

EMBARGO: 6PM WEDNESDAY 25 OCTOBER

Tristan Jepson Memorial Foundation

Lifting the Judicial Veil –

Vicarious Trauma, PTSD and the Judiciary: a personal story.

1. Introduction

This paper is written as an adjunct to my speech at the Tristan Jepson Memorial Lecture. A speech should be fluid and entertaining. If I tried to fit all this in it would be dense and droll. There is only so much one can say in a speech, and this paper is designed to provide a more comprehensive analysis and reflection on the issue of vicarious trauma and the judiciary.

This paper is not written in my professional capacity - I do not speak for the magistracy nor do I write as a judicial officer. That is what I do for a living, not who I am, and while of course I draw on my experience in my work, similarly I am shaped by my experiences as a student of life, a father, a husband and a friend.

I do not want people to think for a moment that I am whining about the job itself. Mostly it is an extraordinary privilege with opportunity to apply justice in a manner that changes lives for the better, and it is continuously stimulating, challenging and fulfilling.

This paper is not intended to be an academic exploration of vicarious trauma and PTSD and the judiciary. I am aware of excellent work being done in this field by the Judicial College of Victoria, and will add a reading list as an addendum. This paper is a personal exploration of some of the issues.

2. Perspectives on Trauma

In July this year there was a topical Law Report titled “Is practising criminal law bad for your mental health?” on ABC Radio National. Peter McGrath SC, a vastly experienced criminal barrister was speaking of a particularly distressing sexual assault case:

...and during the trial I can remember different stages, at one stage the officer in charge was giving evidence before the jury and just burst out crying in the witness box and couldn't go on and we had to adjourn. At another time, the judge's associate, and she was a very experienced woman who had seen a lot of trials, she was unable to come into court, we had to adjourn because she was very affected. At one point the court officer, who was a crusty old fellow who had been in so many cases and heard it all, he was...we couldn't start the call one morning and where was he, he was in the corner of the anteroom and he was just sitting on his chair and weeping and shaking his head and saying, 'Those poor boys, those poor boys.' And I was thinking, God, who's next?

Of course there is someone missing from his description. The judge. What was he or she feeling? How was the judge dealing with all this evidence that he or she was going to need to rule on?

3. Mental Conditions and the Judiciary

Much has been written about 'Judicial Stress', including the seminal work by Michael Kirby. This is important work, however it seems to me that the term is really a euphemism for a mental disorder. Just like people used to speak of a 'nervous breakdown' - as though your nerves had suddenly just stopped working due to some physical dysfunction. Now we call a nervous breakdown for what it is - a mental health crisis. Similarly, whilst the early work in this topic was useful and ground-breaking, we ought to stop talking of judicial stress, and start calling it for what it is - anxiety, panic attack, insomnia, traumatic response, depression, PTSD, substance use disorder and the like.

About one in five Australians will suffer from a mental health episode each year. One in seven Australians will suffer from depression in their lifetime, and an even greater number will suffer from an anxiety disorder. The rates are far higher amongst law students, solicitors and barristers. According to the most recent research, 33% of solicitors and 20% of barristers suffer disability and distress due to depression. They tend not to seek help and often self-medicate with alcohol. Given that judicial officers are almost exclusively drawn from the ranks of the profession, it would be a reasonable conclusion that a significant number of judicial officers suffer from debilitating mental health issues during their time on the bench.

Reflecting on the line immediately above is important. This is a fairly revolutionary statement and debunks some myths about the judiciary. Of course we are meant to be above all this, unaffected by depression, trauma, anxiety, bi-polar disorder or alcoholism. Our objectivity, or what is left of it in a post-modernist world, must remain untouched by our own fragility.

And if many will suffer from a mental health issue, then almost all the rest will suffer from the 'normal' stresses and strains of life caused by death of loved ones, divorce, conflict and physical ailment. Unsurprisingly, judicial officers did not just spring from the womb to the bench and many have backgrounds as victims of crime, witnesses to domestic violence, and experience of addiction or mental dysfunction. Judicial officers are just humans doing a job, and the sooner this becomes the accepted norm, the better the judiciary will be able