to sites such as *mindhealthconnect*, an online store of mental health and wellbeing information.

"What's unique about this site is that it distils all the existing research about lawyer and judicial wellbeing into one place," says Ms Schrever, who spent the best part of a year putting the site together. She says it's too early to release details of website visitor numbers, but notes that the JCV has received positive feedback on the site from judicial officers around Australia.

Supreme Court Chief Justice Marilyn Warren is pleased with the site. "Health and wellbeing are vital parts of judicial life," she says. "We encourage all our judges and magistrates to look after themselves. Being a judge is a demanding and often challenging role. Judges work for many years on the bench. The role needs to be sustainable. The College is making a very significant contribution by raising awareness."

Judicial Wellbeing is at www.judicialcollege.vic.edu.au. ■

LIZ PORTER

THE ART OF PERSUASION

TRIAL ADVOCACY IS A SKILL THAT CAN BE LEARNED. DOOGUE O'BRIEN GEORGE LAWYERS KRISTINA KOTHRAKIS AND KATE BALLARD EXPERIENCED THIS FIRST HAND IN THE US.

Many of us have been in court and watched with great admiration as counsel skilfully, and seemingly effortlessly, cross-examine witnesses and captivate juries with their closing arguments. The temptation is to think the advocacy skills they possess are naturally bestowed, and that they have a special and unattainable natural ability out of reach to the average lawyer. This has become an outdated notion. Proficiency in trial advocacy is a skill just like any other, that can be learned.

Our firm believes strongly in this. As part of an ongoing commitment to training its lawyers in trial related skills, to further their professional development and bring better outcomes for clients, we were sent to Macon, Georgia in the US to participate in a two-week intensive trial practice course run by the National Criminal Defense College (NCDC) at the Mercer Law School.

Over the past 30 years, the NCDC has provided training to lawyers in skilled trial advocacy. Teaching staff are leading criminal defence attorneys in America. Many of them run capital cases, and head public defender law offices around the country. Most of these passionate and skilled teachers were students of NCDC and attest to the benefits the program brought to their trial practice. The teaching staff are unpaid and attend each year voluntarily because they believe so strongly in the program and what it achieves for its participants.

We were lucky enough to be among about 100 students who took part in the course in July. Students came from all over the US and had varying levels of jury trial experience. Each student was allocated one of four cases (all of which were adaptations of real cases), which became their case of primary responsibility. Over the ensuing two weeks, the students were guided through the trial process from beginning to end.

The effectiveness of the program comes from the formulated teaching model. It involves a three step process for each skill or stage of the trial. For example, opening address or cross-examination.

Step 1 Instruction
A lecture is presented which provides instructions on how to perform the task being taught, together with the rationale or theory behind that technique.

Step 2 Active participation
The students break into small groups of lawyers with similar trial experience to practise the task using the facts of the allocated case. Coaching and feedback are provided from a teacher who leads the small group session.

Step 3 Demonstration
Following the active participation, the students reconvene to watch a member of the teaching staff demonstrate that task.

Each day we focused on a different activity, starting with developing a strong case theory and client interview, through to closing address. Professional actors played the role of clients and witnesses, which added a realistic component to the activities.

One of the most interesting elements of the course was the emphasis on storytelling and the use of an emotional narrative as a tool for persuasion. It became apparent that their willingness to be creative in court is where the American approach differs the most from our own. There is a zealousness in the way they represent their clients which is incredibly inspiring.

We were encouraged to tell the story of the case and to find its primary emotion. In a self-defence case, the primary emotion might be the fear the client felt which compelled them to strike their attacker. We were taught to put jurors in the client's shoes so they understood their reaction. We painted the critical moment in words, capturing the intensity of the moment. Emotional concepts jurors can relate to are often more persuasive than pure logic and facts. We were encouraged to stop sounding like lawyers, and instead, to simply stand before the jury and tell the story of what we say happened.

We were taught to put jurors in the client's shoes so they understood their reaction.

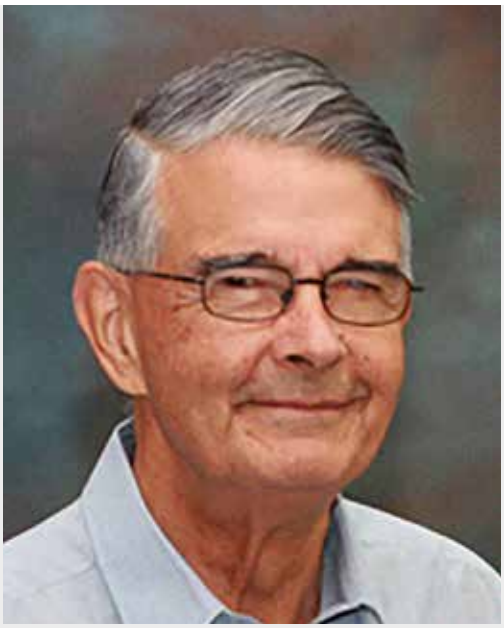
The road to Macon was a long one, but the path to NCDC had already been carved out by Doogue O'Brien George partner and in-house counsel Josh Taaffe who did the course in 2014. He was the first Australian to attend the course and he came home with his practice enriched, and armed with techniques he has shared with colleagues. Now, the weekly advocacy and case strategy workshops held at the firm are based on teaching methods learned at NCDC.

We now have three graduates of the trial practice course at NCDC. This progressive approach to advocacy training will surely see excellent outcomes for clients and improve the standard at which they are represented. ■

Kristina Kothrakis is a partner at Doogue O'Brien George. She is an accredited criminal law specialist and is on the executive of the LIV's Criminal Law Section and the board of the Northern Community Legal Centre. **Kate Ballard** is a solicitor who is involved in running a large number of complex criminal matters for the firm.

Charles Guy Powles

24 MARCH 1934 – 19 JULY 2016



When Guy Powles died he was actively involved in the law, as he had been for almost 64 years. As a senior research fellow of Monash Law School he was supervising a PhD thesis on sorcery in Papua New Guinea and had just completed two major academic papers on Tonga, presented on his behalf by colleagues at conferences in New Zealand.

All his life Guy managed to combine his three great loves, the law, the Pacific Islands, and his family. His father Sir Guy Powles, later New Zealand's first ombudsman, was High Commissioner in Samoa, and Guy travelled back and forth to boarding school with Pacific Islands students, several of whom remained lifelong friends. After completing an LLB and a BA in French at Victoria University in Wellington, he practised until 1974 as a barrister and solicitor there, interspersed with two years as stipendiary magistrate in Samoa, an LLM in insurance law and a year's exchange in a London solicitors' office. At age 40 he became interested in further research in Pacific constitutional law and completed a PhD at ANU.

An intended four years in academia extended for the rest of his life, as he enjoyed teaching and the friendly collegial environment of Monash, and also appreciated how much he could contribute to legal practice and constitutional development in Pacific Island states from the vantage point of a major Australian university.

At Monash Guy founded the Monash Oakleigh Legal Service as part of the clinical law program he helped to develop. He taught Pacific comparative law, legal ethics, other subjects concerning the legal profession, and insurance law. He built up the Pacific law collection in the Monash law library and set up the Pacific Room there, decorated with artefacts he had been given by Pacific friends: it became known among students as a particularly pleasant place to study.

After retirement from full-time work he volunteered one semester a year for four years at the University of the South Pacific law school in Vanuatu, which he had helped to establish. All through his life Guy was involved with many aspects of the law and its development in Pacific Island states. He had a judicial appointment in the appellate division of the Supreme Court of Federated States of Micronesia. He had many commissions: from Pacific Island governments to research and report on a number of topics, such as the Chiefly Titles and the Land and Titles Court, and the place of chiefs in Pacific and African constitutions for the Fiji Constitutional Review Commission; and from AusAid to write a manual of practice and procedure for the magistracy of Papua New Guinea. He served on the Nauru Constitutional Review Commission, and was engaged to advise the Tonga Constitutional Reform Committee.

Throughout his life Guy had a high level of local community involvement, the concept of service instilled in him by family tradition and from attendance at a Quaker school in Washington in his early teens. He would help virtually anyone who asked, and always did a thorough job. He was particularly concerned about Pacific and other non-Anglo youth in their interaction with the Australian court system and developed a number of projects to help familiarise them and their families with appropriate procedures. Through involvement with the Australian Association for Pacific Studies, which he helped establish, he hoped to help raise the consciousness of Australians to the importance of their Pacific neighbourhood.

The many messages received on Guy's death have similar themes, emphasising his gentleness, his consideration and his commitment. Students from over the years, especially Pacific Island students, acknowledge his importance to their personal and professional development. A number of others working now in Pacific teaching and research say they would not be doing so if it were not for his encouragement. His doctor saw him as a "very fine and distinguished man"; his dean noted that "every one of my conversations with Guy was joyful and full of enthusiasm for his life and work". Guy had health problems as a result of having had rheumatic fever as a child and, more recently, meagre sight from a retinal disorder but he never allowed these conditions to restrict him.

Guy's third love was his family, and his wife Maureen, children Tim, Alex and Charlie and their families know how fortunate they are to have had his presence, his influence and his kindly humour in their lives. They are grateful for, as one friend and colleague put it, "a life well-lived in the service of many". ■

This tribute was provided by Guy Powles' son, **Charlie Powles**, senior supervising solicitor, Refugee Legal.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Effective expert witnesses

PRACTITIONERS SHOULD BE AWARE OF THE PITFALLS WHEN INSTRUCTING EXPERT WITNESSES IN PERSONAL INJURY TRIALS AND IN THE PREPARATION OF EXPERT REPORTS.

BY DOUGLAS J JAMES AND JAMES FITZPATRICK

The "once and for all" nature of compensatory damages means that for an injured plaintiff in particular, the consequences of failure or a poor result can have a significant effect on their financial security and wellbeing. Large sums relating to costs are also involved. Such high stakes can lead to many cases settling out of court. In order to argue or present a case or advise properly in relation to settlement prospects, the strength of a client's case needs to be assessed with precision and care.

The opinions of experts can play a key role in determining liability, retained earning capacity, and even quantum of damages at trial. Expert evidence is most useful where there is an issue in the case that needs to be proved and the expert opinion will assist a jury in understanding a technical point. While the process may seem straightforward, there are many traps for the unwary.

Good practice

Expert evidence can help prove your client's case, avoid the costly exercise of having evidence excluded, and allow you to consider excluding an opponent's material.

When the *Uniform Evidence Acts* were introduced, the provisions relevant to opinion evidence were first analysed in decisions such as *Makita (Australia) Pty Ltd v Sprowles* (*Makita*)[1] and *Dasreef Pty Ltd v Hawchar* (*Dasreef*).[2] Practitioners should also be aware of s79 of the *Evidence Act 2008* (Vic)[3] which these cases interpret. Section 79(1) provides that if a person has specialised knowledge based on the person's training, study or experience, then the opinion rule does not apply to evidence of an opinion that is wholly or substantially based on that knowledge and that evidence of an opinion is not admissible to prove the existence of a fact about which the opinion was expressed. Practitioners in the area of personal injuries should be acutely aware of the section's elements in order to avoid their expert's evidence being excluded.

In Victoria, the decision in *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* (*Dura*)[4] provides a useful summary. In short, good practice requires ensuring that:

- the expert has specialised knowledge based on his or her training, study or experience that permits the expert to give the opinion
- the opinion expressed is wholly or substantially based on that specialised knowledge
- the reasoning process is sufficiently clear to demonstrate that the witness has used his or specialised knowledge
- facts and assumptions used by the witness are recorded in the report
- the party tendering expert evidence establishes the facts necessary to support the opinion.

It is the role of the legal practitioners to ensure that these requirements are met.

SNAPSHOT

- If it becomes necessary for the expert to seek further instructions or to request further information in order to enable the formation of a fully informed opinion, then late briefing can become a barrier to proper preparation.
- The provision of incomplete factual material to an expert is one of the most common attacks made by an opposing counsel in cross-examination.
- Potential problems can be avoided when practitioners employ a timely, thoughtful, logical and considered approach to the use of experts in personal injuries litigation.

ILLUSTRATION: PAT CAMPBELL

Selecting the expert

Although identifying the correct area of expertise and a suitable expert is unlikely to be problematic, it follows from the decisions in *Makita* and *Dasreef* that the qualifications of the expert witness should be carefully considered. Once you have identified the factual question to be resolved, the identification of appropriate witnesses flows naturally.

Factors to consider when selecting an expert witness include:

- the level or type of academic qualifications
- practical experience
- professional membership, associations and affiliations.

The various professional bodies and university departments can be a useful starting point in identifying an appropriate expert witness.

Some expert witnesses may be perceived to be overly sympathetic to either the plaintiff or defendant's case. It is worth considering whether the evidence of an expert witness who would be considered more independent may be beneficial in the running of the case.

Briefing the expert

Conflicts of interest

Conflicts of interest must be avoided. Therefore, all parties to the proceedings should be identified to the expert in the written instructions.

Timing

Once the issues in the case have been clearly identified, it is time to engage the experts. In most personal injuries cases, because of earlier (eg, serious injury) applications and the airing of issues which has been afforded by them, by the time of the close of pleadings, the central issues are likely to have been well established. However, it is usually advisable to wait for the completion of discovery and interrogatories before engaging a particular expert. In exceptional cases, where liability turns on novel, unusual or technical facts, early reports from an expert may be required to gauge a case's viability.

The timing must allow ample opportunity for a report to be properly prepared well in advance of the trial. If it becomes necessary for the expert to seek further instructions or to request further information in order to enable the formation of a fully informed opinion, or the expert needs to interview the witnesses to assess part of his or her evidence, then late briefing can become a barrier to proper preparation. It should be made clear to the expert witness that any further information required will be made available.

In all cases, rushed, incomplete or superficial reports can be avoided by appropriate timing of the briefing of the expert within the litigation process. For example, in *Eaton v ISS Catering Pty Ltd & Ors*[5] the Court of Appeal dismissed an appeal by an unsuccessful plaintiff who had suffered multiple injuries in a slipping case. The plaintiff had sought an adjournment on three occasions during the trial in order to allow for an expert report to be revised to include the results of a wet dry slip test and to deal with other deficiencies identified by the trial judge. The trial judge had refused the adjournment applications on the ground that the failure to complete the testing and serve an admissible report in time was a breach of the overarching civil procedure obligations. This is a prime example of the problems that can follow from failure to act in a timely fashion.

Written instructions

It should be assumed that any document or instruction given to the expert may quite properly end up in the hands of your opponents. Any communication requesting or affecting a new opinion needs to be recorded. In order that the issue of waiver of privilege does not arise, a proof of the client's evidence should not be provided to an expert but pertinent facts should be separately set out.

The letter of instruction and brief must contain all relevant materials, both favourable and unfavourable, provide an adequate and accurate history of the key events and ask the questions which the practitioner determines to be pertinent. Any history needs to be both accurate and uncontroversial. A prime example of the consequences of an inaccurate history is provided by the decision in *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (Ruling No 8)*[6] where an expert was provided with conflicting instructions in relation to the chronology of events from the plaintiff and senior counsel in the case. Ultimately the expert used the instructions from senior counsel, but not before several versions of the expert report had been completed and signed. The consequences of this conduct were visited on both the client, in the form of delay, and the expert and counsel in the form of various costs orders.

The materials need to be complete and allow the expert to rely only on assumptions that can be supported by sound evidence.[7] The provision of incomplete factual material to an expert is one of the most common attacks made by an opposing counsel in cross-examination. Any assumption or fact on which the expert witness is to base their opinion should be capable of being proved. If an opinion is based on factual assumptions that are not ultimately established by evidence, then it has the potential to render it inadmissible through the effect of the s135 discretion.[8]

In *Korlevski v Lea Group North (Vic) Pty Ltd*,[9] a shopping centre slip case, an expert who was an engineer and ergonomist was given insufficient instructions and therefore

tested the wrong area of the steps in the shopping centre for slip resistance. A litany of mistakes was made, resulting in the need for four separate visits to the site before a relevant and useful report could be produced. As a result of the errors, the jury in the case had to be discharged and the evidence of the experts in the case was rejected by the judge.[10] These problems could have been avoided with the provision of more detailed instructions.

The Code of Conduct

Specific reference should be made to the requirements relating to the expert witness Code of Conduct[11] in the letter instructing the expert, and a specific request to acknowledge the code in the report. It should not be assumed that the expert will be aware of and deal with this important matter, particularly if they are not experienced or do not usually provide reports for litigation. The possible consequences of such a failure may include exclusion of that expert's testimony from the evidence.

Preparing the questions

Applying logic, examining the factual issue which needs to be proved, and setting out exactly what the expert needs to explain and comment on, will provide the questions. You should think about the factual issues the instructions from your client and the pleadings give rise to and consider how the expert can assist the court in relation to them. The evidence sought will always be beyond what common experience can provide, otherwise an expert would not be necessary. Solicitors can consider involving counsel where genuine difficulties arise with respect to settling such questions.

As a result of the errors, the jury in the case had to be discharged and the evidence of the experts was rejected by the judge.

Questions must be clear and precise, and relate only to the expert's field. Allowing the expert to stray beyond the questions asked is counterproductive and can lead to exclusion. In *Christodoulou v Tunstall Square Fruit & Vegetables Pty Ltd (Ruling No 3)*[12] an ergonomist provided evidence

containing statements as to the law that applied and medical matters, well outside of his domain.

Notwithstanding the judge's statement that he was impressed by the expert, the Court rejected significant parts of the proposed evidence, ruling them inadmissible pursuant to s79 or excluding them pursuant to the s135 discretion of the *Evidence Act 2008* because the probative value of the evidence was substantially outweighed by the risk of prejudice.[13]

A similar pitfall befell the plaintiff in *Pham v Ronstan International Pty Ltd (Ruling No 1)*[14] where the plaintiff put forward an impressive expert in the field of public health and safety, with strong academic qualifications, certification from the Ergonomics Society of Australia and other professional recognition, who sought to bolster the plaintiff's case by attesting to matters which ought to be determined by the jury, such as whether the plaintiff was placed at risk of injury, dealing with complex medical questions and making unnecessary or unreasonable assumptions, among other issues.[15] A carefully considered and structured list of questions to be addressed by the expert would go a long way to avoiding such issues.

Reviewing the report

It is crucial when a report is received that time is taken to ensure that it complies with the requirements for admissibility discussed in *Dura*.

In particular, and notwithstanding that it may be briefly stated in straightforward matters such as many medical opinions, the chain of reasoning must be clear. The practitioner must be sure that the facts and assumptions relied on are identified.

Conclusion

Careful and logical consideration of the issues arising in dealing with expert evidence in personal injury trials can ensure that litigation proceeds more smoothly and successfully. The approach of

the courts to case management and civil procedure squarely imposes a duty on practitioners to ensure proper briefing of experts.

Both the client and the practitioner may ultimately suffer the consequences of poor decisions. The consequences for failures in this area can range from, at best, unnecessary distractions, to at worst, significant delays, adverse findings, costs and the risk of censure against the practitioner personally.

Potential problems can be avoided when practitioners employ a timely, thoughtful, logical and considered approach to the use of experts in personal injuries litigation. ■

Douglas J James is a barrister practising in general commercial law and in common law/personal injuries. **James Fitzpatrick** is a barrister practising in common law/personal injuries.

1. [2001] NSWCA 305.
2. [2011] HCA 21; (2011) 243 CLR 588.
3. See also Tom French, "The Admissibility of Expert Evidence Pursuant to the Uniform Evidence Law and the NSW Uniform Civil Procedure Rules – a Brief Analysis of *Dasreef v Hawchar* [2011] HCA 21 and the Expert Witness Code of Conduct" in *Australian Insurance Law Bulletin*, June 2012.
4. [2012] VSC 99.
5. [2013] VSCA 361.

Both the client and the practitioner may ultimately suffer the consequences of poor decisions.

6. [2014] VSC 567.
7. *Smith v Gould* [2012] VSC 461 is an example of a failure in this regard.
8. Section 135 of the Evidence Act allows for evidence to be excluded where its prejudicial potential outweighs its probative value. See also Miiko Kumar, "Admissibility of Expert Evidence: Proving the Basis for an Expert's Opinion" in *Sydney Law Review*, vol 33, 427, 430 for a more detailed discussion of this problem.
9. [2011] VCC 1168.
10. Note 9 above, at [48]-[50] and [76].
11. See Order 44 of the applicable Civil Procedure Rules for the Victorian courts.
12. [2010] VCC 1638.
13. Note 12 above, at [15]-[18] and [21]. Although some of the evidence was permitted by s80 of the *Evidence Act*, it was nonetheless excluded by the Court on the discretionary basis.
14. [2013] VCC 962.
15. Note 14 above, at [4] and [16]-[30].

Certainty in muddied waters

SNAPSHOT

- Establishing the tax implications in the calculation of damages is not always simple and clear-cut – often "[a] review of the authorities only muddies the already-opaque waters" [Croft J].
- Damages can be subject to income tax in three main ways – they may be assessed as ordinary income, as statutory income or under the capital gains provisions.
- The compensatory principle of damages is to make good the plaintiff's loss. This principle suggests that where the plaintiff's damages are subject to tax, damages should be grossed-up to compensate. Problems arise when it is difficult to calculate a plaintiff's tax liability with certainty.

RECENT CASES CLARIFY SOME OF THE PRINCIPLES LITIGATION LAWYERS SHOULD BE AWARE OF WHEN DEALING WITH CLAIMS FOR DAMAGES THAT INVOLVE POSSIBLE TAX CONSEQUENCES FOR THE PLAINTIFF. BY FLEUR SHAND

Tax can affect the calculation of damages, sometimes in complex ways. When considering claims for damages or other compensation, litigation lawyers should keep tax consequences front of mind. Questions to ask include: Should damages be calculated on a pre-tax or post-tax basis? Should damages be grossed-up to take into account the possibility that the award of damages will be taxed in the hands of the plaintiff? What happens if the tax consequences of the award of damages are not certain? Should orders be sought for the defendant to indemnify a plaintiff for a possible future tax assessment? Should the GST component of individual items be excised from the amount of damages claimed by the plaintiff?

Unfortunately, answers to these questions are not always simple and clear-cut and the authorities do not always provide clear guidance for practitioners. In the recent decision of *Millington v Waste Wise Environmental* (*Millington*),[1] Croft J said that "[a] review of the authorities only muddies the already-opaque waters".[2] However, some principles can be drawn to assist practitioners when framing or defending a claim for damages.

ADOBE STOCK

Income tax consequences of an award of damages

There are three main ways in which damages can be subject to income tax.[3] First, damages may be assessed as ordinary income under s6-5 of the *Income Tax Assessment Act 1997* (*ITAA 1997*) if the damages are a recoupment of what would have been ordinary income. A good example would be damages awarded for non-performance of a business contract.[4]

Second, damages may be assessed as statutory income, including under s15-30 of the *ITAA 1997* which is concerned with amounts received by way of insurance or indemnity for a lost amount that would have been included in assessable income.

Third, damages may be assessed under the capital gains provisions in Part 3 of the *ITAA 1997*. The capital gains provisions are likely to pick up many awards of damages if they are not assessed as ordinary or statutory income. This is because a capital gain (or loss) may be triggered by CGT event C2, which occurs when ownership of an intangible CGT asset ends by being "released, discharged or satisfied".[5] As the definition of a CGT asset is so broad,[6] CGT event C2 picks up the ending of a contractual, tortious or statutory right to the subject matter of litigation, and may therefore lead to a capital gain. Taxation Ruling 95/35, which is binding on the Commissioner of Taxation, sets out further detailed examples of how the Commissioner will assess damages under the capital gains provisions.

Damages for personal injuries normally escape taxation because compensation for lost earning capacity is not on revenue account (and therefore not assessable as ordinary or statutory income). There is also an exemption in the capital gains provisions for amounts paid for personal injuries.[7]

Where damages are not liable to taxation (such as for personal injuries),[8] they are assessed by reference to the lost after-tax earnings of the claimant.[9]

Damages and tax

The compensatory principle of damages is to make good the plaintiff's loss.[10] This principle suggests that where the plaintiff's damages are subject to tax, damages should be grossed-up to compensate the plaintiff. This approach was summarised most recently in Victoria in *Davinski Nominees v Bowler Holdings*, by Kaye J who said:

". . . the function of damages is to provide fair compensation for a loss sustained by a claimant

. . . [W]here the award of damages is liable to taxation, and where it is possible to calculate, with reasonable certainty, both the damages on the basis of the plaintiff's lost post-tax earnings, and also the tax liability arising from the compensatory verdict, it would be unfair to assess damages, without taking the relevant tax implications into account. In such a case, the assessment of damages, ignoring tax, would not result in an amount of compensation, which is fair both to the claimant and to the defendant".[11]

However, it is not always possible to calculate a plaintiff's tax liability with certainty. This uncertainty may make courts wary of dealing with this issue, despite the broad applicability of the compensatory principle. For example, former NSW Supreme Court Justice Gzell, writing in the *Australian Law Journal*, has suggested that courts in commercial litigation should not adjust damages, whether for income tax, capital gains tax or GST. Instead, he argues, it should be left to the taxing provisions, and the courts should not attempt to shift the tax consequences from one party to another. He suggests his approach, if adopted, "will make the life of a judge a little easier".[12] While Justice Gzell's view has not been explicitly adopted, the complexity and lack of certainty surrounding potential tax consequences may mean that tax does not get taken into account in the assessment of damages.

There are several key questions for parties: What are the tax consequences on the plaintiff from the award of damages? Can they be established to the court's satisfaction through expert evidence and/or legal submission? As noted by Croft J in *Millington*, addressing this latter question may require voluminous evidence to assist the court in calculating the proper amount of compensation, which may have the result of increasing costs for all involved. Consequently, do the extra complexity and costs outweigh the marginal tax implications for the plaintiff? Finally, where there is complexity there may also be risks from a tax liability perspective in running an argument that damages are taxable. This is because the Commissioner, not being a party to the litigation, may not subsequently agree with a court's ruling.

What are the tax consequences on the plaintiff from the award of damages?

A recent illustration where the tax consequences were taken into account by the court in assessing damages was the Queensland decision in *Westpac Banking Corporation v Jamieson*.[13] This case concerned a claim by husband and wife investors who had received financial advice from a Westpac employee. At trial, Westpac was found to be negligent, in breach of contract and in contravention of the *Australian Securities and Investments Commission Act 2001*, and was ordered to pay damages for the plaintiffs' loss grossed-up to take into account the likely tax consequences.[14]

On appeal, there was no dispute the damages should be grossed-up to compensate for income tax. The Court of Appeal, however, rejected an argument that the grossed-up component of damages should be repeatedly grossed-up to account for tax on the grossed-up amount. Both experts in the appeal had assumed that the entirety of the damages (including the grossed-up amount) would be subject to tax as statutory income. The primary reason for dismissing this argument turned on the Court of Appeal's construction of the particular taxing provision. However, the Court also took account of the fact that no evidence was led to support the assumption made by the experts that the Commissioner would have taxed the grossed-up component of the damages as statutory income.[15]

If this issue had occurred in a capital gains context, the outcome may have been different. This is because the Commissioner has ruled that if the court awards an additional amount of compensation to cover an additional capital gains liability, this amount will be taken into account when calculating the quantum of the capital gain.[16]

Damages and GST

An issue that often arises where a plaintiff seeks damages for costs already incurred is whether the plaintiff can properly claim the GST component of those costs. The resolution of this issue depends on the application of the compensatory principle and the GST registration status of the party awarded the damages.

A taxpayer registered, or required to be registered, for GST can claim an input tax credit for amounts that it pays in GST.[17] As the compensatory principle is to make good the plaintiff's loss, the court will exclude the GST component from damages where the plaintiff can recover the GST component through the taxation system.[18] The question arises, however, whether it makes any difference if the plaintiff, even though entitled to, has not in fact claimed an input tax credit.

This issue arose in the 2012 decision in *Fulton Hogan Constructions v Grenadier Manufacturing*.[19] Here, the plaintiff sought damages arising from defects in a footbridge, which it had paid to rectify. Almond J said that it was reasonable to infer that in the ordinary course, Fulton Hogan would have already been compensated for the GST it had paid for the rectification works. There was evidence, however, that Fulton Hogan had not claimed GST on a small proportion of these amounts because it was in dispute with a third party. For these amounts, Almond J ordered that an allowance for GST should be made for these repair costs in the award of damages.[20]

In *Millington*, Croft J arrived at a slightly different outcome. Waste Wise had claimed damages for the GST-inclusive repair costs of its garbage truck, which had been negligently

damaged by Millington. Waste Wise was registered for GST so could have claimed an input tax credit. It conducted its case, however, on the basis that it would not claim any input tax credits and therefore was entitled to the GST-inclusive amount.

At first instance, the Magistrates' Court took a two-staged approach – it ordered Millington to pay Waste Wise the GST-inclusive amount, but it also ordered that Waste Wise subsequently repay Millington the input tax credit it was entitled to claim. On appeal to the Supreme Court, Croft J said that to comply with the compensatory principle, Millington should simply pay Waste Wise the GST-exclusive repair costs of the truck.[21]

Further, Croft J said that requiring a business to claim an input tax credit was not an unreasonable imposition. Therefore the law relating to mitigation of loss required that the award of damages be reduced to the extent that Waste Wise had not acted reasonably in not claiming the input tax credits to which it was entitled.[22]

Following the approach taken in *Millington*, more recently in *Dual Homes v Moores Legal*, a solicitor was ordered to pay damages of GST-exclusive sums to compensate for professional costs which were incurred by a builder as a result of negligent legal advice provided to it.[23]

Of course, there are situations where GST may be included in the judgment sum, for example, damages where the plaintiff is not registered for GST. In these cases, the assessment of damages should include the GST on any individual items that go to make up the quantum of loss.[24]

Another example is where the damages themselves constitute payment for a current or earlier "taxable supply" and therefore may be subject to GST.[25] In these cases, the damages may be grossed-up by 10 per cent to include the expected GST to be paid by the plaintiff on the judgment sum. This issue arose in *Peet v Richmond (No 2)* which involved a quantum meruit award, which Hollingworth J said by its very nature involved the payment for services.[26] Generally, however, an award of damages and its payment will not constitute a "taxable supply"[27] and courts will not need to gross-up damages to allow for GST.

Uncertainty and orders for indemnity

Calculating a plaintiff's tax liability with certainty is sometimes difficult because of the complexity of their tax circumstances. The case law does not offer a simple, consistent solution where tax outcomes are uncertain.

Where there is uncertainty, the court may consider whether it is appropriate to make a declaratory order for the defendant to indemnify the plaintiff for the possible future tax consequences of the damages. Alternatively, it may consider whether to require the plaintiff to undertake to repay the defendant any overcompensation for tax. Here, uncertain tax outcomes appear to have driven courts on some occasions to treat the tax component as an exception to the "once-and-for-all" rule that usually applies in the calculation of damages.[28]

In *Millington*, Croft J said that certainty is the keystone in the decision-making process for the tax component of damages. Because the amount of the loss (including tax) was clearly quantified, an order for fixed damages could readily be made and there was no need for an amount to be paid back, or for an indemnity to be provided.[29] Certainty with regard to the tax component in this case allowed Croft J to adopt his preferred approach, which "must always be to provide an order which as accurately as possible compensates the party for the loss suffered in a single, 'once-off' payment".[30]

Croft J did say, however, that there may be situations where uncertainties about the tax outcomes are such that it is "appropriate, indeed preferable", for the court to make declaratory orders indemnifying the plaintiff against tax consequences "in order to achieve greater accuracy in the calculation of damages".[31]

This remains an issue ripe for further argument in the muddied waters where tax meets damages. ■

Fleur Shand is a barrister practising in commercial and tax law at the Victorian Bar. She was previously a senior associate in the dispute resolution group at King & Wood Mallesons.

1. [2015] VSC 167; (2015) 295 FLR 301.
2. Note 1 above, at [52].
3. For a more detailed overview of the taxation consequences of damages awards see, for example: M Y Bearman, "Income Tax, CGT and GST on Judgments and Settlements" (2015) Victorian Tax Bar; C W Pincus QC and Steven White, "Taxation of Compensatory Payments and Judgments" (2001) 75 *Australian Law Journal* 378.
4. *Commissioner of Taxation (NSW) v Meeks* (1915) 19 CLR 568, at 580.
5. *ITAA 1997*, s104-25.
6. *ITAA 1997*, s108-5(1).
7. *ITAA 1997*, s118-37(1)(b).
8. *Cullen v Trappell* (1980) 146 CLR 1 (Gibbs, Stephen, Mason and Wilson JJ); *Wrongs Act 1958*, s28A.
9. *Davinski Nominees v Bowler Holdings* [2011] VSC 220, at [58].
10. *Todorovic v Waller* (1981) 150 CLR 402, at 412 (Gibbs CJ and Wilson J).
11. Note 9 above; and Note 1 above, at [43].
12. Justice Ian Gzell, "The Courts, Tax and Commercial Litigation" (2007) 81 *Australian Law Journal* 866, at 879-880.
13. [2015] QCA 50; (2015) 294 FLR 48; and first instance at *Jamieson v Westpac Banking Corporation* (2014) 283 FLR 286.
14. *Jamieson v Westpac Banking Corporation* (2014) 283 FLR 286 [230]; applying *Tomasetti v Brailey* (2012) 274 FLR 248, at [149].
15. Note 13 above, at [204]-[205].
16. Taxation Ruling 95/35, at [253].
17. *A New Tax System (Goods and Services Tax) Act 1999*, s11-20.
18. *Gagner Pty Ltd v Canturi Corporation Pty Ltd* (2009) 262 ALR 691, at [147], [165] and [168]; *Fulton Hogan Constructions v Grenadier Manufacturing* [2012] VSC 358, at [468].
19. Note 18 above.
20. Note 18 above, at [469].
21. Note 1 above, at [36].
22. Note 1 above, at [66]-[67].
23. *Dual Homes Pty Ltd v Moores Legal Pty Ltd* [2016] VSC 86; (2016) 306 FLR 277, at [289].
24. See for example cases cited in *Gagner*, note 18 above, at [149]-[150].
25. GST Ruling 2001/4, [101], [105]; See also *Dual Homes*, note 23 above, at [285].
26. *Peet v Richmond (No 2)* [2009] VSC 585, at [77].
27. GST Ruling 2001/4, [60]-[61]; *Padstow Corporation Pty Ltd v Fleming* (No 3) [2013] NSWSC 24, at [33]-[35].
28. Note 1 above, at [47]-[50] and cases cited there.
29. Note 1 above, at [36].
30. Note 1 above, at [62].
31. Note 1 above, at [62].

Dealing with trauma

ACKNOWLEDGEMENT OF TRAUMA AND IMPLEMENTATION OF TRAUMA-INFORMED PRACTICE WITHIN LEGAL PRACTICE AND SYSTEMS IS LONG OVERDUE. DOING SO WILL ENHANCE BOTH INDIVIDUAL AND COMMUNITY WELLBEING. BY CATHY KEZELMAN AND PAM STAVROPOULOS

SNAPSHOT

- The prevalence of trauma, its multiple adverse effects and the benefits of trauma-informed practice on individual and community health and wellbeing[1] are well documented.[2]
- Mounting evidence substantiates that "more effective, fair, intelligent, and just legal responses must work from a perspective which is trauma informed".[3]
- Implementation of trauma-informed principles would benefit diverse legal practitioners, personnel, their clients, and the administration of justice.

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Unlike "normal stress", trauma involves the overwhelming of coping mechanisms in response to real or perceived threat. Innate and initially protective fight, flight or freeze responses are activated. People living with the effects of unresolved trauma are often, however, profoundly destabilised by normal life stress. The cycle of physical and psychological reactivity it precipitates negatively affects wellbeing, and erodes health and a wide spectrum of functioning.

The word "trauma" generally connotes single incidents (post-traumatic stress disorder, PTSD) but "there is more to trauma than PTSD".[4] Complex (cumulative, underlying) trauma – which is often interpersonal – is more common[5] and its effects are more pervasive.[6] Complex trauma is prevalent in legal and judicial contexts: "As a powerful institution in society, law regularly encounters and deals with people, both as victims and offenders, whose lives have been shaped and harmed by traumatic events".[7]

In contrast to clinical treatment of trauma, trauma-informed practice can be learned and implemented by all. Its primary aim is to avoid the compounding of trauma – to "do no harm".

Trauma-informed practice is relevant to all contexts, services and institutions which engage with people with unresolved trauma. Necessarily this includes the institution and practice of law which is pivotal in regulating human behaviour and adjudicating disputes. "The law too should strive to become trauma informed."[8]

Pertinence to law

Many members of the public find engagement with the law and justice system stressful (regardless of prior trauma). Heightened stress increases the potential for negative repercussions for all parties, including legal practitioners.

Trauma-informed practice helps to de-escalate charged interactions and arousal, with many attendant benefits. Many people have experienced harm from encounters with the law, so "do no harm" is especially pertinent ("Most, if not all, situations of conflict and harm involve questions of justice and injustice, and situations of injustice frequently involve trauma").[9] Minimising additional harm and containing fallout is beneficial for practitioners and clients alike.

Foundational assumptions of legal discourse and training curricula largely preclude recognition of the adaptive and protective purposes of many responses. Assimilating the insights and research base of trauma-informed practice is critical. Adherence to "rational actor" models, and to the primacy of self-interest, ignores the neurobiological effects of unresolved trauma. The imperative to protect from overwhelming experience trumps rational calculation of interest maximisation. Intense stress impairs cognitive and reflective capacity and leads us to operate from a different area of the brain.[10]

"When correctional officers were trained in the Rhode Island system, administrators showed up to make it clear we were making these changes for them as well as for the women. Officers need to know that some inmate behaviour is an adaptation that stems from trauma and that there are things they can do to help a woman 'chill' when something sets off the alarms. They actually understand this better than the psychologists. They don't need clinical language to get it."[11]

The implications of contemporary research for core concepts of legal practice (eg, notions of credibility) are enormous. Updated knowledge regarding the nature and operation of memory (non-unitary and involving explicit [conscious] and implicit [somatic])[12] is vital for enhanced client engagement and just legal outcomes. Implementation of trauma-informed principles mitigates the risks of secondary vicarious trauma[13] from repeated exposure to traumatic material.

Positive relational experiences assist integration of neural pathways disrupted by stress, while negative relational experiences impede integration and compound the effects of stress.[14] This understanding mandates a trauma-informed approach interpersonally and systemically. Enhanced wellbeing of all parties and facilitation of the administration of justice will follow. Stress generates stress; introduction of trauma-informed practice is part of the antidote.

Core trauma-informed principles

The following trauma-informed principles can be readily acquired by all personnel, irrespective of the nature of their work, qualifications and the services they provide:

- Basic knowledge of the effects of stress on the brain and body.
- Embedding of the principles of safety, trustworthiness, choice, collaboration and empowerment (doing with rather than for or to).
- Consistent focus on the way in which a service is provided – (how – not just what – the service is).
  "What the judge did was pretty incredible. He asked me to come forward. It created a sense of privacy. I didn't have to shout across a really busy courtroom. He really helped me in that simple act of asking me to come closer . . . I had been in the mental health system for 14 years, and this judge changed my life in that one simple act."[15]
  "Once our courtroom team participated in trauma training, we questioned all our routine practices. We communicated more respectfully and effectively, and we began to be much more individualised in our approach to each case."[16]
- Attention to what has happened to a client, rather than what is "wrong" with client/s. "All it took to begin my recovery was for someone to ask me, 'what happened to you?' who was also prepared to listen to the answer."[17]
- Recognition that difficult behaviour and/or symptoms may result from coping mechanisms and attempted self-protection from previous adverse experiences. Without a trauma lens, client behaviour is "often and inappropriately labelled as pathological, when [it] should instead be viewed as adaptations a person has had to make in order to cope with life's circumstances".[18]
- A strengths-based approach which acknowledges people's

Trauma-informed systems understand the effects of traumatic stress on victims, offenders, clients and families.

skills, while remaining cognisant of the enormous challenges of the effects of trauma.

"Not only are we thinking about the trauma of the parent and the child, but also we're steeped in the strength-based approach to recognising that that parent knows their child best . . . to affirm that parent in their relationship with their child . . . can be one of the most healing experiences for the parent as well as the child. The two combined has been very powerful."[19]

Becoming trauma-informed means attuning to all aspects of a service and how it is delivered (formal and informal; policy and procedure, first contact, and the manner of client engagement).[20] Trauma-informed practice applies to all levels of service delivery; from senior management to front line workers (all staff, paid and unpaid; "top down and bottom up").[21]

While implementing the requisite changes take time, some immediate changes can predate comprehensive embedding. The significant benefits of so doing necessitate prompt action.

Increased possibilities

Comprehensive introduction of trauma-informed practice within and across the many contexts of law and the judiciary will have multiple benefits for diverse stakeholders.

Reforms in many areas of law do not guarantee improved processes and outcomes. With respect to some areas of law, opportunities to access and secure justice may actually be decreasing rather than increasing.[22] Trauma-informed practice enhances the likelihood that the processes and intended outcomes of legal reform/s will be achieved by minimising triggers, a sense of overwhelm and the effects of traumatic stress.

The 2015 National Wellness for Law Forum highlighted that "the conversation on psychological wellness and distress in the law has advanced substantially".[23] Yet systematic engagement with the paradigm of "trauma-informed" is missing from this conversation.

It is overdue to deal with and comprehensively implement trauma-informed practice within legal culture and systems which, as discussed, will correspondingly enhance individual and community wellbeing.

Steps to take

Embedding trauma-informed practice and transitional change necessitates appointing "trauma champions". Buy-in from legal and/or judicial leadership is critical. It also requires a commitment to trauma-informed and vicarious trauma training for all staff at all levels. Trauma-informed systems' assessments enable recognition of potential triggers and development of mitigation strategies. Also vital is a collaborative approach within and across systems for dealing with change supplemented by support and advocacy mentors.[24]

The nature of a practice, service or system determines steps to be taken including the need for adjunctive structures and processes. These may include trauma-informed counselling, debriefing and/or supervision delivered by recognised practitioners accessed through identified referral pathways.

Trauma-informed systems understand the effects of traumatic stress on victims, offenders, clients and families. Steps need to be taken to ameliorate these effects. They include systems-level changes to optimise safety and minimise the level of trauma to which already traumatised populations are exposed. They also entail reduction of exposure to traumatic reminders (triggers), and provision of supports and tools to manage traumatic reactions should they occur.

The following comments attest to the multiple benefits of introducing trauma-informed practice in one area of law:

"… we delivered a full-day training on trauma to attorneys, judges and court staff which featured the National Child Traumatic Stress Network (NCTSN) Bench Card for the Trauma-Informed Judge. As a result of the training, we are better equipped to identify trauma in children that appear before us.

"The NCTSN Bench Cards have helped my judicial colleagues and [me} ground our decisions in the emerging scientific findings in the traumatic stress field. So, when I met [a young client] a year ago, I immediately knew she had been exposed to toxic stress as a child.

"Knowing about her history, I immediately asked for a trauma-informed mental health evaluation for [her]and asked other questions on the Bench Card to make sure I had all the information I needed to fully understand [this child's] trauma exposure. As a result, she is doing well in a residential treatment facility that specialises in trauma-informed care – not juvenile corrections."[25] ■

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1. Cathy Kezelman, Nick Hossack et al, *The Cost of Unresolved Childhood Trauma and Abuse in Australia* (ASCA and Pegasus Economics, Sydney, 2015).
2. *The Last Frontier: Practice Guidelines for Treatment of Complex Trauma and Trauma Informed Care and Service Delivery* (Blue Knot Foundation, formerly ASCA, Sydney, 2012).
3. Melanie Randall and Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping", *The Dalhousie Law Journal* (Fall 2013), p501.
4. Robin Shapiro, *The Trauma Treatment Handbook* (Norton, New York, 2010), p11.

5. Bessel A van der Kolk, "Posttraumatic Stress Disorder and the Nature of Trauma", in Marion F. Solomon & Daniel J. Siegel, ed. *Healing Trauma,* (Norton, New York, 2003), p172.
6. Sandra Bloom & Brian Farragher, *Destroying Sanctuary*, (Oxford University Press, New York, 2011), p67.
7. As note 3, p523.
8. As note 3, p505.
9. Carol Dwyer, Warden, *Rhode Island Department of Corrections in Substance Abuse and Mental Health Services Administration*, p5.
10. H. Zehr, "The Intersection of Restorative Justice with Trauma Healing, Conflict, Transformation and Peacebuilding," *Peace and Justice Studies* (23, 18, 1.5, 2009).
11. Daniel J. Siegel, *Mindsight* (Random House, New York, 2009).
12. Pat Ogden et al. *Trauma and the Body* (Norton, New York, 2006); Siegel.
13. Sharon Rae Jenkins & Stephanie Baird, "Secondary Traumatic Stress and Vicarious Trauma: A validational study", *Journal of Traumatic Stress* (15, 5, 2002), pp.423-432.
14. Louis Cozolino, *The Neuroscience of Psychotherapy* (Norton, New York, 2002).
15. Trauma Survivor, Essential Components to Trauma-informed Treatment Practice, Substance Abuse and Mental Health Services Administration (SAMHSA).
16. Treatment Court Judge, as above.
17. Tonier Cane, *National Center for Trauma-informed Care in Substance Abuse and Mental Health Services Administration.* Creating a Trauma-informed Criminal Justice System for Women: Why and How, www.nasmhpd.org/sites/default/files/Women%20in%20Corrections%20TIC%20SR(2).pdf, p4.
18. Randall & Haskell, p508.
19. Interviewee re benefits of trauma-informed approach in Laurie A. Drabble PhD MSW MPH, Shelby Jones MSW & Vivian Brown PhD (2013), "Advancing Trauma-Informed Systems Change in a Family Drug Treatment Court Context", *Journal of Social Work Practice in the Addictions*, 13:1, 91-113, DOI: 10.1080/1533256X.2012.756341.
20. Roger Fallot & Maxine Harris, "Creating Cultures of Trauma-Informed Care: A Self-Assessment and Planning Protocol", Washington, DC: Community Connections (2009).
21. Jo Ann Ferdinand, Judge, Brooklyn Treatment Court in Substance Abuse and Mental Health Services Administration, p3.
22. Justice Peter McClellan, Chair of the Royal Commission into Institutional Responses to Child Sexual Abuse, 14th International Criminal Law Congress, Melbourne said:"[i]n spite of the issues being well-known, and in spite of decades of reform, the preliminary results from some of our research suggest that the opportunity to secure justice for victims of sexual abuse through the criminal justice system may in fact be decreasing, rather than increasing".
23. "Theme for 2015", National Wellness for Law Forum, February 2015. www.tjmf.org.au/2014/12/event-2015-national-wellness-for-law-forum-5-6-february-2015/
24. Drabble, Jones & Brown, note 19 above.
25. Judge Mary E. Triggiano, Milwauee County Circuit Court, Wisconsin, *The Trauma-informed Judge: Asking all the right questions.* Court Appointed Special Advocates for Children; National Council of Juvenile and Family Court Judges, www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.9248319/k.92EA/JP04_Triggiano.htm.

SNAPSHOT

- *Re Veca* and *Giarrusso v Veca and Michielin* are two recent decisions that examine costs issues and evidentiary requirements in the context of a caveat proceeding.
- The decisions highlight the costs consequences of lodging a caveat without a proper basis and the difficulty in proving undue influence.

The probate caveat conundrum

TWO RECENT SUPREME COURT DECISIONS HIGHLIGHT BOTH THE NEED FOR CAUTION WHEN LODGING A CAVEAT AND THE COSTS CONSEQUENCES WHEN A CAVEAT DOES NOT HAVE A PROPER BASIS. BY CAROL MCOMISH AND MICHEL MARGALIT

Due to recent judicial trends and new court procedures, practitioners have become more conscious of evidentiary requirements and costs consequences in the probate jurisdiction.

Practitioners conducting probate litigation should be aware of:

- the overarching obligations imposed on parties and legal practitioners by the *Civil Procedure Act 2010* to ensure that costs are reasonable and proportionate[1]
- Practice Note No 6 of 2015 in relation to the Probate List, one of the aims of which is to reduce the costs of litigation[2]
- the need for evidence to support a caveat and the gravity and potential costs consequences of an allegation of undue influence

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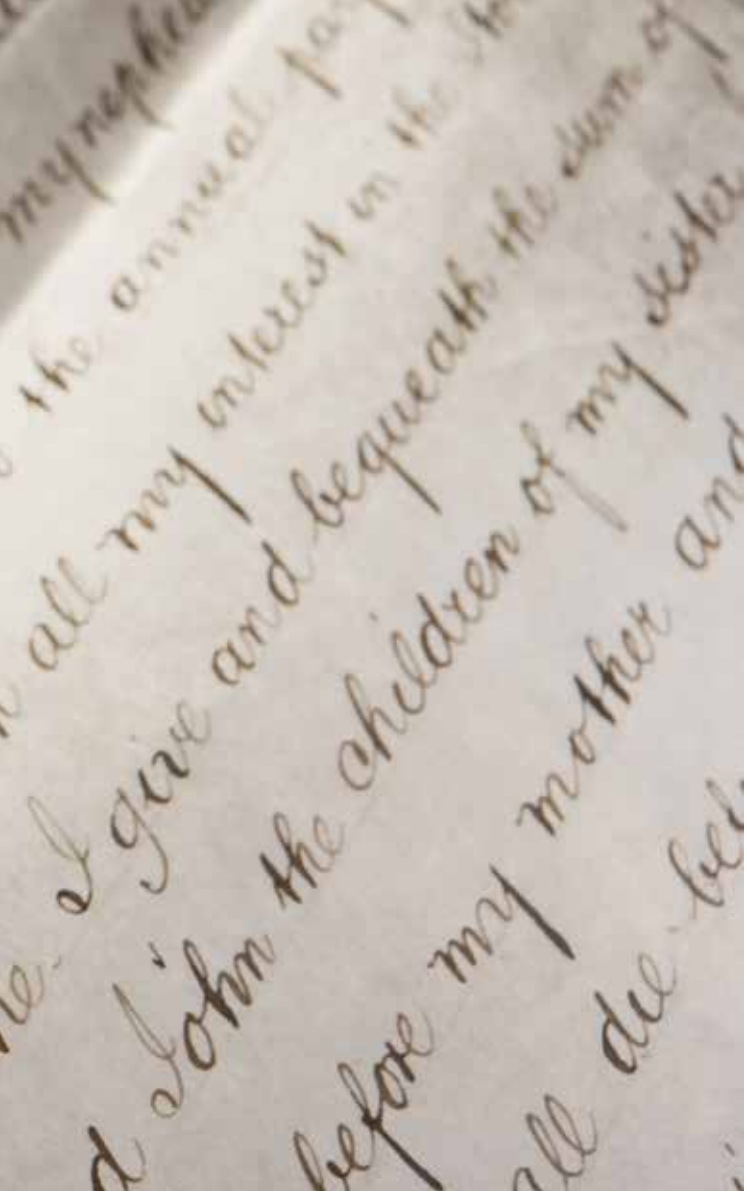

- the fact that costs are at the discretion of the court, regardless of whether the parties seek costs orders by consent.

In *Giarrusso v Veca and Michielin*[3] the Court of Appeal examined costs issues and evidentiary requirements in the context of a caveat proceeding.

McMillan J, at first instance in *Re Veca*,[4] had refused an application by a caveator for costs incurred up to withdrawal of the caveat. The estate had agreed to pay the caveator's costs but disagreed on quantum and the parties sought orders by consent that the caveator's costs be assessed.

The elderly testatrix's last will, made three years before she died, devised a half share in her residential property to her eldest son, and a quarter each to her two younger sons. There were legacies of $20,000 to each of the younger sons and the daughter. The balance of the estate went to the elder son. State Trustees had been appointed as the testatrix's administrator some months before the date of the last will. A will made three years before the last will left the estate equally between the four children. The caveat was lodged by the testatrix's daughter on the grounds of lack of testamentary capacity, lack of knowledge and approval, and undue influence.

The Registrar of Probates requested that medical evidence on oath be filed to establish testamentary capacity. The daughter's solicitors searched the probate file and filed grounds of objection after a conference with counsel. The estate solicitors then filed but did not serve on the caveator's solicitors a medical affidavit deposing to the testatrix having had testamentary capacity, she having undergone a cognitive assessment specifically for the purpose of the last will.

The caveator's solicitors first became aware of the medical affidavit when it was provided to their counsel by opposing counsel after the first directions hearing. At a further directions hearing the parties informed the Court that the caveat would be withdrawn and that the estate would pay the caveator's reasonable costs, to be assessed by a costing service as they disagreed on quantum.

Finding at first instance

In her Honour's view, the conclusion of the caveator's legal representative that the information to hand (being instructions from the caveator, the earlier will, medical, neuropsychology, and social work reports filed with VCAT, and the VCAT written decision) provided a proper basis to lodge the caveat was misconceived. Her Honour considered that the nature of the grounds of objection was such as to require their determination by applying the *Briginshaw*[5] standard as that standard is applied under s140(2) of the *Evidence Act 2008* (ie, that serious allegations require a higher standard of proof), being allegations that should not be made lightly, the allegation of undue influence in particular, as it is a serious claim of an equitable species of fraud. Her Honour was also of the view that before filing grounds of objection, the caveator's solicitor should have either waited until the requisition was answered or should have made inquiries of the estate solicitors as to when it would be answered.

Her Honour considered that a letter foreshadowing a Part IV claim sent by the caveator's solicitors after the caveat was filed had no basis on the facts and was designed to "persuade the estate to compromise against the background of the threatened actions".

Her Honour ordered that the caveator's application for costs from the estate be refused and that she pay the estate's costs of the application.

On appeal

The caveator sought leave to appeal to the Court of Appeal and, if successful, sought orders that her costs of the caveat proceeding be paid from the estate. The estate agreed that the caveator's costs as assessed until the caveat was withdrawn be paid from the estate.

Standard of proof

The caveator succeeded on her first ground of appeal, that the trial judge applied a wrong principle of law by elevating the standard of proof at the caveat stage, or at all, to the *Briginshaw* standard. Garde AJA considered that the *Briginshaw* standard had no application to the grounds of objection of lack of testamentary capacity and of knowledge and approval. His Honour did, however, consider that where the propounders had discharged the burden of showing

The Court's current practice is to require grounds of objection to be particularised when they are filed.

testamentary capacity and that the will was otherwise in due form, the evidential burden might shift to the caveator to establish the ground of undue influence and, if so, s140(2) of the *Evidence Act* would require proof to a standard akin to that described in *Briginshaw*.

Material consideration – the VCAT documents

The second ground of appeal was that the trial judge erred when she failed to take into account a material consideration, being the documents filed in the VCAT proceeding. Garde AJA was not satisfied that there was a failure to take the documents into account as they did not contain any finding relevant to the caveator's three grounds of objection.

Undue influence – an allegation of fraud

His Honour was not satisfied that any error was shown on the third ground of appeal, being a misdescription of undue influence as requiring an allegation of fraudulent conduct. His Honour stated that undue influence has long been described as fraud in equity, and said that:

"The making of an allegation of undue influence is, of course, a serious allegation, and especially so when the second person is said to have exerted it in relation to a testamentary instrument executed by an elderly and infirm person. Such allegations should not be made unless they are based on evidence. Section 18(d) of the *Civil Procedure Act 2010* (Vic) provides that it is an overarching obligation binding on parties and practitioners alike not to make a claim that does not have a proper basis on the factual and legal material available to the person at the time of making the claim".[6]

Foreshadowed Part IV claim an extraneous matter

The fourth ground of appeal, that the trial judge took into account an extraneous matter, being the Part IV claim as foreshadowed in the letter sent by the caveator's solicitors, was upheld on the basis that the existence of a possible Part IV claim and a view as to its merits or demerits is irrelevant to the award of costs in a caveat proceeding.

Costs

As two of the appeal grounds were upheld, the discretion as to the costs of the caveat proceeding was to be exercised anew. Garde AJA ordered that the caveator's costs be assessed on the standard basis and paid out of the estate, including costs incurred after the caveator received a copy of the medical affidavit and the costs of the appeal. The rationale was:

- the principle that costs do not necessarily follow the event in contested probate proceedings
- it was reasonable to allow the caveator costs from the estate on a standard basis until she was provided with a copy of the medical affidavit
- the evidence in the VCAT proceeding indicated that there may have been a testamentary capacity issue; the caveator's intentions in relation to a Part IV claim were not relevant to the award of costs in the caveat proceeding
- it was highly desirable that a dispute between family members be contained and compromised entirely if possible.

Practical matters arising from the decision

The proper basis for lodging a caveat

Section 58 of the *Administration and Probate Act 1958* provides that any person may lodge a caveat (although of course the person must have standing to lodge a caveat,[7] eg, as a beneficiary under an earlier will or under an intestacy). Order 8 of the *Supreme Court (Administration and Probate) Rules 2014* gives procedural guidance and grounds of objection to an application for a grant of representation. When lodging a caveat practitioners are not required to file a Proper Basis Certificate in accordance with Chapter 4 of the *Civil Procedure Act 2010*, however certification must be filed at the time of filing grounds of objection.[8] Neither s58 nor Order 8 address the evidence required for a proper basis to caveat.

The common law position in relation to testamentary capacity, knowledge and approval, and undue influence in the probate context can be summarised as follows:

- there is a rebuttable presumption that a duly executed will, rational on its face, is the will of a person with testamentary capacity who knew and approved of the contents of the will[9]
- where there are circumstances that throw doubt on testamentary capacity, the propounder has the burden of proving testamentary capacity[10]
- where there are facts giving rise to suspicious circumstances, the propounder has the burden of proving that there was knowledge and approval of its contents[11]
- it then becomes a question of looking at the evidence as a whole[12]
- the burden of proof is on the person alleging undue influence.[13]

The Court's current practice is to require grounds of objection to be particularised when they are filed. In the past it was common practice for practitioners to lodge a caveat, file grounds of objection without any particulars, file and serve a summons, and get directions, including orders for discovery, on the first return date of the summons. Caveats were often lodged with very little in the way of supporting evidence (particularly as the propounder, not the caveator, was usually the person with access to documents and medical information), in the expectation that discovery would reveal something to support the caveat or, if not, that the caveat would be withdrawn and costs agreed between the parties.

A caveator's task is to raise doubt as to whether a grant should be made. The Court now requires that doubt to be sufficiently set out in particulars to grounds of objection to warrant investigation by it into issues such as testamentary capacity, knowledge and approval, or undue influence. The degree of doubt that needs to be shown by a caveator and the degree of vigilance that needs to be exercised by the Court are relative, and depend on the circumstances of each case.[14] By way of example, in *Veca* there was a marked difference between the last will and the penultimate will and an administrator had been appointed prior to the last will, so in that case it could be said that a lesser degree of doubt would be required. Although the evidence in the VCAT documents did not specifically address the issue of whether the deceased had testamentary capacity, it was considered sufficient in those circumstances as it highlighted "that there may have been an issue concerning the testamentary capacity of the testatrix when she executed the will".[15]

Costs

If the particulars of objection do not come up to the requisite degree of doubt in the particular circumstances, a caveator is at risk of the Court considering that the caveat does not have a proper basis and ordering costs against them.

Informal discovery

When lodging a caveat, a contemporaneous letter to the estate solicitors, or a letter after receiving notice pursuant to Rule 8.02 of the *Supreme Court (Administration and Probate) Rules 2004*, providing details of the doubts as to the validity of the will and requesting provision of any relevant material might give some costs protection to a caveator. If the estate provides material that dissuades the caveator from continuing, they may simply allow the caveat to expire by not filing grounds of objection within the 30 days required by the notice. If the estate provides material after grounds of objection are filed but before the first directions hearing, the letter could be produced to the Court on the question of costs. Solicitors acting for an estate may wish to wait until the 30 day period expires before incurring the cost of providing substantial advice to their client.

Conclusion

There must be a proper basis for lodging a caveat and if the Court is of the view that there is not then the caveator will be at risk in relation to costs. Careful consideration should be given to whether or not to lodge a caveat, particularly one based on undue influence. As it is a serious allegation, the Court is expected to require a caveator to raise a substantial degree of doubt when particularising a ground of objection based on undue influence.

Postscript: Since this article was written, McMillan J has delivered judgment in *Montalto* [2016] VSC 266. The decision is a reminder of the Court's inquisitorial role in its probate jurisdiction. The utility of a geriatric review and neuropsychologist's report were found not to assist the determination of testamentary capacity, but were found to be relevant to the ground of suspicious circumstances. Particulars relied on to assert undue influence were struck out. The decision reiterates that a caveat must have a proper basis and that particulars of grounds of objection must define the questions for trial. ■

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1. *Civil Procedure Act 2010*, ss10, 24.
2. Practice Note No. 6 of 2015 Probate List, Supreme Court of Victoria.
3. *Giarrusso v Veca and Michielin* [2015] VSCA 214.
4. *Re Veca* [2015] VSC 74.
5. *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; *Civil Procedure Act 2010*, s18(d).
6. *Re Finn* [1942] VLR 125, *Re Seymour* [1934] VLR 136, *Poulos v Pellicer* [2004] NSWSC 504 (11 June 2004) (Windeyer J).
7. *Civil Procedure Act 2010*, Part 4.1, ss42(2)(a) and 3(z). See also Practice Note No 6 of 2015, 6.1.
8. *Symes v Green* 1859 1 Sw and Tr 401, *Guardhouse v Blackburn* (1866) 1 P and D 109.
9. *Kantor v Vosahlo* [2004] VSCA 235.
10. *Nock v Austin* (1918) 25 CLR 519, *Nicholson v Knaggs* [2009] VSC 64.
11. *Timbury v Coffee* (1941) 66 CLR 277, at 282.
12. *Giarrusso v Veca and Michielin* [2015] VSCA 214, at 25.
13. *Bailey v Bailey* (1924) 34 CLR, *Gillespie v Gillespie* [2012] QSC 335.
14. *Giarrusso v Veca and Michielin* [2015] VSCA 214, at 46.

Refusal to engage

CONSEQUENCES MATTER

SNAPSHOT

- Amendments to the *Small Business Commissioner Act 2003* in 2014 introduced the power for the Commissioner to name a party in the Commissioner's annual report as "unreasonably refusing" to engage in ADR.
- Guidelines on what constitutes "unreasonable refusal" were developed, based heavily on two English court decisions: *Halsey v Milton Keynes General NHS Trust* and *PGF II SA v OMFS Company 1 Limited*.
- The amendments have led to a reduction in the incidence of parties refusing to engage with the Commissioner by two-thirds.

AMENDMENTS TO THE *SMALL BUSINESS COMMISSIONER ACT* WHICH PROVIDES THE COMMISSIONER WITH THE POWER TO CERTIFY THAT A PARTY HAS UNREASONABLY REFUSED TO ENGAGE IN ADR, HAVE HAD A SIGNIFICANT IMPACT. BY GEOFF BROWNE

The Victorian Small Business Commissioner (VSBC) provides alternative dispute resolution (ADR) services, predominantly mediation services, under five Victorian Acts,[1] including the establishment *Small Business Commissioner Act 2003* (SBC Act). The disputes that fall within the VSBC's jurisdiction (s3) are primarily commercial disputes between businesses, although disputes may also be between a business and a local or state government body, or a not for profit entity. Section 5(2)(a) of the SBC Act refers to complaints regarding "unfair market practices or commercial dealings", although neither term is defined.

Mandatory referral and consequences of refusal

The vast majority of disputes under the *Retail Leases Act 2003* (RL Act) (between landlords and tenants in retail premises in Victoria) and the *Owner Drivers and Forestry Contractors Act 2005* (between hirers and owner drivers) must first be referred to the VSBC for attempted resolution before the matter can progress to litigation. Exceptions under the RL Act are disputes relating to rent alone (s81(2)), injunction applications (s87(2)), relief against forfeiture (s89(4)(a)), unconscionable conduct (s89(4)(b)), guarantors (s89(4)(c)) and key-money (s23(4) and s89(4)). These matters (other than injunction applications) may still be referred to the VSBC for ADR, but there is no statutory requirement to do so.

Under these two Acts, the VSBC can issue certificates stating that ADR has failed to resolve the dispute or is unlikely to resolve the dispute. Such certificates enable the dispute to progress to litigation at the Victorian Civil and Administrative Tribunal (VCAT) should the applicant decide to do so. Importantly, the VSBC may certify that a party (typically the respondent) has refused to engage in ADR. This enlivens s92(2)(b) of the RL Act and s51AB of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, and provides that VCAT may order a party to pay all or a specified part of the costs of another party in the proceeding if it is satisfied

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that the party refused to take part in, or withdrew from, mediation or another form of ADR.

Under the *Transport (Miscellaneous and Compliance) Act 1983* (Transport Act), the VSBC has a limited mediation role that arises only if the Taxi Services Commission determines that a dispute between a (non-employee) taxi driver and taxi operator is amenable to mediation and issues a certificate to the applicant. Again, if a party refuses to engage in mediation with the VSBC, a certificate from the VSBC to that effect enlivens the ability of VCAT to order costs against the refusing party through the operation of s162T(2)(b) of the Transport Act.

Similarly, a creditor cannot take enforcement action against a farmer in default under a farm debt under the *Farm Debt Mediation Act 2011* (FDM Act) until the creditor has informed the farmer of their right to seek mediation by the VSBC. Section 6 of the FDM Act provides that any enforcement action taken in contravention of the Act is void.

If the farmer seeks mediation, enforcement action cannot proceed until "satisfactory mediation" (as defined in s4 of the FDM Act) has occurred. Again the VSBC has a certification function. If a farmer refuses to engage in mediation, or satisfactory mediation has occurred, an exemption certificate issued under s16(2) of the FDM Act enables the creditor to commence enforcement action. If a creditor refuses to engage, a prohibition certificate issued under s14(1) prevents enforcement action occurring until satisfactory mediation has occurred, or for six months, whichever occurs earlier.

There is no statutory requirement for disputes falling under the SBC Act (which are essentially commercial disputes between businesses, or with government or not-for-profit entities which do not fall under any of the four abovementioned Acts) to progress to ADR at the VSBC before litigation is commenced, although the ADR services are available. In 2014-15, 560 such dispute applications were received by the VSBC.

Amendments to the *SBC Act 2003*

Amendments to the SBC Act came into effect on 1 May 2014 through the *Small Business Commissioner Amendment Act 2013*. One key amendment was the introduction of a certificate function under the SBC Act, similar to that under other Acts within the VSBC's jurisdiction. Sub-section 6A(1) provides the power to certify that ADR under the Act has failed to resolve the dispute or is unlikely to resolve the dispute. Importantly, sub-s6A(3) provides that "the Commissioner may certify that a party to the dispute has unreasonably refused to

participate in alternative dispute resolution". "Unreasonable refusal" is not defined under the SBC Act.

In addition, sub-s14(3) provides that the annual report submitted to the Minister for tabling in parliament "may include details of a certificate issued under section 6A(1) certifying that a party to a dispute has unreasonably refused to participate in alternative dispute resolution".

The rationale for the introduction of the "unreasonable refusal" provision and the "naming" power was to address the lack of any consequence under the SBC Act if a party declined to engage in ADR, and by so doing to encourage greater participation in ADR. As shown in Table 1, in the three years prior to the amendments, around 50 per cent of all matters under the SBC Act did not resolve or go to mediation, compared with around 20 per cent of matters under the RL Act. Table 1 highlights the significant reduction in this rate for disputes under the SBC Act in 2014-15 following the amendments. Disputes under these two Acts comprise 85-90 per cent of all disputes handled by the VSBC.

Table 1: Per cent of VSBC finalised dispute applications where the matter was not resolved and mediation did not occur.

	2011-12	2012-13	2013-14	2014-15
RL Act	22.2%	19.9%	19.7%	15.5%
SBC Act	53.3%	49.2%	51.7%	25.2%

There are three main reasons why disputes are not resolved and do not proceed to mediation:

- the respondent refuses to engage with the VSBC
- the respondent cannot be contacted
- the amount in dispute is too low to justify the cost of mediation.

Following the amendments, the VSBC commenced capturing this disaggregated data for all new disputes under the SBC Act, and retrospectively disaggregated data for all 2013-14 dispute applications. Table 2 provides the disaggregated comparison for these two financial years.

Table 2: Disaggregated data: finalised dispute applications under the *Small Business Commissioner Act 2003* not resolved and where mediation did not occur

	2013-14	2014-15
Percentage of disputes not resolved	51.7%	25.2%
Refusal	14.9%	5.2%
Can't locate	9.4%	4.9%
No mediation – small amount	27.4%	15.2%

The reduction in the refusal rate by nearly two-thirds is significant, as too is the halving of the incidence of not being able to locate the respondent, and the reduction in the percentage of small amount disputes not being resolved.

The refusal rate of 5.2 per cent in 2014-15 for disputes under the SBC Act is consistent with the 5.1 per cent refusal rate for disputes under the RL Act in that year. For the first three-quarters of 2015-16, the refusal rate under the SBC Act was 4.3 per cent.

Determination of "unreasonable refusal"

The VSBC published *Operational Guidelines* on unreasonable refusal at the time of the commencement of amendments to the SBC Act.[2]

The *Guidelines* were strongly influenced by two UK court decisions relating to whether costs would be awarded against a party refusing to engage in ADR.

In *Halsey v Milton Keynes General NHS Trust*[3] the Court held that six factors needed to be considered when determining whether refusal to engage in ADR was unreasonable:

- the nature of the dispute, as some cases may not be amenable to ADR
- the merits of the case, and whether a party reasonably or unreasonably holds the view that it has an unassailable case
- the extent to which other settlement methods have been attempted

- whether the costs of mediation would have been disproportionately high
- whether any delay in setting up and attending mediation would be prejudicial
- whether mediation had a reasonable prospect of success.

In *PGF II SA v OMFS Company 1 Limited*,[4] the Court added to the *Halsey* factors consideration of whether a party's non-response to an invitation to participate in ADR was reasonable. The Court held that "silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, even if, had the reasons been provided, they were reasonable".[5]

The VSBC takes a careful and conservative approach when determining whether refusal to engage in ADR is unreasonable or not. Each case is considered on its merits, and procedural fairness is paramount. All such decisions are made by the Commissioner. In 2014-15, the VSBC Annual Report contained details of eight certificates issued to parties who the VSBC determined had unreasonably refused to engage in ADR. The respondents in a further nine disputes refused to engage in ADR, but these refusals were deemed to be not unreasonable.

Conclusion

Introducing a certificate function and the power to name a party unreasonably refusing to engage in ADR under amendments to the SBC Act has had a significant impact on the willingness of parties to engage in ADR. The refusal rate is now consistent with that for disputes under the RL Act, more respondent parties are being located, and resolution rates both prior to mediation and at mediation have remained high. ■

Geoff Browne was appointed Victorian Small Business Commissioner in 2011 for a five year term, following six years as Deputy Director of Consumer Affairs Victoria. In August 2016 he announced that he is not seeking reappointment to the statutory role when the term ends in October 2016.

1. The other Acts are: *Retail Leases Act 2003, Owner Drivers and Forestry Contractors Act 2005, Farm Debt Mediation Act 2011, Transport (Compliance and Miscellaneous) Act 1983.*
2. Available at www.vsbc.vic.gov.au. A copy is sent to all respondents to disputes under the SBC Act.
3. EWCA Civ 576, May 2004.
4. EWCA Civ 1288, October 2014.
5. Note 4 above, at 34.

HIGH COURT JUDGMENTS

ANDREW YUILE

Administrative law

Migration – procedural fairness – data breach

Minister for Immigration and Border Protection v SZSSJ; Minister for Immigration and Border Protection v SZTZI [2016] HCA 29 (27 July 2016) concerned judicial review of decisions and processes of the Department of Immigration following a data breach in 2014. The department accidentally published a document that contained embedded information disclosing the identities and personal information of 9258 applicants for protection visas who were in detention at the time. There was a risk that the information might be disclosed to entities seeking to harm the applicants. The department notified affected individuals and created an "International Treaties Obligation Assessment" (ITOA) process, which assessed the effect of the data breach on individual applicants against non-refoulement and other obligations. In an ITOA, the department was to assume that the information had been accessed by authorities in the country in relation to which the applicant feared persecution. Depending on the ITOA result, the case might be referred to the Minister to consider exercising certain non-compellable powers under the *Migration Act 1958* (Cth). Those factual circumstances were interpreted by the Court as incorporating a decision by the Minister to consider exercising his personal powers; the ITOA represented an inquiry by the Department to assist the Minister in that consideration. The respondent argued they had not been conferred procedural fairness in the ITOA process, in that they were not provided with the full details of who might have accessed the information and the full contents of a report on the data breach. Also at issue was the jurisdiction of the Federal Circuit Court of Australia (FCCA). The Court held that the ITOA formed part of a statutory process as it was an enquiry to assist the Minister in the exercise of his powers. That meant that the FCCA had jurisdiction. It also followed that there was an obligation to provide procedural fairness as the statutory scheme did not suggest otherwise. However, the Court held that the respondents in this case had, in fact, been provided with procedural fairness given that the Department assumed the worst case disclosure scenario, and the respondent had been given a chance to comment. French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ jointly. Appeal from the Full Federal Court allowed.

Contract law

Contract terms – penalties – unconscionable, unjust or unfair terms

In *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28 (27 July 2016) the High Court held that late payment fee provisions in contracts for consumer credit card accounts were not unenforceable penalties at common law and were not unconscionable, unjust or

unfair under statutory consumer protection regimes. Mr Paciocco held two credit cards with ANZ and was required to pay a late fee of $35 (later $20) if he did not pay a minimum amount each month by the due date. At first instance, Gordon J (then of the Federal Court) held that the fees were penalties and unenforceable; but that they did not contravene the statutory regimes. The Full Federal Court overturned her Honour's finding on the penalty claim and upheld the finding on the statutory claim. The High Court affirmed that a sum may not be stipulated for payment on default if it is a threat to the person required to pay, or if the purpose or effect of requiring payment is to punish the defaulting party. The critical test or policy is whether a sum is extravagant and unconscionable in comparison to the greatest loss that could conceivably be proved to have followed from the breach. That is, to be a penalty, the sum must be plainly excessive or out of all proportion to the interests of the party in whose favour the alleged penalty stands. In deciding that point, the interests of the parties must be considered in the whole of the circumstances of the contract. In this case, Mr Paciocco's expert gave evidence that the maximum cost to the bank of default of each payment was around $3. The bank's expert gave evidence that, taking into account other parts of the bank's business, including enforcement, covering bad debts and regulatory capital, the maximum cost of failure to pay might be between $5 and $147. The High Court held that it was legitimate to take into account all of the circumstances and interests of the bank, beyond the individual customer. Those circumstances were complex and difficult to reduce to a figure. In those circumstances, the fees were not plainly excessive or out of proportion to expenses incurred by, or the interests of, the bank. Accordingly, the fees were not penalties at common law. Nor were they unjust, unfair or unconscionable. Mr Paciocco could choose not to enter the contract, could leave at any time, and could avoid the fees by paying on time. He knew the terms, which were standard. There was no oppression, unfairness or imposition of unfair bargaining power. French CJ, Kiefel J, Gageler J and Keane J each writing separately; Nettle J dissenting (on the penalty ground). Appeal from the Full Federal Court dismissed. ■

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FEDERAL COURT JUDGMENTS


DAN STAR

Administrative law

Where the AAT gives oral reasons at the time of decision and written reasons later – degree of permissible departure in later written reasons from earlier oral reasons

In *Negri v Secretary, Department of Social Services* [2016] FCA 879 (5 August 2016) the Court (Bromberg J) set aside a decision of the Administrative Appeals Tribunal (AAT). The applicant sought a Disability Support Pension under the *Social Security Act 1991* (Cth). Her claim was rejected by a Centrelink officer, then on internal review, and then again at the Social Security Appeals Tribunal. The applicant then sought merits review at the AAT. The AAT also rejected her claim, giving *ex tempore* oral reasons. The applicant requested written reasons under s43(2A) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). The applicant later filed a notice to appeal in the Federal Court. On that same day, the AAT delivered its written reasons.

An interesting and significant question which arose was: what were the AAT's reasons? The Court had to consider whether it was to have regard to the AAT's oral reasons only, its written reasons only or both sets of reasons. The applicant submitted that the written reasons substantially departed from the earlier oral reasons, and that the Court should only have regard to the oral reasons.

The Court found at [10] that based on s43 of the AAT Act, the reasons for the decision are not themselves the "decision". When providing written reasons as requested under s43(2A), the AAT is permitted to elaborate upon its oral reasons and to improve their expression, "as long as they are 'reasons for [the Tribunal's] decision'" (at [11]).

As to whether something passes from permissible elaboration to impermissible departure, Bromberg J explained at [27]: "A decision is a sum of conclusions. The ultimate conclusion will usually be based on intermediate conclusions. Each conclusion is arrived at by a process of reasoning, that is, a progression along a path from premise to conclusion through a process of induction or deduction. The reasons given by a decision-maker should expose or explain the decision-maker's reasoning. That is the function of reasons for decision. In requiring the Tribunal to give reasons for its decision, s43(2) of the AAT Act requires an exposition of the Tribunal's reasoning for its decision. Section 43(2A) requires that, upon request, the reasoning of the Tribunal be exposed or explained in writing. As I have said, the reasons or explanation given in writing may be different to that given orally. Different reasons, as between those provided orally and those later provided in writing, are not necessarily demonstrative of different reasoning. As long as the reasoning remains consistent, there can be no objection to the provision of a more elaborate exposition of the same reasoning that was orally explained. What is not permissible is altered or new reasoning. The Tribunal is not permitted to substantially divert from the reasoning upon which its decision was made, but is permitted to explain that reasoning differently and, in doing so, is required to address the matters specified in s 43(2B)".

Whether the AAT's written reasons departed from its oral reasons to the point of revealing new reasoning is a question of degree (at [28]). The Court made the following general statements at [30]:

"(1) Am I to have regard to the Tribunal's oral reasons only, its written reasons only, or both sets of reasons? The answer is, both.

(2) In the latter case which (if any) is to have predominance? The answer is that I will presume, consistently with the certification appearing after the Tribunal's written reasons, that they are the reasons for the subject decision. If I am satisfied, however, that a written reason is not a reason for decision – if, for example, it is clearly inconsistent with the reasoning of the Tribunal (as made apparent by the oral reasons) sufficiently to reveal new or substantially altered reasoning – I will ignore the written reason and rely upon the oral reason.

(3) If one is to have predominance what is the role of the other? The oral reasons will be relevant in assessing any submission that the written reasons are not, in fact, the reasons for decision of the Tribunal. Where a written reason is found not to have been a "reason for decision" of the Tribunal, any corresponding oral reason assumes primary significance. It seems to me that oral reasons may also be used, with caution, to clarify an ambiguity in the written reasons."

In this application, the Court held that the oral and written reasons could stand consistently, although the AAT "flirted dangerously with impermissible alteration to its reasoning" (at [62]).

Various alleged errors of law were rejected. However the appeal to the Federal Court was allowed because the AAT erred by failing to deal with a clearly articulated submission upon which strong reliance was put (at [86]-[105]).

Associations and clubs
Corporations

Declaratory relief sought pursuant to s21 of *Federal Court of Australia Act 1976* (Cth) – whether subject matter justiciable

Members' rights and remedies – whether conduct of the association's affairs in connection with applicant's Senior Counsel application and appointment process was oppressive to, unfairly prejudicial to or unfairly discriminatory against the applicant

In *Walker v New South Wales Bar Association* [2016] FCA 799 (12 July 2016) the Court (Besanko J) dismissed an application for declarations and an order pursuant to s233 of the *Corporations Act 2001* (Cth) against the New South Wales Bar Association (the Association) and certain office holders of the Association.

The litigation concerned the rejection of the applicant's appointment to Senior Counsel. The applicant was a barrister and a member of the Association. She predominantly acted as a mediator. The Association was a company limited by guarantee, governed by a constitution. The Association is responsible for the appointment of Senior Counsel in NSW, governed by the principles in the Senior Counsel Protocol (the Protocol). The applicant applied to become Senior Counsel in 2014 and 2015, but was unsuccessful. As to her application in 2014, the applicant was told that her application was not considered because the Senior Counsel Selection Committee (the Selection Committee) determined that it was not within the Protocol. As to her application in 2015, the applicant was told that her application was considered on its merits and that she did not have sufficient support. The Protocol included (in clause 4): "Appointment as Senior Counsel should be restricted to practising advocates, with acknowledgment of the importance of the work performed by way of giving advice as well as appearing in or sitting on courts and other tribunals and conducting or appearing in alternative dispute resolution, including arbitrations and mediations".

The applicant sought various declarations to the effect that a person can still be a Senior Counsel despite their practice being wholly or substantially as a mediator (at [6]). The Court refused to grant a declaration under s21 of the *Federal Court of Australia Act 1976* (Cth). The issues concerning the applicant's unsuccessful application for appointment as Senior Counsel did not relate to the rules of the Association's constitution but rather to the terms of the Protocol and what is said by the applicant to be its proper construction (at [69]). The applicant did not have any contractual rights in relation to the Senior Counsel Protocol and she had no property rights affected by the construction of the Senior Counsel Protocol (at [78]). To show that the matters she raised are justiciable, the applicant relied on their effect on her livelihood or the damage to her reputation or both. The Court at [79] held that the matters regarding the construction of the Protocol were not justiciable. There were two related reasons for this conclusion. First, the Protocol is not a document that creates legal rights and duties; it is a policy document. Second, there was not a relevant threat to livelihood or damage to reputation. Senior Counsel has an ability to charge higher fees and appointment is a public identification of an ability to provide outstanding service and the rejection of an application no doubt leads to "disappointment, even great disappointment". Nevertheless, it is not any economic interest or potential economic interest which is sufficient to justify the Court's intervention, particularly having regard to the policy nature of the Protocol.

The Court also rejected the applicant's allegations of oppressive conduct under ss232 and 233 of the *Corporations Act 2001* (Cth) in connection with the applicant's Senior Counsel application and the appointment process. The Selection Committee fulfilled their obligation to interpret the Protocol as it considered appropriate and did not try to decide its intention by some other process (at [98]). The applicant alleged that the Association did not amend the Protocol to properly reflect the intention of the Bar Council to allow appointment to Senior Counsel despite an applicant acting predominantly as a mediator. However, the Court held that the Selection Committee's approach was not unfairly prejudicial or unfairly discriminatory to the applicant (at [101]). Even if the Association's conduct had amounted to oppression, the Court observed at [104] that the applicant may not have been affected in her capacity as a member, because any junior counsel with a full unrestricted practising certificate is entitled to apply for appointment to Senior Counsel, not just members of the Association. ■

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FAMILY LAW JUDGMENTS

ROBERT GLADE-WRIGHT

Children

Full Court held that alternate weekends, special days and holidays amounted to "substantial and significant time"

In *Ulster & Viney* [2016] FamCAFC 133 (28 July 2016) Ainslie-Wallace and Ryan JJ dismissed the father's appeal against Judge Bender's order allowing the mother to relocate from Melbourne 85km away to Gippsland where she obtained work. From separation the children spent alternate weekends and Thursday nights with the father and two hours with him on alternate Mondays to coincide with the children's piano lessons in which he was "keenly involved" (at [43]) until the mother relocated two months later without notice. The father withheld the children, negotiating an interim order for six nights a fortnight (the mother returning to Melbourne), but at the final hearing a year later his time was limited to alternate weekends; alternate Fridays (after school to 7pm); special days (Jewish holidays) and school holidays.

While the whole Court disagreed that "daily routine" under s65DAA(3) requires seeing the children every day (as argued for the father) the majority rejected his contention that the final order was not an order for "substantial and significant time". Strickland J dissented, saying at [5]:

"It is beyond doubt that the time the children are to spend with the father is 'extremely limited' and pales in comparison with the . . . time they enjoyed with him prior to separation and under the interim orders. The magnitude of that change and its effect on the relationship between the children and the father is amply described by the family report writer . . . :

'. . . Such a proposal entails the children moving from seeing [the father] six nights per fortnight to only two. This is a high magnitude change. The children and [the father] enjoy a strong . . . relationship which would be eroded and compromised if their time with him is reduced to such an extent. This would entail a significant loss for them which would not be in their interest'."

Property

Wife wins appeal against decision that advances secured by mortgages in favour of husband's father retrospectively were loans

In *Bircher & Bircher and Anor* [2016] FamCAFC 123 (15 July 2016) the Full Court (Strickland, Murphy and Hogan JJ) allowed the wife's appeal against Judge Demack's order where the pool was $185,171, $165,493 of which was superannuation so that the parties were "effectively litigating over . . . $20,000" (at [16]) due to a ruling that $64,467 held in a solicitor's trust account was not an asset but a debt payable to the husband's father in repayment of two loans he was found to have made to the husband during the marriage (secured by mortgages retrospectively). The Full Court at [46]-[47] examined evidentiary inconsistencies between the husband and father and between advance terms and mortgages, saying:

". . . we do not regard it as sufficient to find that 'the loan was real and the interest properly sought' without making a finding as to the terms of the loan and the evidence accepted by her Honour which sustains that finding. While . . . conversations between . . . husband and [father might have been] 'recorded . . . with . . . great . . . particularity' in the [father's] affidavits it is not clear . . . how . . . inconsistencies between the accounts given by the [father] (many of which, inadmissibly, purport to give evidence of what was in the husband's mind . . .) are dealt with . . . (at [56])

" . . . it is not to the point that the interest that '[the father] sought to enforce is a reasonable amount and that it is reasonable, given that he loaned this money in 2001/2002, that there be interest … owing'. . . (at [58])

"Her Honour also does not address the fact that the husband (i.e. the borrower) does not . . . depose to the terms of the agreement … [or] to the rate of interest or how it might be calculated . . . (at [60])

". . . In essence, the wife asserted that the existence of the mortgages was a recent invention or that they were created so as to deny her a property settlement . . . That issue was not . . . 'neither here nor there' as her Honour found at [35]; it was central to the wife's case." (at [62])

Property

Not just and equitable to make a property order sought by husband's estate where "financially destitute" wife was in poor health with dependent adult children – *Stanford* applied

In *Paxton* [2016] FCCA 1689 (7 July 2016) a property application filed by the husband who then died was continued by his estate under FLR 6.15(3). The wife sought to remain in the home. Judge Wilson said at [6]:

"Both parties agreed that the . . . home would have to be sold if any division of property . . . were to be ordered . . . [T]he wife is in very poor health . . . financially destitute . . . has no apparent prospects of employment and the adult son of the marriage, himself mentally infirm, lives with the wife and she cares for him. Any sale of the . . . home will occasion very considerable hardship to the wife. Conversely, the husband is dead."

The Court also referred at [18] to the wife's evidence that her 29-year-old daughter (who also lived with her) "suffered from . . . cerebral palsy . . . had learning difficulties . . . had not worked since leaving school and received social welfare benefits" and that "it was likely that her children would continue to depend upon her well into the future having regard to their physical and intellectual difficulties".

Judge Wilson at [34] cited *Stanford* (2012) 247 CLR 108 in which "[t]he High Court held that it had not been shown that, if the wife had not died, it would have been just and equitable to have made an order under s79" (relying on ss79(2) and 79(8)(b)(ii)); also citing *Bevan* [2013] FamCAFC 116 in concluding that it was not just and equitable to make a property order. Applying *Stanford*, the Court

said at [58] that it was "wholly erroneous for Mr Paxton . . . as his late brother's personal representative to proceed . . . on the premise that the husband had (or Mr Paxton now has) the right to have the former matrimonial asset divided between the wife and the estate". The Court added at [65] that "[i]n *Stanford* the court addressed the error made at first instance where the court did not take into account the consequences to the surviving spouse if a property settlement order was made".

Children

Indigenous father loses appeal against order permitting non-Indigenous mother to attend traditional smoking ceremony with child

In *Lokare & Baum* [2016] FamCAFC 135 (28 July 2016) the Full Court (Ainslie-Wallace, Ryan and Aldridge JJ) dismissed with costs an Indigenous father's appeal against Rees J's order that the parties' daughter (aged 5, who was 8 months at separation) live with the (non-Indigenous) mother in Sydney, spend time with the father in Darwin and attend a traditional smoking ceremony at which she could be accompanied by the mother, the father to meet their accommodation and travel costs. The father argued on appeal that Rees J (at [64]) had erred by requiring him or his family to allow the mother to be present at the smoking ceremony and (at [18]) failed to properly apply s61F FLA which requires the Court to "have regard to any kinship obligations and child-rearing practices of the child's Aboriginal culture".

The Full Court noted at [24] that the child had lived in the primary care of the mother since her birth and since separation the distance between the parents' homes meant that the time spent by the child with her father had been limited and had not included overnight stays and at [29] that Rees J recorded that the father "having taken offence at a submission made to the Principal Registrar by the mother's counsel [the father] rang his sister [who] as a result . . . withdrew her permission for the mother to attend the [smoking] ceremony".

The Full Court continued from [47]:

". . . Her Honour did not, as the father contended, determine the child's best interests solely by reference to the financial capacity of the parties. Her Honour determined that the child's best interests would indeed be served by her being able to be immersed in her culture with her indigenous family, but, as her Honour correctly noted, in assessing that, she was obliged to consider how, practically, that could be achieved. As her Honour said:

'The orders which are sought by the father cannot practically be implemented as neither party can afford the cost'.

"Finally it was argued that the effect of her Honour's orders was to foreclose finally any prospect that the child could attend the ceremony. We do not agree with that proposition. Her Honour specifically noted … that the mother would facilitate the child spending time with the father if he could fund the travel and accommodation" (at [48]).

"Her Honour's order was:

'The mother shall be permitted to be present during the "smoking ceremony"' (at [66]).

"Her Honour's order does not, as the father submits, compel the mother's participation in the smoking ceremony and we reject this submission" (at [67]). ■

Robert Glade-Wright, a former barrister and accredited family law specialist, is the founder of *The Family Law Book*, a looseleaf and online service: see www.thefamilylawbook.com.au. He is assisted by accredited family law specialist Craig Nicol. References to sections of an Act in the text refer to the *Family Law Act 1975* (Cth) unless otherwise specified. The full text of these judgments can be found at www.austlii.edu.au. The numbers in square brackets in the text refer to the paragraph numbers in the judgment.

SUPREME COURT JUDGMENTS

PROFESSOR GREG REINHARDT

Establishing causation of serious personal injury under the *Transport Accident Act 1986* (Vic)

Principe v Transport Accident Commission [2016] VSCA 205 (unreported, 26 August 2016, No S APCI 2016 0033, Hansen and Beach JJA and Cavanough AJA)

This was an application for leave to appeal a judgment of a judge of the County Court.

The applicant claimed to have suffered lower back injury as the result of a motor vehicle collision. It was agreed that the injury was a serious injury for the purposes of the *Transport Accident Act 1986* (Vic) (the Act). The applicant had sought leave to commence proceedings at common law. The trial judge refused leave on the basis that the applicant had not established that the injury was caused by the collision.

The collision occurred in July 2009. There was some evidence of lower back pain suffered by the applicant before the collision, although denied by the applicant. There was also evidence that the applicant had sought no treatment until late December 2010 when he was referred back to a specialist he had seen prior to the accident. Ultimately, after a history of pain and medical consultations, the applicant underwent surgery on 29 December 2011.

Central to the judge's decision that the applicant had failed to establish causation between the collision and the lower back injury was an opinion obtained by the respondent which concluded at [71]:

". . . My view is that one cannot reasonably relate the subsequent development of a right-sided L1/2 disc prolapse and symptoms in this regard to the motor vehicle accident of 2009. I accept that [the applicant's] recollection is that after his neck pain reduced in its intensity he was aware of general soreness etc. In my view the reality of the situation is that if the motor vehicle accident caused a lumbar disc prolapse on the right side at the L1/2 level, then significant symptoms would have been noted at the time of the motor vehicle accident or soon after. I accept the mechanism whereby [the applicant] and others are relating subsequent symptoms in this regard to his motor vehicle accident. My view is that one cannot reasonably do so on a scientific basis. It is well recognised that overall disc prolapses develop spontaneously as part of the natural evolution of underlying degenerative disc disease. They may occur in response to acute traumatic episodes or chronic repetitive trauma. If they occur in relation to an acute traumatic episode, then symptoms develop either around the time of that episode or within a week or two after. Similarly in relation to the development of acute low back pain around June of 2013, symptoms developed as a consequence of underlying degenerative changes within the lumbar spine at the L4/5 level. They did not develop as a consequence of the motor vehicle accident either directly or indirectly".

The Court of Appeal noted at [79]:

"As a general proposition, it may be observed that relevant injuries often manifest themselves within a very short period of time after a particular traumatic event. Sometimes, however, injuries do not manifest themselves immediately. Moreover, on occasions, victims of traumatic events do not initially complain about all of the injuries about which they later make complaint. As has also been observed before, sometimes an initially more painful injury (described as a 'distracting injury') masks, or distracts an injured person from, a second injury about which complaint is not initially made. In the present case, it will be recalled that Professor Bittar [a consultant neurosurgeon engaged by the applicant's solicitors] referred to the applicant's initial neck pain as 'a distracting injury'".

The Court of Appeal continued at [81]-[82]:

"In the present case, there was plainly a delay between the collision and the applicant's complaints of back-related symptoms. There were no complaints made by the applicant to medical practitioners that

might have been capable of being described as back-related until at least two years after the collision. Absent any complaints by the applicant to any other people, and absent any assertions by the applicant that he in fact suffered back-related symptoms, at some earlier point in time than his first complaint to a doctor, one might readily conclude that the necessary causal link between the collision and the applicant's back condition was not made out.

However, in this case there was a substantial body of evidence (the applicant's evidence, the applicant's wife's evidence, the applicant's daughter's evidence, the applicant's cousin's evidence and the applicant's former work colleague's evidence) to the effect that the applicant had back-related symptoms within a relatively short time after the collision – and well prior to his first relevant complaint to a medical practitioner. Further, while the judge went into considerable detail dealing with the evidence of histories given to medical practitioners, very little (if any) reference was made by the judge to this substantial body of evidence that was tendered, called and given by the applicant".

The evidence of lay witnesses as to complaints of pain by the applicant was significant in the case. The decision in *De Agostino v Leatch and the Transport Accident Commission* [2011] VSCA 249 could be distinguished. In that case, cross-examination of the plaintiff had resulted in concessions by the plaintiff as to her pre-accident capacity. That was not the case in the application before the Court of Appeal. The applicant had made no concessions of significance in cross-examination.

The Court of Appeal concluded at [92]:

"Making due allowance for all of the advantages that the trial judge had in seeing the three witnesses who were called to give evidence at first instance and in conducting the application over four sitting days, and having reviewed all of the evidence, we have respectfully come to the conclusion that the judge erred in accepting Mr Dooley's opinion, and in not concluding that the applicant had established that the collision was a cause of the back condition that the respondent otherwise accepted constituted a serious injury within the meaning of s93 of the Act". [endnote omitted]

Leave to appeal was granted and the appeal was allowed. An order was made under s93 of the Act giving leave to the applicant to commence common law proceedings. ■

Professor Greg Reinhardt is executive director of the Australasian Institute of Judicial Administration and a member of the Faculty of Law at Monash University, ph 9600 1311, email Gregory.Reinhardt@monash.edu.
The numbers in square brackets in the text refer to the paragraph numbers in the judgment. The full version of this judgment can be found at www.austlii.edu.au.

LEGISLATION UPDATE

New Victorian 2016 Regulations

As at 22/08/2016

2016 No. 86 Estate Agents (Retirement Villages) Regulations
2016 No. 87 Conveyancers (Qualifications, Experience and Fees) Amendment Regulations
2016 No. 88 Subordinate Legislation (Rail Safety (Local Operations) Regulations 2006) Extension Regulations
2016 No. 89 Subordinate Legislation (Retirement Villages (Contractual Arrangements) Regulations 2006) Extension Regulations
2016 No. 90 Dangerous Goods (HCDG) Regulations
2016 No. 91 Local Government (Electoral) Regulations
2016 No. 92 Road Safety (Drivers) Amendment (Interstate Disqualification and Other Matters) Regulations
2016 No. 93 Road Safety (Vehicles) Amendment (Australian Border Force Vehicles) Regulations
2016 No. 94 Aboriginal Heritage Amendment Regulations
2016 No. 95 Fisheries Amendment Regulations
2016 No. 96 Residential Tenancies Amendment Regulations
2016 No. 97 City of Melbourne (Electoral) Amendment Regulations

New Victorian 2016 Bills

As at 22/08/2016

Corrections Amendment (No body, No Parole) Bill 2016
Environment Protection Amendment (Container Deposit and Refund Scheme) Bill 2016
Local Government Amendment Bill 2016
Melbourne and Olympic Parks Amendment Bill 2016
National Domestic Violence Order Scheme Bill 2016
Police and Justice Legislation Amendment (Miscellaneous) Bill 2016

New Commonwealth 2016 Principal Regulations

As at 22/08/2016

Note: From 2016, Commonwealth Statutory Rules (Regulations) are not numbered.

Charter of the United Nations (Sanctions – Iran) Regulation
Customs (Prohibited Imports) Amendment (Shotguns and Shotgun Magazines) Regulation 2016
Maritime Transport and Offshore Facilities Security Amendment (Interstate Voyages) Regulation 2016
Marine Safety (Domestic Commercial Vessel) National Law Amendment (Cost Recovery) Regulation 2016
Intellectual Property Legislation Amendment (Fee Review) Regulation 2016
Health Insurance (Pathology Services Table) Regulation 2016
Health Insurance (Diagnostic Imaging Services Table) Regulation 2016 ■

This summary is prepared by the **LIV Library** to help practitioners keep informed of recent changes in legislation. For weekly updates, visit www.liv.asn.au/practice-resources/library/resources/legislation/legislation-update.

PRACTICE NOTES

Remote signing procedures

REVISED REMOTE SIGNING PROCEDURES FOR FINANCING TRANSACTIONS AND THE LEGAL ANALYSIS BEHIND THEM HAVE BEEN RELEASED

The Walrus Committee – an informal group made up of practitioners from Allens Linklaters, Ashurst, Herbert Smith Freehills, King & Wood Mallesons and Norton Rose Fulbright, all Law Firms Australia [LFA] members – joined to develop the remote signing procedures.

The safest way to execute any document is for all parties or their attorneys to be physically present and to contemporaneously execute and exchange a hard-copy original. Increasingly, however, the location of the parties, the timing requirements of the transaction or other prevailing circumstances are making it impracticable for some or all signatories to be physically present at a signing, either directly or through an attorney.

In response, the authors have developed a set of procedures they are prepared to accept (subject always to contrary instructions from clients) for the effective remote execution of documents, in the hope this will lead to broad market consensus on the topic. The procedures have been developed for use in financing transactions, but should be able to be used for remote closings of other types of transactions as well. The authors note that in some cases, a remote signing will not be appropriate or practicable.

The procedures are not necessarily the only procedures that are capable of satisfying relevant Australian legal requirements, and other procedures may be adequate in particular circumstances. This would need to be considered on a case-by-case basis. (For example, the procedures do not deal with the rules for electronic conveyancing that are being introduced across Australia. They also do not deal with the effectiveness of proprietary on-line products for the electronic creation, execution and storage of documents.) Some "safe harbour" procedures are set out that the five firms are prepared to accept (subject to contrary instructions from clients) for remote signings, in order to smooth the closing process.

The paper sets out three approaches to the remote signing of documents. The availability of a particular approach will depend for the most part on the type of document involved: in particular, whether the document is a deed; a document that will need to be registered with a land titles office; a document (such as a guarantee or document affecting land) to which the Statute of Frauds will apply; or a security agreement under the *Personal Property Securities Act 2009*.

For remote signing of documents, all affected parties should agree which of the approaches is to be adopted. This agreement should be struck in good time in advance of the actual signing to avoid misunderstandings. Each approach assumes there will be a coordinating law firm – this should also be agreed in good time. In a financing transaction this would usually be the financiers' counsel, but that is not always the case. The protocols include template emails to be sent from the coordinating law firm to all lawyers and parties, which clearly set out steps for each party to complete remote signing.

The remote signing procedures for financing transactions were originally published in the *Australian Business Law Review* (2015) 43 ABLR 497. The latest version of the procedures is available at www.liv.asn.au/staying-informed/substantive-legal-updates/practice-resources/august-2016/remote-signing-protocols-for-financing-transaction.aspx.

A follow-up paper by Bruce Whittaker, "Remote signings under Australian law", explains the legal analysis behind the procedures and has recently been published in the *Australian Business Law Review*: (2016) 44 ABLR 229.

The LIV provides a suite of forms and precedents for common transactions through the LIV Bookshop and online at www.liv.asn.au/LawBooks.

State Revenue Office

NEW WEBINARS AND HELP FOR SMALL BUSINESS

You can now register your spot in the 2016-17 webinar calendar for the following topics:

- Payroll tax
- Land tax absentee owner surcharge
- Foreign purchaser additional duty
- First-home buyers - the grant and duty reduction
- Duties Online
- Land tax

There is also a comprehensive video library at www.sro.vic.gov.au/videos and a new Small Business Hub www.sro.vic.gov.au/smallbusiness to provide even more assistance to our customers.

Practitioners, please note: 2016 is a revaluation year which may result in customers receiving a land tax assessment for the first time next year. Our webinars will help you to answer common questions from your clients about land tax and valuation processes.

If you have any questions, please contact education@sro.vic.gov.au. ■

Customer Education Unit, 11 August 2016

CASH RATE TARGET

From 6 December 2007 law practices whose matters are governed by the *Legal Profession Act 2004* cannot use the penalty interest rate for their accounts. The maximum rate is the cash rate target plus 2 per cent. The cash rate target is currently 1.50 per cent (from 3 August 2016). To monitor changes between editions of the *LIJ*, practitioners should check www.rba.gov.au/statistics/cash-rate.

PENALTY AND FEE UNITS

For the financial year commencing 1 July 2016, the value of a penalty unit is $155.46. The value of a fee unit is $13.94 (*Government Gazette* GG15, 14 April 2016).

PENALTY INTEREST RATE

The penalty interest rate is 9.5 per cent per annum (from 1 June 2015).

To monitor changes to this rate between editions of the *LIJ*, practitioners should check the Magistrates' Court of Victoria website at www.magistratescourt.vic.gov.au/procedural-information/penalty-interest-rates.

Expert Witnesses Online

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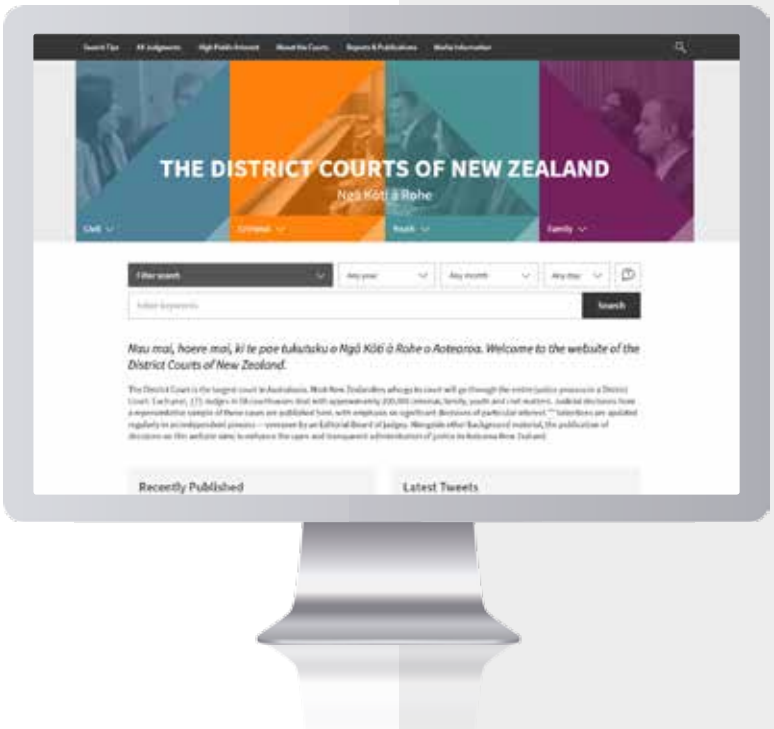
IN_SITES



The District Courts of New Zealand

www.districtcourts.govt.nz

The District Courts of New Zealand website has begun publishing judicial decisions from the New Zealand District Courts. The website will include selected decisions from the Court's criminal, family, youth and civil jurisdictions. The District Court of New Zealand, being the largest court in Australasia, has a large volume of decisions handed down each year and therefore not all judgments will be published. All decisions from proceedings under the *Harmful Digital Communications Act 2015* (NZ) will be published as per legislative requirements.

Austlii-Young Lawyers Journal

www.austlii.edu.au/au/journals/VicYngLawyersJl

Issues of the *Young Lawyers Journal* published from 1996-2015 are now available on the Austlii website. The journals have been scanned and can be found on the Austlii homepage under Libraries>Law Journals>Australian Law Journals. Journal articles can be searched for by author, publication year or using keywords. Copies of articles can be saved in a pdf format or printed.

The Tax Institute

www.taxinstitute.com.au

The Tax Institute website has recently undergone some key changes, making it quicker to upload and view on mobile devices such as phones and tablets. There are also new sign-in and search icons to help navigate the site. Some of the more popular content has been moved based on user feedback. If you are having any trouble finding a page from the previous site there is a helpful list under "quick links" which shows where content is now located.

Boardtrac Board Portal

www.boardtrac.com.au

Boardtrac is an online board portal tool that can be used by board or committee members to access documents, correspondence and governance materials. You can view and print documents, as well as annotate and highlight material online and offline. The software allows for two levels of security with a password and a PIN, as well as the ability to remotely delete stored documents if your device is lost or stolen. This app is available free from the AppStore and requires iOS 7.0 or later. It is compatible with an iPad.

Goodreader

www.goodreader.com

Those who enjoy their apps will be pleased to know that Goodreader is now in its fourth edition. If you have never used it, Goodreader is a pdf reader for iPad, iPhone and iPod touch. It allows you to edit and annotate your pdf documents, mark-up text and importantly, sign documents. You can also use Goodreader to view MS Office, txt and html files, as well as pictures and videos. This app is available for purchase from the AppStore and requires iOS 6.0 or later.

Office of Public Advocate

www.publicadvocate.vic.gov.au/power-of-attorney

The library continues to receive queries about the *Powers of Attorney Act 2014* (Vic) which commenced on 1 September 2015. The Office of Public Advocate website provides general information about this topic as well as resources for the public regarding different types of powers of attorney. The free 60 page guide titled *Taking Control* is available to download from this site or a hardcopy can be posted by request. Various powers of attorney forms created by the Department of Justice and Regulation can also be downloaded and saved. ■

IN_PRINT

This month's books cover Melbourne's underworld, Aboriginal courts, federal and Victorian regulators, uniform evidence law and military entitlements and compensation.

Once Upon a Time in Melbourne

Liam Houlihan, *Once Upon a Time in Melbourne,* Melbourne University Publishing, 2015, pb $30

This is a fast and punchy narrative of Melbourne's underworld during the first decade of the new millennium.

While the criminals provided the front page news at the time, this narrative takes the reader to the back stories: the machinations between police commissioners and their underlings vying for the top job, politicians, the Police Association and tales of criminal vendettas are explored.

The story is told through a roll call of characters. The exploits of detectives, police, politicians, union officials, drug dealers, police informers, barristers and vampire gigolos are cleverly woven into an entertaining modern history of Melbourne crime. Even Silky, the police dog who played a leading role in the arrest of police informant Terence Hodson and his detective handler, both caught in the act of stealing drugs from a drug house under covert surveillance, gets a chapter.

Houlihan expresses the view that Victoria Police was an unregistered political entity; a big political party with guns.

While corrupt police were seduced by the romance of crime, the lure of power also clearly got the better of some public officials.

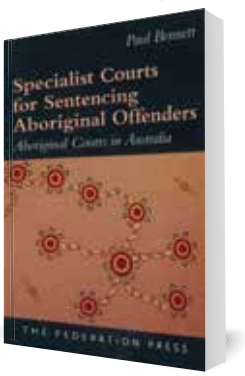
Jamie Bolic, Managing Legal Counsel, Coles Group

Specialist Courts for Sentencing Aboriginal Offenders: Aboriginal Courts in Australia

Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders: Aboriginal Courts in Australia,* Federation Press, 2016, pb $50

Bennett brings a wealth of personal experience to this timely study, in which he canvasses the development of Aboriginal sentencing courts across the country (1999 to the present). Tellingly, he concludes these courts "are not an easy solution to complex problems".

Bennett works anecdote, review and analysis into a narrative outlining motivations, practicalities and pitfalls. Readers are introduced to supporting commentary and complex, conflicting critiques from those who support the status quo and those who complain of the need for more radical change.



Readers who have never been involved in an Aboriginal sentencing court will explore the roles of the participants, settle into a discussion about "two-way learning" and consider the role of mainstream jurisprudence. The book invites a conversation about whether Aboriginal sentencing courts are or should be therapeutic or confronting, or both.

For me, the text would benefit from a discussion about gender in respect to the role of Elders, more information about the tensions underpinning the role of the Aboriginal Justice Officer and details about the ever-present need for multi-sectoral, cross-cultural professional development for all involved.

It is a concise and otherwise complete effort to involve us all in the profoundly important discussion about justice for Aboriginal people.

Professor Kate Auty, Vice Chancellor's Fellow, University of Melbourne

Federal and Victorian Regulators: A Practical Guide

John O'Callaghan, *Federal and Victorian Regulators: A Practical Guide,* LexisNexis Butterworths, 2015, pb $135

This is an extremely helpful text for in-house and external lawyers advising on investigations by regulators. It not only provides an overview of the various regulators with investigative powers, it also conveniently and succinctly summarises those powers. To my knowledge, it's the only text that gives a snapshot of all the federal and state regulators who might impact on clients. In that alone, it is useful.

The text is divided into three parts – federal regulators, Victorian regulators and issues.

The first two parts concisely list and explain the investigative powers of each regulator, such as power to enter (when consent is required or is unnecessary), power to seize documents or require production, whether the investigator can compel answers to questions, any power of recording or surveillance and any power to search persons.

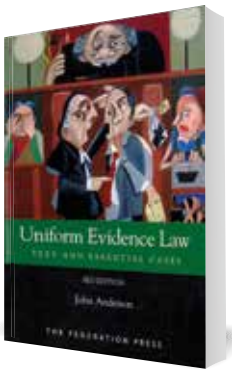
The third part provides an excellent summary of critical matters such as privilege against self-incrimination, legal professional privilege, search warrants and improperly or illegally obtained evidence.

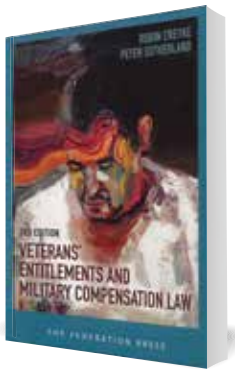
The summaries of these areas are focused and enable the reader to understand recent developments, backed up by reference to significant case law.

Investigations can move fast and urgent advice is often required. This text meets the needs of both those who have to advise quickly and those who want to learn the law at a more considered pace.

I recommend it to practitioners.

Rod Saunders, Barrister





Uniform Evidence Law: Text and Essential Cases

John Anderson, *Uniform Evidence Law: Text and Essential Cases* (3rd edn), Federation Press, 2016, pb $110

It is now approaching 10 years since the introduction of the Uniform Evidence Law in Victoria and more than 20 years since its introduction in NSW and the commonwealth jurisdictions, but there are still divergences.

While the author's coverage is not as dense as his main competitor, Stephen Odgers (Thomson Reuters), the illustrations and analysis provided are both detailed and clear. Variations between the many jurisdictions are noted.

The broad introductions to each section will often suffice in allowing the reader to obtain a quick reference in a particular area of evidence law. Historical perspective is provided by the inclusion of many older cases, particularly those of widespread application – for example, *Briginshaw v Briginshaw*, *Shepherd v The Queen* and *Browne v Dunn* – allowing the reader to trace the development of evidence law through the years.

More modern statutory requirements such as notice provisions in relation to hearsay exceptions and the like are well detailed in the text.

Although at first blush the author's intended audience may seem to be students, the wide-reaching scope of the law of evidence in the conduct of litigation makes this book extremely useful as a reference guide for any practitioner across the several jurisdictions that have adopted the Uniform Evidence Law.

Douglas James, Barrister

Veterans' Entitlements and Military Compensation Law

Robin Creyke and Peter Sutherland, *Veterans' Entitlements and Military Compensation Law* (3rd edn), Federation Press, 2016, pb $140

Veterans' entitlements and military compensation law is a field dominated at first instance by trained lay advocates; lawyers' involvement is usually restricted to appellate work in the AAT, Federal Court or High Court. Consequently, authors in this field must be conscious of providing accessible but detailed resources suitable for both lay and legal audiences. The authors of this book achieve this with an annotation-style approach to the relevant legislation and subordinate legislative instruments in the field – a continuation of the style adopted in the first two editions (2000 and 2008).

This third edition deals for the first time with the *Military Compensation and Rehabilitation Act 2004* (Cth) ("MCRA") and provides commentary on the "Statements of Principles" under the *Veterans' Entitlements Act 1984* (Cth). In the absence of a substantial body of case law dealing specifically with the MCRA, the authors helpfully draw upon relevant precedents from analogous provisions in the *Safety, Rehabilitation and Compensation Act 1988* (Cth) when necessary.

The authors' wealth of academic and practical experience in administrative and compensation law is evident throughout. With increasing community awareness of contemporary veterans' issues, this edition is a timely and welcome update for veterans, their families and dependants. It remains an essential and unique resource for practitioners in the field. ■

Gerard O'Shea, Barrister

IN_REFERENCE

LIBRARY FACILITIES

- Wide range of online legal databases
- PCs with free internet access and commonly used software
- Private study carrels with power for notebooks
- Wireless internet access
- Photocopiers
- Members' lounge
- Experienced staff offering assistance and advice on the use of resources
- Swipe card member access to the library Monday to Friday, 9am-5pm
- Request, reserve and renew books, order copies of articles, request research assistance and access legal resources via the LIV website

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Books, multimedia and seminar papers

LIV Members may borrow library material for 14 days, with a one week renewal available unless reserved by a member. Items can be collected from the library, posted or sent via DX free of charge. Material with the location REF is unable to be borrowed.

Binding financial agreements

Szabo, Peter, *Financial Agreements: Relieving the headache.* Seminar paper, July 2016, Television Education Network (TEN), 2016 (F KN 170 S 2)

Bullying

Catanzariti, Joe and Egan, Keryl, *Workplace Bullying,* LexisNexis Butterworths, 2015 (KN 198.7 C 1)

Caveats

Campbell, Neil, *Campbell on Caveats,* 2nd edn, LexisNexis NZ Limited, 2016 (KN 72 C 3)

Commercial leases

Van Ede, Warwick, *When a Commercial Lease Blows Up.* Seminar paper. February 2016. Television Education Network (TEN), 2016 (F KN 92.6 V 1)

Competition law

Steinwall, Ray, *Annotated Competition and Consumer Legislation,* 2016 edn, LexisNexis Butterworths, 2016 (KN 266 S 2 2)

Dictionaries

Ross, David and Bagaric, Mirko, *Ross on Crime,* 7th edn, Thomson LawBook Co. Information Services, 2016 (KM 540 R 2 7))

Domain names

Roy, Alpana, *Australian Domain Name Law,* Thomson Reuters (Professional) Australia, 2016 (KN 347.4 R 1)

Employment

Elsey, Lynn (ed), *Australia's Top 100 Graduate Employers: The definitive guide to Australia's most sought-after graduate employers,* 2nd edn, GradAustralia, 2016 (KN 192 A 1)

Estate planning

Skilton, Edward, *Gifts & Asset Divestment.* Seminar paper, July 2016, Television Education Network (TEN), 2016 (F KM 337.35 S 2)

Clemente, Robert, Skilton, Edward, Lowis, Mark, et al, *Sound Education in Estate Planning,* Audio CDs, July 2016, Television Education Network (TEN), 2016 (ACD KM 337.35 C 2)

Fair work

Catanzariti, Joe, *Annotated Fair Work Act and Related Legislation,* 2016 edn, LexisNexis Butterworths, 2016 (KN 190 C 3 3)

Family law

Kayler-Thomson, Wendy, Szabo, Peter, Nehmy, Chistopher, et al, *Sound Education in Family Law,* Audio CDs, July 2016, Television Education Network (TEN), 2016 (ACD KN 170 K 2)

Sorensen, Phillip, Jackson, Neil, Wilson, Craig, et al, *Tenth Annual Family Law Conference.* Seminar papers, July 2016. Television Education Network (TEN), 2016 (F KN 170 S 9 10)

Immigration

Petrie, Ben and Bosnjak, Natasha, *Migration Law: Annotated Migration Act with related commentary,* Thomson Reuters (Professional) Australia, 2016 (KM 176 P 1)

Notaries

Zablud, Peter, *Principles of Notarial Practice.* 2nd edn, Psophidian Press, 2016 (KL 88 Z 1 2)

Property law

Johnston, Vanessa, *Property Law Fundamentals: Part 1 sale of land and leases.* Seminar papers, 13 July 2016. Law Institute of Victoria Continuing Professional Development, 2016 (F KN 60 J 1)

Restraint of trade

Dilanchian, Noric, *Enforcing Restraints in Distribution Contracts.* Seminar paper, February 2016, Television Education Network (TEN), 2016 (F KN 266.2 D 2)

Torts

Goodhand, Corrie and O'Brien, Peter, *Intentional Tort Litigation in Australia: Assault, false imprisonment, malicious prosecution and related claims,* Federation Press, 2015 (KN 30 G 2)

Trusts

Dal Pont, GE, *Trusts,* 6th edn, Thomson Reuters (Professional) Australia, 2015 (KN 210 D 1 6)

Wills

Neal, Richard, *Statutory Wills.* Seminar paper, February 2016, Television Education Network (TEN), 2016 (F KN 125 N 2)

Articles

Articles may be requested online and will be emailed, faxed or mailed to members.

Contracts for sale of land

TaxCounsel Pty Ltd, "Vendor and purchaser of land – tax tips" in *Taxation in Australia,* vol 50 no 11, June 2016, pp656-658 (ID 63492)

Fraud

Moore, Andrew and Meagher, Tobin, "Responding to fraud: a practical checklist of general counsel" in *Inhouse Counsel,* vol 20 no 4, May 2016, pp73-75 (ID 63644)

Restraint of trade

Solomons, Ryan, "Employee restraint of trade: a valuable tool in the social media age" in *The Australian Corporate Lawyer,* vol 26 no 2, Winter 2016, pp30-31 (ID 63600)

Withholding tax

Jebeile, Maged, "A practical guide to the foreign resident capital gains withholding measure" in *Australian Property Law Bulletin,* vol 31 no 4, June 2016, pp62-67 (ID 63484) ■

A SOLICITOR'S DUTY

Ethical dilemmas are part of everyday practice for solicitors. The LIV Ethics Committee is available to help.

Solicitor's duty to the Court

R4874: MAY 2015 – CORRECTING A MISLEADING STATEMENT

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 – Rule 3. "A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty."

Previously, the Ethics Committee was asked by way of a discussion point and not a ruling to consider the obligation on a solicitor to correct a misleading statement made to a court which was only discovered after closing submissions were made, but before judgment was handed down. At the time, the Ethics Committee agreed that a solicitor must correct a misleading statement regardless of client instructions. The issue later returned to the Ethics Committee because the practitioner, having previously obtained client instructions to notify the other side, sent a copy of the wrong document to the other side, and upon realising the mistake and explaining it to his client, again sought the client's instructions to send the correct document to the other side, at which time the client refused to authorise that the matter be corrected. The practitioner had a conflict of duties and sought the Ethics Committee's ruling.

Ruling

In the opinion of the Ethics Committee and on the information presented:

1. The solicitor is under an obligation to correct misleading statements made to the other side and to the court, regardless of client instructions or any opposition by the opposing solicitor.
2. The solicitor is encouraged to give counsel advance notice of doing so. ■

The Ethics Committee is drawn from experienced past and present LIV Council members, who serve in an honorary capacity. Ethics Committee rulings are non-binding. However, as the considered view of a respected group of experienced practitioners, the rulings carry substantial weight. It is considered prudent to follow them. The LIV Ethics website, http://www.liv.asn.au/For-Lawyers/Ethics, is regularly updated and, among other services, offers a searchable database of the rulings, a "common ethical dilemmas" section and information about the Ethics Committee and Ethics Liaison Group. For further information, contact the ethics solicitor on 9607 9336.

HOW THOROUGH ARE YOU?

Properly advising a purchaser client at the start of a matter is good risk management.

TIPS

- Regularly check for changes in the law that may impact on advice given to purchasers.
- Prepare a precedent letter of advice which covers all the usual issues that arise when advising on section 32 statements.
- Always use the precedent letter and avoid copying over from another file.
- Ensure all necessary information is obtained from the purchaser at the start of the matter.
- Keep a record of instructions received.

The new federal government CGT withholding regime, which started on 1 July 2016, is a timely reminder to keep up to date on legislative changes so thorough advice can be given to purchasers of real estate. You can find more information about the new CGT regime in the LPLC website bulletins.

Failure to properly advise a purchaser is one of the most costly mistakes in conveyancing.

Poor communication is often the cause of these claims. In busy and high-volume practices, issues that arise because of poor communication can be multiplied due to the volume of work. Poor communication claims can also arise where practitioners give off-the-cuff advice. See the LPLC blog "Communicate better to avoid claims".

Here is an example of a claim that touches on a number of these areas.

Section 32 quick advice

A practitioner received a contract of sale via email from a purchaser client. The client asked the practitioner to look at the contract and to let the client know if it was OK. The client also asked two specific questions, both about the section 32 statement.

- Why is there a strata plan?
- What are the actual boundaries?

The client probably asked these questions because it was not easy to find the description of the lot boundaries on the subdivision plans.

On the same day the practitioner sent an email in reply, essentially only answering the two specific questions by stating that:

- there is no active body corporate
- the boundary of the property is shown on the planning certificate.

Given the client wanted to know if everything was OK it seems on receiving this reply he interpreted it as meaning there were no other issues that needed to be addressed. The sale went ahead with no other issues discussed.

Almost six years after settlement when the client wished to demolish the existing house they discovered there was a 3m wide easement at the rear of the property and a restrictive covenant limiting the height of any building. The restrictions were disclosed in the searches attached to the section 32 statement but had not been brought to the attention of the client by the practitioner.

A claim was made against the practitioner for the cost of removing these restrictions.

This claim eventually settled with a payment made to the client.

The key to avoiding this sort of claim is to set up the terms of the retainer before answering questions. For example, when the practitioner received the request for advice, they could have asked the client specifically if they wanted advice on the whole contract and section 32 statement or just answers to the two specific questions.

Where a client decides they only want specific questions answered, warn them of the risks they are taking by doing so.

New checklist

To assist practitioners to identify questions they should consider asking a purchaser LPLC has prepared a new checklist, Purchase of Land: Questions for the Purchaser.

In addition to asking questions about the purchaser the checklist covers other areas including the title, tax, insurance and finance.

A question you might not have thought to ask is whether the purchaser is a trustee. The checklist also includes some notes to the client to prevent any misunderstanding. For example, the question about obtaining finance contains a note that the client must keep the practitioner informed of the progress of their application for finance.

Giving this checklist to a purchaser client, combined with a list of issues that are usually addressed when reviewing a section 32 statement, is one way of ensuring there is good communication between the practitioner and client. Combine this with a tight retainer and transparency about costs, and the chances of a claim are greatly reduced. ■

This column is provided by the **Legal Practitioners' Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

ADOBE STOCK

AGREEMENT TO LEASE

An agreement to lease is as enforceable as a lease.

RUSSELL COCKS

Property lawyers deal with leases all the time; sometimes in the context of a relationship between landlord and tenant, sometimes where a property that is to be sold is leased; and sometimes in more obtuse ways, such as in the assessment of duty or tax.

Usually, such leases will be in a written form and the terms of the lease will be readily identifiable. However, unlike contracts for the sale of land which the law requires to be in writing and signed by the parties, the law has long recognised that a lease relationship can be created in a less formal way than a written and signed lease. Hence, courts will enforce a lease if the court can be satisfied that the parties reached an agreement to lease, and this has given rise to the mantra "an agreement to lease is as enforceable as a lease".

Walsh v Lonsdale (1882) 21 Ch D 9 is the historical authority for this proposition, and *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7 restated the proposition in the modern language of estoppel and unconscionability, concluding that a court will enforce a written agreement to lease where it would be unconscionable for a party to the agreement to resile from that agreement.

2016 has seen something of a flurry of cases, at all levels, concerning agreements to lease.

North East Solutions P/L v Masters Improvements Aust. P/L [2016] VSC 1 analysed the obligations of parties who entered into a written agreement to lease which included a term that the parties would negotiate in good faith to resolve any disputes that arose during the term of the agreement. The enforceability of the agreement to lease was never in doubt; the issue was the meaning and extent of the "good faith" obligation and whether one party had breached that obligation.

Risi P/L v Pin Oak Holdings [2016] VCAT 1112 also related to a written agreement to lease but found that the lease prepared pursuant to that written agreement should be varied to comply with an oral agreement that the parties made prior to entering into the written agreement to lease. The landlord had sought to include a demolition clause in the written lease and VCAT ordered that the demolition clause be removed as it had not been a term of the agreement that the parties had concluded.

Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) P/L [2016] HCA 26 saw the issue return to the High Court in a slightly different form. The tenant entered into a five-year lease with an expectation that the tenant would be offered a further term. No promise to do so was included in the written lease nor specifically offered to the tenant – all the tenant could rely on were words to the effect that the tenant would be "looked after" when the lease came up for renewal. The Court was not satisfied that these words meant that there was an agreement for a new lease or even an obligation on the landlord to submit terms for a new lease to the tenant for negotiation.

The concept of business efficacy has also crept into the language of these cases with courts apparently prepared to analyse the conduct of the parties through the prism of business efficacy.■

Russell Cocks is author of *1001 Conveyancing Answers* and the LIV Mentor of the Year 2015. For more information go to www.russellcocks.com.au.

TIPS

- Courts will enforce informal agreements to lease.
- Adequate proof of the terms of any such agreement remains essential.

ADOBE STOCK

BE PREPARED FOR TRAUMA

In many workplaces the psychological impact of traumatic material is not considered until a crisis occurs.

The challenges that come from working with traumatic material and distressed clients won't be news to anyone who has worked in personal injury, crime or a community legal centre. However law firms have often not needed to contemplate the impact that distressing material can have on their staff.

Vicarious trauma is a psychological term used to refer to changes in a person that occur when they are repeatedly exposed to traumatic material. Symptoms are wide-ranging but can include avoidance, poor concentration, intrusive thoughts, negative feelings towards clients and work, increased alcohol consumption, poor health, emotional numbing, personality changes and feelings of despair.

Research has shown that criminal lawyers who work with distressing or graphic evidence have a higher rate of vicarious trauma, depression and anxiety than lawyers working in areas which do not involve exposure to distressing or graphic material, such as conveyancing.

For many lawyers participating in their firm's pro bono program necessitates exposure to distressing material, particularly when working with survivors of abuse, victims of crime, asylum seekers and people living with mental illness. Fortunately, firms are increasingly aware of the need to take proactive steps to support lawyers who will be exposed to traumatic material through pro bono work.

An employee assistance program can be a great resource, but better still is a proactive plan to negate the risk of emotional and mental strain. Gadens, Russell Kennedy and Colin Biggers & Paisley have recently collaborated to provide training designed to assist their lawyers with pro bono matters involving traumatic material and distressed clients.

There is also a wealth of free or low cost resources available to help organisations better support staff who work with traumatic material. LIV members and their families have complimentary 24-hour access to the Vic Lawyers' Health line. The Tristan Jepson Memorial Foundation website contains best practice guidelines for the legal profession on mental health issues. ■

Sophie McNamara is the Gadens pro bono and CSR manager. This column is coordinated by Justice Connect.

LOOKING TO HELP?

To find pro bono opportunities for your firm, see **www.justiceconnect.org.au/get-involved**, which also manages the LIV's pro bono Legal Assistance Service. **For solicitors:** talk to your pro bono coordinator or the person responsible for pro bono work at your firm, or see **www.fclc.org.au/cb_pages/careers_and_getting_involved.php**. **For barristers:** see **www.vicbar.com.au/social-justice/pro-bono**.

BACK TO THE FUTURE

Big changes are required to reform the NT youth detention system.

Aboriginal and Torres Strait Islander children are 26 times more likely to be incarcerated than non-Indigenous children and an astounding 97 per cent of children in detention in the Northern Territory represent this category. The figures suggest substantive change in public policy is required to address this injustice. The question however is how this can be achieved.

The Royal Commission into the NT juvenile detention system is a welcome step towards greater transparency, however we have already been there – 25 years ago. In 1991, the Royal Commission into Aboriginal Deaths in Custody made 339 recommendations, largely tackling the underlying reasons why young people come into conflict with the law in the first place. Two further reports were prepared into the NT detention system last year with no substantive subsequent action taken. Therefore, implementation of the previous recommendations and advice is likely to be an important first step in restoring public trust and confidence in the process.

Second, the criminal justice system may not be a solution to this socio-economic issue. Thus, the focus should be shifted to earlier intervention in the lives of Indigenous children to address the root causes that drive them into detention. This follows the need to review the current minimum criminal responsibility age in light of international standards.

Third, to ensure that detention is only ever used as a last resort for children, this should be clearly legislated upon.

This suggests that consideration should also be given to amending the mandatory sentencing laws and the establishment of youth specific courts in Australia.

Fourth, the children at Don Dale Detention Centre and other children who have experienced cruel, inhuman or degrading punishment deserve access to justice and a chance to heal. Therefore, psychological support and counselling should be made available for as long as it is needed to recover.

Fifth, this may be the right time for Australia to reconsider ratifying the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), allowing oversight and monitoring by the UN. The reasons why Australia should ratify OPCAT are contained in UNICEF Australia's submission to the NCC and AHRC. ■

Divya Sharma is a lawyer at MST Lawyers and Lieutenant Legal Officer in the Royal Australian Navy Reserves. She was the 2014 LIV Young Lawyers vice president.

FUTURE PROOFING

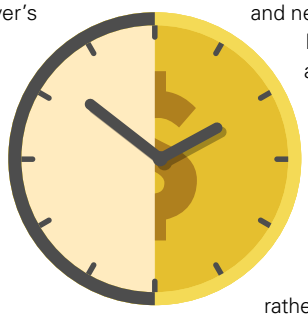
Value pricing is linked to innovation and creativity.

SNAPSHOT

- Help young lawyers understand clients' needs by giving them context about clients.
- Encourage young lawyers to develop their networking skills.
- Suggest your young lawyer write simple updates on new developments in your area of practice to give them practice at distilling legal information.

At the LIV's recent Brave New World of the Law seminar it became clear from the keynote address by Phil Ruthven of IBISWorld and the panel of experts that value pricing may well be the inevitable future of legal practice.

As the profession finds itself in a buyer's market with a push for transparency in legal costs and efficiency in the delivery of legal services, many clients are demanding value pricing over time-based billing.



Discussion about time-based billing is nothing new. However, client demand for creativity and innovation may ultimately be the last nail in the billable unit's coffin.

A new report released by the Australian Council of Learned Academies (ACOLA) "Skills and capabilities for Australian enterprise innovation" emphasises that truly innovative business needs a diversity of skills and capabilities within its workforce, including creative capacities. Highly innovative organisations interviewed for the report identified a bundle of skills required for innovation. As well as technical skills, innovators also needed to be strong in analytic and critical thinking, problem solving, social and cultural knowledge, creativity, leadership, communication and people skills.

While lawyers tend to be strong on analytic and critical thinking, problem solving and technical skills, research has described how an emphasis on the production of billable hours has the effect of diminishing qualities such as customer service attitude, innovation, willingness to delegate, mentoring and teaching skills, and practice development activities.[1]

So although time-based billing may be good for business in the short term, the long-term impacts include an absence of innovation, reduced teamwork and negative effects on work satisfaction.

Moores managing director David Wells, a panel member at the Brave New World event, described his firm's decision to move completely to value pricing as challenging, but ultimately surpassing expectations in terms of the positive effect on firm productivity and staff wellbeing.

Assessing performance by outcomes, rather than the production of billable hours enables law firms to drive a culture of innovation, client service and efficiency. This approach also facilitates greater diversity at senior levels of the firm, and that's good for everyone. ■

Madeleine Dupuche is executive director of the College of Law, Victoria. Best Practice is provided by the College of Law.

1. Bergin Adele J and Jimmieson Nerina L (2014) Australian Lawyer Well-Being: Workplace Demands, Resources and the Impact of Time-billing Targets *Psychiatry, Psychology and Law*, Vol 21, No 3, 427–441.

GETTING STARTED

Proper preparation and a sound foundation will maximise success for a new firm.

TIPS

- Have a business plan.
- The legal structure to adopt is critical.
- Get help from an IT consultant.

December 2009 marked the establishment of my law firm. I remember well the ground work, preparation and pressure in establishing the firm.

For all start up law firms the first question to ask is why do I want to do it? Are your reasons sound and right for you? Make sure you have support from those important in your life.

Do not underestimate the stress and pressure involved in establishing a new law firm. In my case the departure from my previous firm was amicable. Even so, continuing to run a file load to meet fiduciary obligations to my existing partners while establishing a new firm, albeit with the partners' knowledge, consumed energy at levels I had greatly underestimated.

What is the business plan? What is it that you hope to achieve? What is your plan to get there? What resourcing is needed now, short and long term?

There is a consultancy saying that "strategy dictates structure". The legal structure to adopt is a critical decision at the outset. Changes later can have adverse financial and tax implications. The structure also needs to take into account asset protection, growth (if part of your business plan), succession and exit. Get sound strategic, financial and taxation advice at the outset.

ADOBE STOCK

Without clients we have no practice. Who will be your clients? Establish your marketing plan as part of your business plan, including how you will establish and manage your client base. Make sure you factor in any legal constraints.

Consider your own physical and mental health needs not just as part of the rigours of establishing and running a law firm, but also as part of business planning. Consider insurance for key personnel, sickness and accident insurance and workers compensation. Obviously these are matters relevant not just to the firm itself, but also to family and staff who may be dependent on you.

Information technology is important to get right from the beginning. Get a consultant who can guide you expertly on the myriad issues including cyber security, systems, networking, domain names, recovery, disaster planning, back up, macros, document management, precedents, equipment – the list is endless. It is worth spending the money.

For a non-property lawyer, leasing was confronting. Not only was it choosing location, but also size, fitout, cost and rental, negotiation of lease and terms and options require expertise. Get advice. Know what you want and can afford.

The LIV, Legal Services Board (LSB) and Legal Practitioners' Liability Committee websites have invaluable information to assist with the legal requirements of starting up. Government websites offer templates for business plans. I found the self-assessment audit tool on the LSB website helpful in identifying policies and procedures for the running and protection of my firm. Tap into mentors for support, advice and encouragement.

Establishing a law firm is like litigation – proper preparation and a sound foundation will assist in maximising success. Proper investment in the planning stage will give enhanced benefits and security in the longer term. ■

Damian Clarke is a solicitor and sole director of Clarke Legal Pty Ltd.

SMART SHARING

Using an online file hosting service is a way of exchanging documents digitally.

In legal practice, documents need to be shared and exchanged – with clients, service providers, courts and other parties. In most legal practices, documents are exchanged in hard copy or as attachments to emails. Both have their limitations.

Size limits on email servers makes it difficult to exchange large or multiple files by email. Encrypted attachments to emails may not pass a recipient's firewall.

Exchanging hard copy documents is expensive and, following changes to Australia Post's delivery standards, slow. Some clients are increasingly reluctant to reimburse lawyers the costs of copying and delivering documents. In a "digital first" practice, converting hard copy documents to digital is costly and administratively burdensome.

Using an online file hosting service is another way of exchanging documents digitally. Online file hosting services are also known as file sync and share services, virtual filing cabinets, online file storage providers, cyberlockers or cloud storage services. Examples include Dropbox, SugarSync, Google Drive, ShareFile and ArxPX.

An online file hosting service is an internet service that hosts users' files; that is, users can upload files to the service and leave them there until the user deletes them. Users can then share those files with other users by extending the privacy settings to grant the recipient permission to access a particular file or folder, or with non-users by sending web links, from which documents can be downloaded.

Each service has different costs and features. Features to consider include encryption (both during upload and download and when the file is hosted on the service – known as "at rest"); whether the service claims a licence or ownership rights over files hosted; how requests from law enforcement agencies (domestic and international) for access to files hosted will be managed; and whether files are scanned for viruses.

When using an online file hosting service to exchange documents, consider the format of the documents. Will you permit the documents to be edited? If exchanging a PDF, has it been converted to OCR (optical character recognition) so it is searchable? What level of security needs to be applied to the documents (including passwords and encryption)?

If the documents will be hosted on the service for the life of a matter (such as a brief to counsel), consider preparing a hyperlinked index to allow users to find documents easily without worrying about file names. If documents are being changed regularly, consider how you will manage version control, which entails ensuring everyone is working from the right version at the right time.

Ensure that your online hosting system integrates with your other systems and procedures, such as your document and records management systems and archiving and file closing procedures.

Finally, consider the people who will be using the service. Do you need to provide additional guidance or education to staff or clients? What will you do if a service provider requests hard copy documents?

The LIV's Technology and the Law Committee is developing guidelines on cloud computing, including cloud storage services. Please let us know your experiences. ■

Katie Miller is a member of the LIV Technology and the Law Committee, and the immediate past president of the LIV.

SNAPSHOT

- Features to consider include encryption, both during upload and download.
- Consider what level of security needs to be applied to the documents, including passwords and encryption.
- Ensure that your online hosting system integrates with your other systems and procedures.

ADOBE STOCK

EXPERT DETERMINATION: TO BE OR NOT TO BE BINDING?

Expert determination is a cost-effective and quick way of resolving technical disputes.

TIPS

- To ensure certainty, parties contemplating using expert determination should execute a written expert determination agreement.
- Practitioners need to carefully draft the terms of such an agreement so the expectations and requirements of the parties are clear, including whether they intend the expert determination to be binding.

Expert determination is a quick and effective way of resolving disputes of a technical nature.

A recent Commercial Court decision in the Supreme Court of Victoria highlights the importance of considering the potentially binding nature of an expert determination.

In *Adnow Pty Ltd (as Trustee for the Adnow Pension Fund) v Greenwells Wollert Pty Ltd [2016] VSC 153* the court had to consider whether an expert determination made by an independent valuer was binding on the parties to the contract for the sale of land.

The plaintiff, Adnow, was the owner of 42 hectares of prime land for residential development in Woolert, Victoria, and in 2008 granted an option to call for the transfer of land to the defendant, Greenwells. The parties were unable to agree on a price, nor were valuers appointed under the contract annexed to the option deed. An independent valuer was then appointed in accordance with the contract.

The valuer provided a written valuation of $18,700,000 and the defendant exercised its option, but the plaintiff claimed the valuation failed to comply with the requirements of the contract, and sought to have it set aside.

The plaintiff claimed the valuer had failed to make a required assumption; had failed to specify matters to which he had regard; and failed to have regard to Valuation Guidelines published by the Australian Property Institute. It submitted the property should be valued at $30,000,000.

Judd J's analysis of the relevant authorities determined the primary issue involved an assessment of what the parties should be presumed to have intended by their contract, determined objectively from its terms, bearing in mind the context in which it was created, and whether the valuer's report met the express and implied requirements of the contract.

After detailed consideration of the terms of the contract and the procedure followed by the valuer, Judd J held the valuation was binding. He found the valuer had complied with all requirements specified in the contract; he had applied the Valuation Guidelines, having regard to all relevant factors; and the report complied with those guidelines.

Importantly, the court emphasised that the question of whether an expert determination is binding will depend on the presumed intention of the parties, determined objectively from the terms of the contract. If an expert determiner's actions, assumptions and processes comply with the contract, then the determination will be binding. ■

Steve White is principal, White SW Computer Law, and **Heather McIntosh** is a law student.

ADOBE STOCK

WHO ARE YOU?

Data is critical for supporting cultural diversity in the legal profession.

Globalisation is changing the legal profession, with increasing numbers of newly qualified lawyers from a diverse range of cultural backgrounds. As the recent census sought to collect data on ethnic origin, so too does the legal profession need to better understand the composition of its members. This is critical for representing our members and continuing progress towards proportionate representation of our changing profession in positions of leadership and decision making.

Supporters of cultural diversity are learning key lessons from the successes achieved and challenges still faced by gender diversity advocates. The collection of statistics on the cultural composition of leadership roles in organisations (including professions, corporations and government) is critical to ensuring accountability, transparency and progress.

The federal Race Discrimination Commissioner Dr Tim Soutphommasane has recently highlighted the importance of gathering cultural diversity data in his blueprint report, "Leading for Change: A blueprint for cultural diversity and inclusive leadership".[1] The blueprint seeks to address the lack of proportionate representation in leadership positions of the estimated 32 per cent of the Australian population that has a cultural background other than Anglo-Celtic. According to this report, no industry in Australia has more than 5 per cent of its leaders from non-European backgrounds.

Currently, the information and data available in relation to cultural background in the legal profession is very limited and much more work needs to be done to gain a clearer picture of the cultural make up of the lawyers practising in Victoria and nationally.

While cultural background and identity may be more complex to measure than other aspects of our diversity, such as gender or age, they can be usefully measured through careful design in the information-gathering process. Without this basic data we cannot properly understand what initiatives we may need to implement to best serve culturally diverse groups of the profession and to support their career and leadership opportunities and development.

The LIV's Diversity Taskforce is proposing to take advantage of opportunities to collect data on the diverse groups in our profession, including its cultural and ethnic composition. The clearest and most effective method of obtaining accurate data of this kind is to ask members of the profession themselves. This method has not previously been undertaken by the LIV and therefore the Taskforce has considered a number of ways of collecting the data, including diversity surveys and as part of the LIV's annual membership renewal process. Once collected, this data will provide crucial information for informing the LIV's future policies for more effectively representing its members, and is likely to highlight to the profession the importance of more accurately reflecting our diverse profession and the community it serves.

Sam Pandya is managing partner at OpusRed, LIV Councillor and chair of the LIV's Diversity Taskforce. **Julie White** is an employment and discrimination lawyer at OpusRed Lawyers and is also a member of the LIV's Diversity Taskforce.

1. www.humanrights.gov.au/our-work/race-discrimination/publications/leading-change-blueprint-cultural-diversity-and-inclusive (29 July 2016)

Q&A

WORK IN PROGRESS

Practitioners reveal how they balance the demands of their professional and personal lives.

Betty Alexopoulos with children Lee and Ellen

BETTY ALEXOPOULOS

LAWYER, SLATER & GORDON

What hours do you work and where?
20 hours a week, Monday to Thursday 9.30am-3pm in the Melbourne office

Why do you work flexibly?
After being a stay at home mum for over seven years, I was interested in easing back into the workforce while my children transitioned to school life. It was important for me to remain present for my children and their needs and at the same time connect with my peers in the legal profession.

How does your organisation accommodate flexibility?
I am fortunate to work in the Motor Vehicle Accidents Personal Injury team in Melbourne. The ethos of the department and the firm as a whole is to support work/life challenges faced by men and women.

What are the challenges of working flexibly?
The time constraints. Open communication with my manager and group team leader is encouraged and file management/workload is regularly discussed during our monthly team meetings. It is important, however, to also show flexibility and participate in professional development and lawyers' forums organised by the firm which will usually run for a full day. Sufficient notice is provided to plan ahead for these days.

Have flexible hours kept you practising law?
Absolutely. At the time I was considering returning to the workforce, it was important I work flexible hours. I met Janine Gregory in 2011 (who at the time was the state practice leader for personal injury at Slater & Gordon), while we were both involved in our respective children's kindergarten committee. She gave me the opportunity to work initially on a casual basis which resulted in permanent employment maintaining the flexible hours.

What are the personal benefits of working flexibly?
The main benefit is maintaining the status quo for my family and children. My husband is the managing partner of a national law firm and president of the Greek Community of Victoria and so I am the go-to for homework, school and extra-curricular activities. It allows me time to engage with my children's school and its community.

Will you work flexibly long term?
I hope to work flexibly in the long term albeit in a different arrangement, depending on my family needs and opportunities that may present at work. ■

ON THE MOVE

NEW JOB?
NEW LOCATION?
NEW STAFF?

For a free *LIJ* listing, email your details and colour photograph (minimum 30mm wide x 40mm high at 300dpi) to edassist@liv.asn.au. This column also draws on information sent to the LIV Member Services section. **For daily updates on moves by lawyers see LawNews, the daily enewsletter to members.**


Andrew Thompson

CIE Legal
Andrew Thompson has been appointed special counsel.


Brett Bryant

Cinque Oakley Senior Lawyers
Brett Bryant, formerly of BJT Legal, has joined as a litigation lawyer.


Claire Munroe-Smith

Hope Earle
Claire Munroe-Smith, formerly of LAC Lawyers, has joined the business law team.


Phoebe Tolich

HR Legal
Phoebe Tolich has been appointed senior associate.

IDP Lawyers
New location: Level 16, 114 William Street, Melbourne 3000. PO Box 339, Collins Street West 8007, DX 122 Melbourne, ph: 9602 8400 fax: 7000 5071.

Maddocks
New location: Collins Square, Tower Two, Level 25, 727 Collins Street, Melbourne 3008, ph: 9258 3555 fax: 9258 3666.


Mona Emera

Slater & Gordon
Mona Emera has been promoted to joint practice group leader of the family law team.

Waverley Law
New branch: Main office: 1628 High Street, Glen Iris 3146; Branch: 2/17 Carrington Road, Box Hill 3128. (Also at 407/39 Kingsway, Glen Waverley 3150)

White & Case LLP
New branch: White & Case LLP will open in Australia, with offices in Melbourne and other major cities. Brendan Quinn, Andrew Clark, Alan Rosengarten, Josh Sgro, Tim Power, Jared Muller and Joanne Draper, formerly of Herbert Smith Freehills, have joined White & Case LLP. ■

MENTORING Q&A

Mentor DEAN A CINQUE

Why be a mentor? Age hopefully brings wisdom from one's years and life experiences. Not to share them with another person who may benefit would be selfish and a wasted opportunity. Reflecting on one's successes and failures not only in the practice of law but life generally is a good antidote to complacency.

How does your expertise/ experience help? Lessons learned by making bad decisions as well as good ones are in themselves character building and just because one has travelled a long and winding road does not in itself make one an expert but certainly an experienced traveller who can provide those that follow with a road map.

Best advice given? Whatever you do in life or in the law, do it in such a way that you can sleep at night with a clear conscience.

Who was your mentor? The late Hugh Fraser Morrow who to me was the very essence of the lawyer I aspired to become. I had the privilege of working with him for more than 10 years and I modelled my practice on what I learned from him.

Dean A Cinque is Cinque Oakley Senior principal.

Mentee JANINE MONTGOMERY

Why have a mentor? To have guidance provided on a day to day basis when learning the role of a lawyer, especially when it is out of your comfort zone or experience.

Dean A Cinque

Janine Montgomery

Best advice received? That with all the matters we come across, there are no real guarantees to the outcome, and we can only do the best we can to assist a client to resolve it or reach their desired outcome.

What are the arrangements? I have been working with Dean Cinque for many years as his personal assistant. When studying for my degree his personal support was greatly appreciated, and since becoming a lawyer his assistance in reaching decisions on the direction a matter needs to go is significant.

Benefits achieved? Having his support and ability to provide advice and direction, drawing on his many years as a lawyer, is invaluable. It allows me to receive a different perspective on matters, which gives me a lot more confidence to achieve my best.

Janine Montgomery is a trainee lawyer at Cinque Oakley Senior.

NEW ADMISSIONS

The following people were admitted to practice as Australian lawyers and as officers of the Supreme Court of Victoria on 9 August 2016. The *LIJ* welcomes them to the legal profession.

ADOL, Charlotte
AL-JEBORI, Rand
ANTOS, Anastasios
BARRERA, Jonathan
BEBEL, Alice
BECKER, Christine
BING, Stephanie
BOUROVA, Evgenia
BRADBURY, Mark
BRITTON, Jillian
BYRNE, Dustin
CAIN, Oliver
CARTY COWLING, Daisy-May
CHANDRAMOHAN, Jehan
CHIN, Julian
CHONG, Mignon
CLARK, Bethany
CLARK, Rebecca
CLARK, Samuel
CLAVARINO, David
COLLINGS, Stephen
COLLINS, Juanita
COLLOM, Jake
CONDON, Sarah
COX, Kaleb
DHINGRA, Mandeep
DI TORO, Teresa
DIAS, Sharlini
DIB, Alia
DICKSON, Jessica
DIXON, Anna
DO, Thang
EARL, Raymond
EASTWOOD, Nicola
FICARRA, Leticia
FINCH, Bronwyn
GARA, Carmel
GILBERT, Meg
GILLAHAN, Stephanie
GOVENDER, Kriya
HALLIDAY, Sebastian
HANCOCK, Timothy
HANDLEY, Sherril
HARALAMBOUS, Michael
HARTSHORNE, Ryan
HESCOCK, Anne
HO, Guo
HOGLUND, Micaela
HORNE, Michael
HUGHES, Magda
IRVING, Tiffany
ISMAIL, Hanan
ITALIANO, Laura
JAMES-MURPHY, Jessica
JELLIS, Beau
JONES, Samantha
KANNAYYA, Sheilana
KHNG, Nathaniel
LAMBERT, Jay
LANE, Bridget
LAO, Louis
LEDDA, Laura
LIM, Andrix
LIM, Jun
LOH, Emelia
LYTTLETON, Patrick
MALONE, Kate
MARTAKIS, Eleni
MARUZIVA, Desmond
MCCONNACHIE, Jamie
MCDERMOTT, Christopher
MCGOWAN, Luke
MCLEAN, Benjamin
MCPHIE, Luke
MEI, Kevin
MICIC, Nadja
MILANA, Kayla
MOAR, Elaine
NASTOS, Christine
NG, Chu Wen Giselle
NGUYEN, Christina
NGUYEN, Phuong
NIJAMUDEEN, Nizam
O'CONNOR, Lillian
OSVATH, Daniel
OTTAWAY, Camilla
OZER, Melissa
PANAGIOTOPOULOS, Constantionos
POPAL, Maryam
RAHIMI, Ameena
RANA, Musarrat
RUDD, Anne
RULLO, Laura-Ann
RUSSELL, Natalie
SAWEIRS, Ehab
SHANKUMAR, Branevan
SHIMODA, Naomi
SIM, Jeremy
SINCLAIR, Matthew
SOAR, Hannah
SPACKMAN-WILLIAMS, Ruth
SYMONS, David
TAMIR, Rachel
TAN, Felicia
TEZENGI, Theresa
THAM, Giselle
THEODOROU, Andreas
TRAN, Thanh
TSOI, Linna
TURNER, Alexander
VEAR, Madeleine
VERSACE, Simona
WALLEY, Lauren
WANG, Chengyuan
WEN, Xinmo
WONG, Natasha
WONG, Rebekah
ZIINO, Josephine

7 HABITS
OF HIGHLY EFFECTIVE LAWYERS

MARIA RIGOLI

1 Know who you are
There is no point setting goals or writing a "to do" list if you aren't clear on who you are and what you love doing or what your purpose in life is. Take some time to reflect on your values and then work from there in setting the logistics.

2 Set yourself apart
This is important not just in marketing your legal services. Making a stance for who you are personally will reflect in the clients, staff and the business colleagues you attract.

3 Own your own time
Whatever work you are doing, even if it involves time to do pro bono work, make sure you own your own timetable and schedule. Never let anyone else set it for you. If you do, it can become an excuse for never getting anything done. We all have the same 24 hours in a day but need to guard how we use our time wisely.

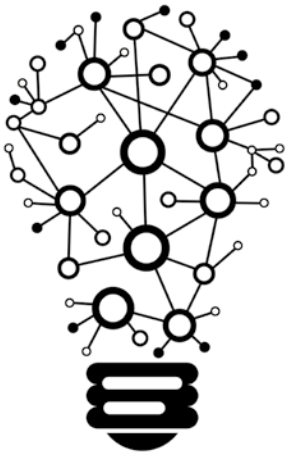
4 Solve other people's problems first
You will find that by serving others first, many of your own problems will be solved. The more complex problems of others you can solve, the more in demand you will be professionally.

5 Hold your tongue
The tongue is a weapon that can heal or destroy, so it should be used wisely. Think twice if you get the urge to get on the phone to blast your opponent. Wait a few hours before sending that toxic email. If you must do paper warfare in litigation, remember such letters may also be read by the judge in the case, the LSC or a prospective employer.

6 Learn the value of the client relationship
Although advertising and marketing will get you some good clients, good old fashioned quality customer service can never be underestimated. The time and cost of going the extra mile to help that client who needs special attention will often bring its rewards later. Reputation is the foundation of this profession.

7 Don't compare yourself to others
Success looks different to different people. For some it is financial reward or professional status. For others it is quality relationships with others and with God. For others it is time freedom. Be aware we don't have the same success markers. ■

Maria Rigoli is the 2016 LIV Suburban Lawyer of the Year. She is an accredited family law specialist and principal and founder of Rigoli Lawyers. She has more than 25 years legal experience and has mentored and trained many young lawyers, many of whom have started their own legal practice. Nominations for the 2017 legal awards are open from 3 October to 4 November.



HOW TO STAND OUT FROM THE CROWD

THERE ARE A FEW SIMPLE STEPS YOU CAN TAKE TO ENHANCE YOUR PROFILE AND GET NOTICED.

THOMAS HOBBS

Lawyers at all levels can take steps to improve their marketability. Many firms map out plans for junior lawyers to do just this, including by tapping into their own networks for client referrals, and increasingly rewarding those who do with referral-based commission. This makes sense. In private practice, those lawyers who are most marketable tend to command relatively higher salaries based on their portable client base and ability to refer work.

These tips can improve your marketability.

Maximise your profile on LinkedIn

Keep it up to date and include a professional headshot – usually taken from your current role. You'd be surprised at how many current and future clients will view your profile, as well as other (potentially future) employers. Include discussion of your key areas of expertise in the background section and do your best to avoid being seen as too much of a generalist. Get a legal recruiter to look over this if you've got some questions or aren't happy with what you've got. LinkedIn Premium can look good though isn't absolutely necessary.

Be that pro-active person

Word spreads, both internally and externally, regarding lawyers willing to go the extra mile to help their colleagues and assist on matters requiring more hands. Be that person. Be known for chipping in when help is needed. You'll build significant goodwill and this will follow you throughout your career, keeping in mind that current colleagues will know of your reputation as they progress their careers. This may lead to future potential employment opportunities and a source of referrals.

Attend industry and networking functions

Get out and about. Build your social confidence and your networks. Most practice areas in Victoria are actually quite small and you soon realise the major players (ie lawyers) generally do well at networking and get themselves out there. Also, no matter where you're based – whether it be the Melbourne CBD or suburban/regional/rural areas, focus on building relationships with local business groups if relevant to your practice areas.

TIPS

- Maximise your profile on LinkedIn.
- Be proactive.
- Attend industry and networking functions.
- Present at events.

Present

If you're attending events, why not aim to present to show your expertise? Not everyone enjoys public speaking, though you can expect to be a lot more confident when you know the subject material in detail. Presenting can be an ideal way to make a name for yourself as one of the leaders in your practice area. You may even bring in some clients by doing so.

Write

Lawyers tend to have strong writing skills and you'd be mad not to put these to good use. Not only will you promote your own knowledge of a particular case/legislative development, you'll also promote your firm and this is something you should be doing. LinkedIn is full of lawyers including links to articles they've written. Being published in the *LIJ* is an ideal way to demonstrate knowledge in a practice area.

Join relevant committees

As an LIV member, look into what opportunities the LIV has in terms of committees to join. Certain practice groups have their own committees, and if they don't in your area you might consider taking steps to set one up with the support of suitably experienced practitioners. There is also a whole host of non-LIV committees you can contribute to so be open and undertake the appropriate research.

Volunteer

There are many ways to volunteer your time, and seemingly as many websites to help get you started. Many lawyers seek to give back using their legal skills and this can involve networking with other lawyers. Other lawyers look to non-law volunteering.

In addition, some firms have strong pro bono programs for their lawyers so be across what your firm can offer.

Study

To accelerate your knowledge base in a particular area of the law, consider post-graduate study such as a master of laws. This will usually need to be self-funded, although some firms may provide assistance. Just be aware that there will often be a clause in your employment contract requiring you to pay back any of this assistance if you leave within a certain period. The LIV also offers the opportunity to become an accredited specialist. This is highly sought after and serves to enhance your credibility with clients.

So while personality can play a part in terms of your marketability, there are many ways to be proactive in driving your profile forward in a positive light. ■

Thomas Hobbs is a former lawyer and now consultant at Burgess Paluch Legal Recruitment. He is co-chair of the LIV's Young Lawyers Committee.

ADOBE STOCK

REPRESENTATION

Bendigo Law Association
LIV CEO Nerida Wallace and Court Services Victoria director Asset Planning and Management Jurisdiction Services Brian Stevenson took part in a teleconference with the Bendigo Law Association to provide an update on upgrading Bendigo courts.

Country and suburban law associations
LIV president Steven Sapountsis and Ms Wallace hosted a conference of the presidents of the country and suburban law associations. Presidents (or their representatives) from 10 of the 15 associations attended the conference which was held at the LIV.

Deakin Oration
Mr Sapountsis and LIV vice-president Sue Kee attended the Deakin Oration given by Professor Emeritus Judith Brett. The inaugural oration, presented by the president of the Legislative Council and the speaker of the Legislative Assembly, was held at Parliament House in honour of the 160th anniversary of the birth of Australia's second prime minister Alfred Deakin.

Hong Kong Secretary of Justice
Mr Sapountsis and Ms Wallace attended a boardroom lunch, organised by the LIV and hosted at the offices of Corrs Chambers Westgarth, for members of the legal profession to meet with the Hong Kong Secretary of Justice Rimsky Yuen SC. They discussed the Hong Kong experience in providing international arbitration facilities.

Property law conference
Mr Sapountsis attended the Property Law Conference, presented by the LIV with the significant involvement of the Property and Environmental Law Section. The conference, held at the RACV Club, provided updates on contracts, legislation and cases touching on property law. The conference included coverage of retail leasing, Land Victoria processes and proposals, owners corporation developments, State Revenue Office issues, and risk managing conveyancing claims.

Society of Notaries of Victoria
Mr Sapountsis spoke at the Society's annual dinner, held in the committee room of the MCG. The Society of Notaries is a professional organisation of long standing and represents almost all notaries practising in Victoria. Notaries in Victoria are all practising lawyers and are appointed by the Chief Justice of the Supreme Court.

Victorian Access to Justice review
Ms Wallace and LIV Legal Policy and Practice lawyers attended a meeting to provide LIV comments on the Victorian Access to Justice review.

Victoria Legal Aid means test review
Mr Sapountsis spoke at the launch of the VLA's means test review. Other speakers included VLA managing director Bevan Warner, Victorian Council of Social Services CEO Emma King, and Federation of Community Legal Centres chair Belinda Lo. The event launched a consultation process to inform VLA on appropriate changes to its means test to implement a test that is simple, efficient, fair and financially sustainable, with a view to making more people eligible for assistance.

SUBMISSIONS

Advance care planning
The LIV has long advocated for reform to advance care planning laws and commends the Victorian government on its proposed *Medical Treatment Planning and Decisions Act*, which seeks to simplify the existing legal framework for medical treatment decision making and provide greater certainty around the legal status of advance care plans. The LIV supports the introduction of enforceable advance care plans and a review of the numerous statutes relating to substitute decision making.

Elder abuse inquiry
The LIV recognises that elder abuse is a serious human rights issue which can have negative consequences on a person's health, dignity, independence, security and financial resources. The LIV collaborated with the Law Council of Australia to respond to the Australian Law Reform Commission's issues paper, which encompassed a broad range of issues pertaining to elder abuse, social security, aged care, financial institutions, superannuation, family agreements, appointed decision makers, public advocates, health services, forums for redress and criminal law.

Land Victoria bulk conversion of certificates of title
Land Victoria has indicated it will cancel all existing paper certificates of title in October 2016 where any of the four major banks are registered as the first mortgagee, and convert those paper certificates of title to electronic certificates of title. The LIV has made submissions to the Minister for Planning and Land Victoria to express concerns about the proposal and to highlight the need for an awareness campaign alerting members of the public to the change.

Retail Leases Act 2003
A new ministerial determination has been made under s5(1)(d) of the *Retail Leases Act 2003* (Vic) which specifies tenants to which s4(2)(g) of the Act applies. The LIV made submissions regarding the text of the determination, many of which were adopted.

Retirement housing sector inquiry
The LIV welcomed the opportunity to respond to the Parliamentary Inquiry into the retirement housing sector. Building on its previous submissions and advocacy in relation to retirement village contracts, the LIV reiterated the need to reform the complex legislative framework to increase clarity around the legal structures operating within the sector. The LIV also expressed concerns with the complexity of resident contracts and identified areas for improvement in dispute resolution processes. ■

LIV members offer their commitment, diversity and expertise to promote justice for all, advancing social and public welfare, education and public confidence in the legal profession. People in need of legal help are directed to the LIV's Find Your Lawyer Referral Service – call 9607 9550, 9.30am–5pm, Monday to Friday.

COUNCIL UPDATE

At the 18 August Council meeting, directors considered a range of issues affecting the day-to-day procedures practitioners use, as well as the regulatory role of the LIV.

Farewell

A vote of thanks and acknowledgment of tremendous service by Kerry O'Shea, the LIV's former general manager public affairs and legal policy, was given by LIV president Steven Sapountsis.

Mr Sapountsis said if there was one person responsible for bringing the LIV into the modern social media age, it was Ms O'Shea, a nine-year veteran of the LIV who equally gave sound advice on advocacy and policy. The LIV had been well-served by Ms O'Shea, he said.

In reply, Ms O'Shea said the LIV had been a very important part of her life and it had been a pleasure to work with the LIV staff. She has joined the Supreme Court of Victoria as senior communications adviser three days a week.

Management reports

The following management reports were received: finance, member support, compliance, legal policy, public affairs.

Regulation

The report from the Taskforce on Regulation and Charitable Status was tabled, the recommendations of which were noted. A decision was made to retain the taskforce to continue investigating the role of the LIV in regulation.

Transformation approval

Approval was given for a transformation budget to overhaul LIV systems which will upgrade the overall member experience.

LIV building

A committee of Council was established to investigate and report on the future use of the LIV building on Bourke Street. The LIV Building Working Group is to be chaired by president-elect Belinda Wilson and will report back to Council. ■

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To find out more about LIV governance and representation or to contact LIV Council members see www.liv.asn.au or phone the secretary to the Council on 9607 9372 or email councilsecretary@liv.asn.au.

ABOUT THE LIV: The LIV represents almost 19,000 lawyers and people working in the law in Victoria, interstate and overseas. Our members offer their commitment, diversity and expertise to help shape the laws of Victoria and to ensure a strong legal profession for the future. The LIV promotes justice for all advancing social and public welfare in the operation of the courts and legal system as well as advancing education and public confidence both in the legal profession and in the processes by which the law is made and administered. As the peak body for the Victorian legal profession, the LIV initiates programs to support the needs of a changing profession, promotes an active law reform advocacy agenda, responds publicly to issues affecting the profession and broader community, delivers continuing legal education programs, and continues to provide expert services and resources to support our members.

TRUSTS UNDER UNIFORM LAW

Practitioners need to be aware of requirements and process in relation to withdrawal of trust money under the Uniform Law.

Pursuant to the Uniform Law, a law practice must not withdraw trust money from a general trust account other than by cheque or electronic fund transfer (EFT).

This means that the law practice can withdraw trust money from a general trust account only by cheque or EFT.

If a law practice withdraws trust money from a general trust account by cheque, the cheque must be made payable to or to the order of a specified person or persons and must be crossed "not negotiable". Refer to r43(1) for more information.

Who can sign trust cheques or effect EFT withdrawals?

A trust cheque must be signed by or an EFT must be effected under, the direction or authority of an authorised principal of the law practice.

However, if such principal is not available, the Uniform General Rules allow a law practice to nominate signatories to withdraw trust money from a general trust account to comply with r43(2).

Pursuant to r43 (2) a cheque must be signed by, or an EFT must be effected under, the direction or authority of:

(a) an authorised principal of the law practice; or

(b) if a principal referred to in paragraph (a) is not available –

(i) an authorised legal practitioner associate; or

(ii) an authorised Australian legal practitioner who holds an Australian practising certificate authorising the receipt of trust money; or

(iii) two or more authorised associates jointly.

It is emphasised that the principals assume the primary responsibility for trust cheque and EFT withdrawals, therefore all cheques should be signed or EFT withdrawals must be effected by principals first and if unavailable the other authorised persons as per r43(2). ■

Nilantha Wanaguru is an LIV investigator.

TIPS

- Trust money must be withdrawn by cheque or EFT.
- A cheque must include the name of the law practice or the business name under which the law practice engages in legal practice and the expression "law practice trust account" or "law practice trust a/c".
- Cash or bearer cheques are not allowed.
- The words "or bearer" must be struck through on trust cheques.
- Trust cheques must be crossed "not negotiable".

what's On

LAW INSTITUTE VICTORIA

For more information and to register, go online at www.liv.asn.au/whatsOn2016, call 03 9607 9473 or email register@liv.asn.au.

ALL EVENTS HELD AT THE LIV, 470 BOURKE ST, MELBOURNE, UNLESS OTHERWISE STATED

CONFERENCES

Workplace Relations Conference

FRIDAY 28 OCTOBER, 9AM–5PM, RACV CITY CLUB, 501 BOURKE ST, MELBOURNE, 6 CPD UNITS

This will be a full day of unparalleled legal education, panel discussions and networking opportunities with influential members of the legal profession. You will gain a better understanding of substantive law issues such as complex transfers of business, mental health impacts on an employee's fitness for work and what to do when a WorkSafe Inspector calls. The LIV is pleased to launch this conference with a keynote presentation from Fair Work Ombudsman Natalie James, who will discuss the changing landscape of the Australian workplace.

WORKSHOPS & SEMINARS

Core Competencies – Legal Research Part 3: Commentary

TUESDAY 11 OCTOBER, 2–3.30PM, 1.5 CPD UNITS

You will learn how to find commentary using various resources, and will discuss a chosen piece of commentary in detail to illustrate the ways to search for what you need.

Advanced Mediation Skills and Theory Parts A & B

PART A: THURSDAY 13 OCTOBER TO SATURDAY 15 OCTOBER, 8.30AM–6PM, 18 CPD UNITS
PART B: THURSDAY 10 NOVEMBER TO SATURDAY 12 NOVEMBER, 8.30AM–6PM, 18 CPD UNITS

555 LONSDALE ST, MELBOURNE

The LIV in conjunction with Australian Centre for Justice Innovation, Monash University, presents this interactive workshop that has been developed to assist participants to meet part of the National Mediation Accreditation Standard requirements and provides them with an opportunity to learn the essential negotiation, mediation and communication skills required to become a mediator.

LIV*ing* Ethics – Topical Ethics Issues

TUESDAY 25 OCTOBER, TUESDAY 22 NOVEMBER, MONDAY 5 DECEMBER, ALL SESSIONS 1–2PM, 1 CPD UNIT EACH

Work through a range of structured real-life legal practice scenarios designed around the conduct rules to help you identify key ethical issues that you are likely to encounter in practice.

Business Structures, Sales & Acquisitions Fundamentals

MONDAY 7 NOVEMBER, 1–5.15PM, 4 CPD UNITS

If you're new to commercial or business law, this workshop will give you a head start on the step-by-step processes involved in business sales and acquisition. You'll get an overview of the relevant legislation, how that impacts the process and more.

Bookkeepers Trust Recording Workshop

TUESDAY 8 NOVEMBER, 9AM–12.15PM, 3.5 CPD UNITS

This workshop is suitable for bookkeepers new to trust account recording and anyone wanting a detailed understanding of the changes brought about by the *Legal Profession Uniform General Rules 2015*.

Evidence in Family Law Proceedings Parts 1 & 2

MONDAY 14 NOVEMBER, PART 1: 8.30AM–12.45PM, PART 2: 1–5.15PM, 8 CPD UNITS (4 EACH PART)

There are specific rules of evidence that apply to family law proceedings, but many lawyers new to this area have difficulty finding education that sets these rules out in a clear and concise manner. This new two-part workshop offers you the opportunity to learn in an interactive setting and get feedback.

Core Competencies – Proofreading for Accuracy

WEDNESDAY 7 DECEMBER 5.30–7PM, 1.5 CPD UNITS

Get easy tips for catching errors in legal writing, including ones that might not be picked up by spellcheckers. This practical workshop will provide you with tricks and tools for proofreading efficiently and effectively so that you can provide documents to your senior lawyers error-free.

MASTERCLASSES

Complex Property Transactions Masterclass

TUESDAY 15 NOVEMBER, 1–5.15PM, 4 CPD UNITS

New issues arise in property law on a regular basis, particularly as the legislation continues to be amended and electronic conveyancing grows in popularity. Add dimension to your learning and get practical information that will be essential when you represent clients dealing in these matters.

Will Drafting Masterclass Parts 1 & 2

MONDAY 10 OCTOBER, PART 1: 8.30AM–12.45PM, PART 2: 1–5.15PM, 8 CPD UNITS (4 EACH PART)

Knowing how to draft a will that meets the needs of your client is an essential part of practising in succession law. By attending this two-part masterclass, you will develop the advanced drafting skills you need to achieve your client's desired outcomes and avoid risks later.

LEGAL RESEARCH TRAINING

Avoiding Common Mistakes

THURSDAY 20 OCTOBER, TUESDAY 22 NOVEMBER, TUESDAY 6 DECEMBER, 1–2PM, 1 CPD UNIT

This is an essential "Research 101" session, ideal for those just starting out as a new practitioner and for legal support staff wanting to ensure they are providing lawyers with the best possible material.

Case Law

THURSDAY 3 NOVEMBER, 9.30AM–12PM, 2.5 CPD UNITS

Learn how to search for case law more effectively using free internet resources and subscription databases.

Making the Most of Free Resources

8 NOVEMBER AND 1 DECEMBER, 2–4PM, 2 CPD UNITS

Learn how to gather important legal information from free online and hard copy resources.

Legislation

THURSDAY 17 NOVEMBER, 9.30AM–12PM, 2.5 CPD UNITS

This practical workshop helps you to search for Victorian and Commonwealth legislative materials in electronic and print form.

For more information and to register, go online at www.liv.asn.au/whatsOn2016, call 03 9607 9473 or email register@liv.asn.au.

ALL EVENTS HELD AT THE LIV, 470 BOURKE ST, MELBOURNE, UNLESS OTHERWISE STATED

NETWORKING & SOCIAL EVENTS

Trivia Night: A Salute to General Knowledge

THURSDAY 13 OCTOBER, 6–9PM, CQ FUNCTION, 113 QUEEN ST, MELBOURNE

Calling all random fact knowers, all constant correctors and pedantic word users. This is the night where we celebrate you as we offer our salute to General Knowledge. Everyone is welcome to join us for one of the most popular events of the year.

Prospective Accredited Specialist Networking Evening

WEDNESDAY 26 OCTOBER, 5.30–7PM

If you are interested in applying to become a specialist in 2017, this networking evening is not to be missed! You'll have the opportunity to meet current specialists and committee members, as well as other applicants and key LIV staff. This complimentary event will also introduce you to the subject guidelines and program expectations for the coming year.

Frank Marrie Trophy Golf Day

THURSDAY 17 NOVEMBER, 12.30–4.30PM

TERREY HILLS GOLF CLUB, KINGFISHER DRIVE, 116 BOORALIE RD, TERREY HILLS NSW 2084

The Frank Marrie Trophy is an annual golf match played between Victorian and NSW lawyers. Enjoy an afternoon out on the course with colleagues while building your profile and professional network. This year's match will be held in NSW. Cost includes golf and the following dinner at 6.30pm in the Club House (Dress code for dinner: smart casual).

LIV Legal Fun Run & Walk

MONDAY 21 NOVEMBER, 5.30–8.30PM, TAN TRACK, ROYAL BOTANIC GARDENS, MELBOURNE

Can you outrun the law? Lace up your runners and stretch those muscles. It's time for the annual Legal Fun Run & Walk. Each year, hundreds of legal professionals and law students gather in Melbourne and take to the track. Get your colleagues together for a day of fresh air, exercise, networking – and the delicious post-run reward of food truck catering. You can register as an individual or as a team of three.

The LIV Members Christmas Party

THURSDAY 8 DECEMBER, 5.30–7.30PM, ZINC AT FEDERATION SQUARE, SWANSTON ST & FLINDERS ST

Please join us to celebrate the end of the year and the beginning of the holiday season at the annual LIV Members Christmas Party. Registration is essential and available online only. The LIV Christmas Party is complimentary for graduate, new solicitor, practising and affiliate members of the LIV. This includes honorary life members.

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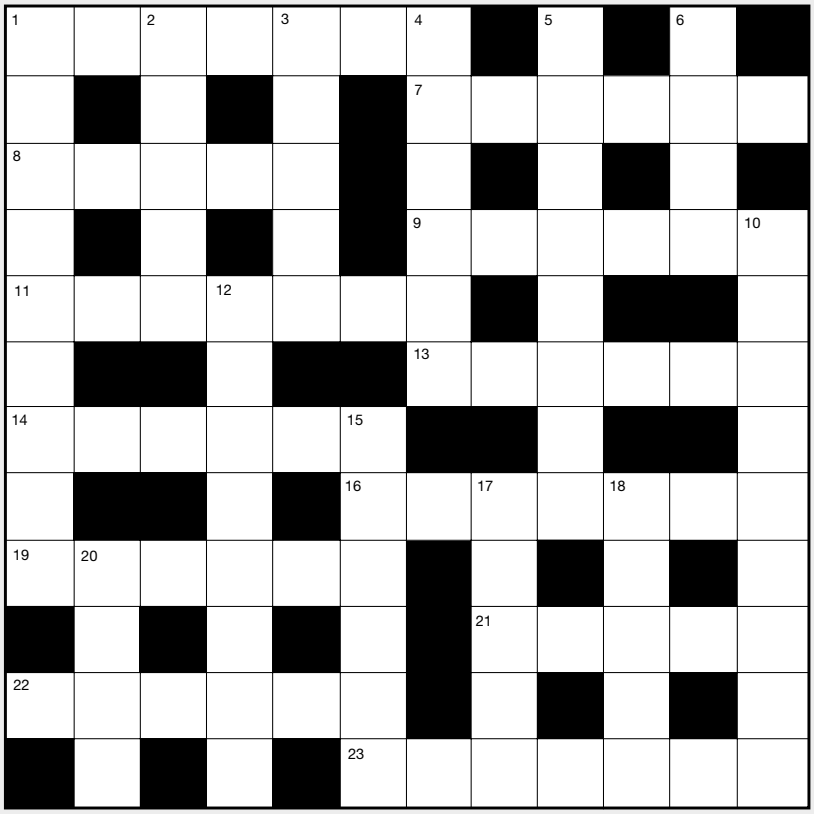

Solution next edition
Compiled by Stroz

ACROSS

1 Word of advice: "fore" (7)
7 Shoemaker sounds like therapist! (6)
8 Strains badly unset (5)
9 Hot potato can hop out for needlework! (6)
11 Although who bet I damage (7)
13 Not skating position (6)
14 Calling for Anglo Saxon Lear (6)
16 Dealing can be made parallel (7)
19 Rubber removalist (6)
21 Confine receiver (5)
22 Murphy atop to work (6)
23 Land title from South Australia (7)

DOWN

1 Cashew found in ACT sentry box! (5,4)
2 Mend newer form (5)
3 Number of offspring (5)
4 City district can be toughest without us (6)
5 Quibble about little sounding pea-souper (8)
6 "No" for wrong vote (4)
10 Dress up with apron (9)
12 Magistrate tried without administrable error (8)
15 Attic sounds like a tourniquet (6)
17 Take it can be finer (5)
18 Cha has no chance for the time being (5)
20 Overhead ceiling (4)

Solution to Letters of the Law No. 186

S	U	P	P	O	R	T	E	R	■	R	■
L	■	R	■	M	■	H	■	E	V	E	N
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In the spotlight: Steve McBurney in his AFL role

ON THE BALL

Chief Examiner Steve McBurney is used to making tough calls – on and off the field. **BY KARIN DERKLEY**

There are one or two similarities between being Chief Examiner and a footy umpire, says Steve McBurney, who started in the first role last year after 18 years as an AFL field umpire. Both come with complex rules and laws and operate in worlds populated with big egos. Both require absolute independence and impartiality, and both are subject to enormous levels of scrutiny.

The difference is that while Mr McBurney's work as Chief Examiner assisting Victoria Police in their investigation and prosecution of organised crime offences, is strictly confidential, as an AFL umpire every decision he has made and every word he has spoken have been in the public spotlight. "With umpiring everything we do is public. The papers will report on every mistake they think you make – and you'll be reminded about it the day after by your family and friends and colleagues. I've never been in any occupation where so many people were experts and happy to tell you what you did wrong." Not to mention the spectators, ever ready to loudly protest any unpopular decision on the field.

But the baying of the crowd doesn't faze Mr McBurney. He says it's just background noise and as far as he's concerned, they've paid their money and have every right to scream and yell. "I've been one of those supporters myself, yelling and screaming and convinced the umpires had it in for my team. I understand that emotional involvement."

That imperturbability was apparent from a young age when as a footy-mad teenager Mr McBurney was talked into becoming a junior umpire for his local southern suburbs footy

PHOTO: AFL

A witness in a . . . gangland killing said: 'Now I've got a question for you: why do you always give Carlton such a hard time?'

league. "They say if you can survive a year you're potentially an umpire for life."

Umpiring was a great way to keep fit, he says, and helped pay his way through a Monash law degree. Working his way up through district footy and into the VFL under-19s, he then umpired for the Sydney Football League after he was transferred to Sydney with the Australian Government Solicitor to work on the proposed Qantas privatisation.

Back in Melbourne in 1995 after that fell through, he was promoted to the AFL and had umpired 400 games by the time he officially retired in 2014. He is still closely involved with umpiring and the AFL as a mentor and commentator.

The game is unrecognisable since his early umpiring days, and the rules have had to evolve with the game, he says. "If you tried to apply the rules from back then, it wouldn't work." Today's players are bigger and fitter, and the game more professional and strategic. New rules are aimed at keeping the game entertaining by keeping it moving and preventing negative tactics from reducing scoring. The result is a fast and furious game that Mr McBurney says is thrilling to be in amongst. "The best thing about being an umpire is you get to see it close up – the pace and the power, the ferocity of the tackling, the skill level of the tackling. Sometimes you forget you're umpiring and you're standing there with your mouth open – it takes your breath away."

The original lawmakers did a reasonably good job of crafting the game in the *Law of Australian Rules Football*, first formulated in 1859, Mr McBurney says. There have been several revisions and the current law book is 60 pages. It's all the variations and hypotheticals where rules get complicated, he says." The laws try to anticipate every possible scenario, but the poor umpire has to remember every one of these scenarios in a split second, without a replay, and hope he's done the right thing.

"What we try to do for young umpires is keep it as simple as possible. If they can protect the ball player and pay the obvious free kicks, then the game should run okay. We say just try to apply common sense and hope for the right outcome."

One of the biggest changes has been to the way umpires communicate with players. In the early years, on-field discourse could get very heated, and umpires were expected to argue back. "But then the zero tolerance rule came in – and as part of that, we were no longer allowed to argue or yell at the player. The communication strategy changed to using negotiation and diplomatic skills to calm the player down."

Mr McBurney says the new umpiring style fitted his own natural inclination to defuse a situation – borne from being the peacemaker in his family of seven. "I just found that talking quietly and using humour calms the situation.

"There were only a few situations where I really felt a player was out of control," he says. "One player told me to 'f-off' nine times in 60 seconds and that left me no option than to report him. We always got on very well, but he just lost his cool. It led to a tribunal hearing and a record fine – but we moved on and the next week he was back to his normal self."

He recalls legendary Collingwood player Tony Shaw abusing the umpires from before the first bounce. "He'd scream at us: 'Your only job today is to bounce it straight and make sure you . . . do it right'. I offered to let him bounce the football himself if he thought he could do a better job – and he just snarled at me and off he went."

Soon after the zero tolerance policy came in, Mr McBurney had to award a free kick against Geelong player Darren Milburn at the 2009 Grand Final against St Kilda, after the player abused the goal umpire. St Kilda scored the goal from the free kick. "He was trying to make his point to me, but I said 'I don't care Darren, if you abuse me I'm going to pay you a free kick every time'.

"I remember sweating through the rest of the game wondering what they were going to make of that." Fortunately, Geelong came back and won by nine points. The football operations manager praised Mr McBurney for his actions, saying that penalising a player in a Grand Final sent a great message for zero tolerance.

Another big change has been the almost complete elimination of the on-field racial vilification that he says was commonplace when he started. "The AFL played a big part in that, with the leadership of people like Nicky Winmar and Michael Long. Players got a lot of training on that and we were the ones responsible for enforcing it. It's almost non-existent on the field now."

Remaining unflappable and impartial is also integral to Mr McBurney's role as Chief Examiner, where he exercises coercive powers to summon witnesses before private hearings where they must provide evidence that may be used in the investigation and prosecution of organised crime offences.

In a town so obsessed by sport, occasionally the two worlds have collided. One gangland killing he was involved in investigating happened at a kids' footy match. A witness in another gangland killing said to him after an examination: "Now I've got a question for you: why do you always give Carlton such a hard time?"

As a role with extraordinary powers, the Chief Examiner is subject to extraordinary oversight. "We have to comply with the Act in every respect, otherwise the evidence we collect will be deemed unlawful and inadmissible in court."

Oversight of umpiring is carried out by the AFL itself. Nevertheless, Mr McBurney is confident those entrusted to oversee the umpires are committed to integrity and impartiality and independent from the clubs.

Another commonality umpires have with judges is that they are unable to defend themselves or comment on their decisions. "Once you start getting into a debate with supporters it impacts upon your impartiality," Mr McBurney says. His retirement from official umpiring duties has freed him up to discuss umpiring decisions in his fortnightly Wednesday evening radio show on SEN.

While he's no longer on the AFL payroll, Mr McBurney is still strongly involved with umpiring – umpiring special occasion matches, such as the EJ Whitten legends game, as well as schoolboy footy. He is also involved in coaching and mentoring two female coaches who he says are the beginning of a new era of female umpires in the AFL.

He is also a chaperone for the Fiona McBurney Matchday Experience, named in honour of his late sister. It is a national AFL program which gives adults with Down Syndrome the chance to be an umpire's assistant for the day. ■

COFFEE

Le Petit Gateau
458 Little Collins Street

Tucked at the back of the RACV Club is Le Petit Gateau, "the little cake" in French. As the name suggests, this cosy café is serious about its cakes. The simple set up inside highlights the variety of confections on offer. Patrons can sip their coffee while observing the RACV Club's award-winning French pastry chef Pierrick Boyer and his team of patissieres working their magic in the kitchen. The coffee is seriously good – smooth, strong and a perfect accompaniment to the cakes and tarts (in my case a slice of the hazelnut millefeuille). And although spring has well and truly sprung it's difficult to look past a winter favourite, the dark hot chocolate. With delightfully bitter notes, it is a welcome pick-me-up on a brisk morning or during Melbourne's infamous spring drizzle. **SS**

FOOD

San Telmo
14 Meyers Place
http://santelmo.com.au

Where do you take a colleague who has just returned from a lengthy sojourn in Paris and has been missing the Melbourne food culture? Well, if you're like me, it would be Argentinian, self-evidently.

You realise pretty quickly that the guys at San Telmo are serious about meat when your place is set with a knife that Crocodile Dundee would be proud of. And despite being tucked away in a lane between Bourke and Little Collins Streets, on the Friday afternoon we visited the place was smoking – and not just from the imported bespoke 2.5 metre parrilla charcoal grill.

The menu is designed for sharing, like a family asado (barbecue) in Argentina. We kicked things off with a couple of empanada, a traditional Argentinian fried pastry filled with meat or vegetables. Think of a pastie, but with the taste amped to the max, and you'll get the picture.

This was followed by fried broccoli with pecorino which was seriously good, and if you can replicate it, might even get your kids eating greens.

For mains, we ordered a wonderfully smoky and flavour packed plate of house made pork and beef chorizo, as well as the entrana – 300 grams of hanger steak from the flank of premium pasture cattle produced by the O'Connor family in Gippsland, charred to perfection on the aforementioned grill.

To balance the omnivorous books, we ordered an accompanying zanahorias salad of burnt carrots with hazelnut, thyme and garlic goat's curd. Which just goes to show that vegetables can be tasty if you try hard enough.

All this was washed down with a couple of glasses of Punto Final Malbec Clasico from the Mendoza region in Argentina – and, as the name suggests, an elegant full stop to the red meats.

The meal and drinks came to a reasonable $115.

So, definitely a place to take a colleague or client in my humble opinion, although you might need to think twice if your dining companion is vegetarian. ■

HOW WE RATE IT

18 to 20: Would take my best client here
15 to 17: A safe bet for client entertainment
12 to 14: Best for a lunch with colleagues
<12: Life's too short, try somewhere else

17.5/20

WINE *By Alister Purbrick*

SPRING RACING CARNIVAL SPARKLING SPECIALS

Vollereaux Brut Reserve NV Champagne
98/100 RRP $84

Vollereaux is a sixth generation family-owned Champagne house established in 1805 and boasts 40 hectares of pristine vineyards around Epernay in the heart of the Champagne region of France. This non-vintage Brut Reserve is a classic blend of one-third chardonnay, one-third pinot noir and one-third pinot meunier and blended from reserve wines from three different years to ensure consistent quality. Fine, elegant, delicate and fruity, it's an ideal inclusion in your Spring Carnival race hamper. **Stockists:** Mayerling Cellars Croydon, Prince Wine Store South Melbourne

Paulett's Trillians NV Sparkling Riesling
94/100 RRP $20

Made by the Paulett family in the Clare Valley and named Trillians after the hill the winery is situated on, this 100 per cent riesling offers something different from traditional sparkling wines. This is a bright sparkling style with classic notes of citrus and lime, most often associated with riesling, and has well-balanced yeast tones. It is fresh and lively with full and rich flavours, a fine bead and a crisp, dry finish. Make it your selection with fresh prawns on race day – while you bet on that sure winner. **Stockists:** Savvy Cellars Altona, The Village Store Yarraville

Dalfarras Prosecco 2016
95/100 RRP $19.50

If your Spring Carnival theme this year is Italian, prosecco is the ideal choice and Dalfarras has hit the mark with a fresh and vibrant style which has hints of spring flowers on the nose, displays lovely apple and lemon citrus notes and has a finely beaded finish. What a wine to follow in the footsteps of the trophy winning 2015. A safe bet with Italian bruschetta or go the trifecta with traditional antipasto. My wife artist Rosa Purbrick says about this label named Lichen Light "The inspiration for this work was the fabulous pattern work made by lichen on a stand of birch trees – all lacy, loopy semi-transparent shapes that overlap and intertwine". **Stockists:** Blairgowrie IGA X-press, Wine Republic Fitzroy ■

Alister Purbrick, CEO of Tahbilk Winery

WRESTLING WITH DECORUM

LAWYER SELF-PROMOTION IS TRICKY.

There's an old saying that "it pays to advertise". I think it was coined by someone selling advertising.

But for lawyers who want to promote their firm there are tricky issues to negotiate. Advertising in the *LIJ* or trade magazines is effective, but some may want to cast the net wider to catch the public attention.

How do you get noticed in a crowded media landscape while staying within the bounds of legal decorum and the various state-based advertising rules?

Lawyers can't go full-on Franco "grand sale, grand sale" Cozzo. Even if your firm is based in "Footisgray". Some Victorian lawyers, mainly in the areas of personal injuries and family law, advertise on TV and radio and the ads are generally muted and tasteful.

It's unlikely Victorian lawyers will follow the example of US attorney Larry L Archie who has a billboard that reads "Just because you did it doesn't mean you're guilty" or Ruth Warner who advertises herself as "An honest lawyer – but not enough to hurt your case".

America is not the best place to look for tasteful legal advertising but it is entertaining. Legal firms have pretty much been able to do what they like since the Supreme Court ruled in *Bates v The Arizona State Bar* (1977) that lawyer ads are protected by the First Amendment.

There are jaw-dropping examples of lawyers taking advantage of this laissez-faire attitude. One TV commercial features a Florida lawyer running down a street chasing an ambulance. It's hard to miss the message there.

Pittsburg criminal defence attorney Daniel Muessig's TV commercials feature actors staging criminal offences like burglary, home invasion and armed robbery with the perpetrators giving the thumbs up and saying "Thanks Dan" as they make their getaway.

Muessig tells potential clients "you keep your trap shut and I'll keep your trap open".

King of the tacky legal ad is Bryan Wilson, a hyper-active attorney who calls himself The Texas Law Hawk. Wilson's commercials, featuring him yelling slogans as he crashes through walls on a motorcycle, Lucha Libre wrestles or spruiks his business to accompanying explosions have gone viral on the internet, drawing nearly two million hits on YouTube.

In one ad he rides a trail bike on its rear wheel while proclaiming "Due process? Do wheelies". In another he crashes through a sign on a lake on a jet ski watched by women in bikinis. The word "awesome" features prominently.

Wilson does his own stunts and since the US is a notoriously litigious country I wonder if he sues himself if he is injured.

As well as attracting clients he has landed parts in an ad for a law practice management software company and in Taco Bell's Super Bowl commercial, where a woman about to eat a vile-looking cheese pastry says "this is going to be bigger than that Texas lawyer guy". On cue Wilson bursts through her living room wall on a motorcycle.

"Filming that commercial was probably the best day of my entire life," he says without blushing.

For Wilson it certainly pays to advertise. ■

DO YOU EVER COME ACROSS AMUSING INCIDENTS RELATED TO THE LAW?

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FROM HELPLESSNESS TO RESILIENCE

MARK LEE

TIPS

You can choose to be more optimistic by:

- identifying pessimism: systematically take time to analyse your thoughts – do they have a pessimistic (personalised, permanent, pervasive) structure?
- paying attention, in particular to those thoughts that seem important or have an emotional impact.
- challenging the accuracy of pessimistic thoughts. Is it really likely to last "forever"? Is it entirely attributable to you? How likely is the worst case scenario?
- trying some optimism. Reframe the thought in a more optimistic way, with more optimistic language (depersonalised, transient, situation specific).

THERE IS A ROLE FOR OPTIMISM AND PESSIMISM IN THE LEGAL PROFESSION.

In this column in July I wrote of a reason to be optimistic regarding the future of wellbeing in the legal profession. It's likely however, that even if this notion was of interest, most readers wouldn't share my optimism. In fact lawyers tend to be trained and evaluated on their capacity for pessimism.

Wellbeing theorist Martin Seligman was instrumental in developing our understanding of the relationship between optimism and wellbeing. In a series of experiments, Seligman demonstrated that, by placing animals and people in negative environments with an objective lack of control, most began to think and subsequently behave in pessimistic ways. Even when circumstances improved and control was possible, many continued to behave as though things hadn't improved and the situation was still beyond their control. Seligman termed this phenomena 'learned helplessness'.

Subsequently Seligman and his colleagues became increasingly interested in a minority who demonstrated a different pattern. Although exposed to the same conditions as those who developed a learned helplessness, some responded with resilience. A key difference identified was the way in which people perceived the causes and attributed meaning in the situation. Those with a pessimistic attribution style were likely to blame themselves, to believe the negative event would impact other areas of their life and to perceive that the situation was likely to never change. In contrast, those with an optimistic attribution style perceived the causes of their difficulties to be external, isolated to that incident and transient. Subsequently optimists were likely to continue the struggle and, once the circumstances changed, seize the opportunity.

Much research in a variety of academic, professional and personal domains has demonstrated that optimists tend to be more effective in just about all endeavours, with one distinct exception – law school. It is recognised that pessimism is an important and valued professional skill for law students and lawyers alike. Unfortunately research has also shown that pessimism can be pervasive, spilling over into other domains and more generally to how the world is perceived, negatively impacting wellbeing.

Seligman and many since have demonstrated that it is certainly as possible to learn optimism as it is to learn helplessness. Those who demonstrate a highly optimistic perspective have better physical health, increased immunity, more occupational success, and are less prone to psychological difficulties such as depression. In other words, lawyers and others with similar specialist "worst-case"cognitive training are at risk of lower wellbeing. Taken together these findings suggest that learned optimism is likely low hanging fruit, and a little effort may go a long way to improving law-student and lawyer wellbeing. It's important to note that the nature of cognitive optimism is not about a blind belief; rather it is about a rational approach that can be deliberately applied.

Further Reading:

- O'Grady, CG (2006), "Cognitive optimism and professional pessimism in the large-firm practice of law: The optimistic associate". *Law & Psychology Review,* 30, 23-55.
- Seligman, MEP, (2006). *Learned Optimism: How to change your mind and your life.* Vintage: New York
- Seligman, MEP, Verkuil, PR, & Kang, TH (2001). "Why lawyers are unhappy", *Cardozo Law Review,* 23 (1), 33-54.

Mark Lee is a lecturer and industry fellow in psychology at RMIT University, registered psychologist and organisational consultant.

PHOTOS: JOEL CHECKLEY

COURTROOM DRAMA

AN EDUCATIONAL PROGRAM RUN BY THE NATIONAL TRUST BRINGS TEENAGERS INTO CONTACT WITH THE LAW.

Walking into Melbourne's Old Magistrates' Court, you find yourself in the middle of what sounds exactly like a County Court culpable driving trial. Except the judge is wearing a wig at a rather rakish angle. Then you look more closely and see she's a teenager.

You're watching a group of high school students acting out a script based on an actual culpable driving case, in which a teenage boy, driving recklessly and negligently, has caused the death of his passenger and close friend.

The latest addition to a "courtroom dramas" education program run by the Victorian branch of the National Trust of Australia, the culpable driving program received a "highly commended" award in the 2016 Museums and Galleries National Awards.

The Trust's courtroom-based education program began in 2009 with the recreation of historical trials such as Ned Kelly's and the 1863 murder trial of Elizabeth Scott, the first woman hanged in Victoria. Contemporary trials were then added, beginning with "Respect me" on the issue of sexting, which can land a young person with a criminal conviction.

The culpable driving drama, which is held at the old Melbourne Magistrates' Court and at courts in Sale, Bairnsdale, Morwell and Traralgon, is an extensive redevelopment of a program devised in 2009 with the Transport Accident Commission. Developed with the Gippsland Community Legal Service and funded by grants from the Victoria Law Foundation and the Campbell Edwards Trust, it is aimed at years 10 to VCE. It offers an introduction to legal procedures and requires students to think analytically about evidence, arguments, motives, ethics and social values.

The program begins with the students watching a film clip, shot in the back streets of Brunswick. It's late at night and Kim Tran, an 18-year-old P-plate driver, is at the wheel of his hotted-up car. His best mate, Jase Greco, is in the passenger seat. Another friend, Eric, pulls up next to them at the lights. He revs his Holden Commodore. "C'mon Tran," he yells. "You ever gonna use that V8 or what?" The streets are empty and in a moment of weakness Tran yields to the challenge. Eric, shocked, is compelled to follow.

Then the inevitable happens. As his speedo nudges 120 kph, Kim takes his eyes off the road to look across at Eric. Losing control of the car, he crashes and Jase is killed. The 18-year-old from a loving family has just finished his VCE. Now he's facing a charge of culpable driving causing death.

"We devised the program to challenge students," says Martin Green, the National Trust's learning and interpretations manager. "It makes them active participants rather than passive observers. They recreate the case by taking all the roles."

Groups of 15 to 30 students arrive at their chosen courtroom familiar with the back story to the script, which has 11 speaking parts: judge, tipstaff, defendant, prosecutor, defence lawyer, expert psychologist witness, character witnesses and public gallery identities.

The authenticity of the courtroom setting is an integral part of the learning experience.

"When students enter the court they giggle nervously, become shy or may act over-confidently," Mr Green says. "But all feel the solemnity of its atmosphere."

In this play, he explains, the judge does not decide on the sentence. Instead all the students are provided with the sentencing options and asked to make a judgment.

"It is always surprising how some students you might expect to be liberal have very strong opinions about punishment," Mr Green says.

"The aim of the program is really just to make an adolescent brain . . . pause before making a reckless spontaneous decision like jamming their foot on the accelerator. We will never really know if it has changed students' behaviour as young drivers but just maybe it has."

So far this year 4780 students have completed a National Trust courtroom drama, with the majority doing Respect Me or Culpable Driving. ■

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Legislation update

Many practitioners have been seeking clarification on how the latest legislation changes in property law and conveyancing affect their practice. Russell Cocks will be covering these industry hot topics including recent changes related to Land Registries, Verification of Identity, SRO Foreign Purchaser/Foreign Vendor updates and more.

Agenda

12:00pm – 12:30pm	Lunch & registration
12:30pm – 12:45pm	Introduction & eConveyancing demonstration
12:45pm – 1:15pm	Keynote speaker **Philip Argy**, Solicitor, Mediator, Arbitrator and Negotiator Legislation update: **Russell Cocks**, Lawyer, Mentor, Author and Lecturer
1:15pm – 1:30pm	Q & A panel with industry experts
1:30pm – 2:00pm	Networking/expo

Key takeaways you'll receive from the roadshow

1. Understand the role of technology in the modern legal and conveyancing practice - how it lowers costs, increases staff satisfaction and professionalism, reduces risks, and increases efficiency, profitability and client loyalty.
2. Get up to date on the latest property legislation changes in the legal and conveyancing landscape and understand how they affect your practice.
3. Start embracing digital disruption. It isn't about overhauling your entire business model or operations but about using technologies in a smart way to complement and boost your current practices.
4. Learn how paperless conveyancing is revolutionising the way Australians buy and sell property - what traditionally took 3-6 weeks can now be completed in a day or two.
5. Electronic exchange is now a reality and there's no need to be registered for PEXA to start using.
Find out how InfoTrack can carry you through the conveyancing process right up until settlement – from mobile verification of identity through to digital contract preparation, signing and exchange - see how our technology allows for seamless end-to-end electronic conveyancing.

Don't miss out! Register today.
www.infotrack.com.au/econveyancing

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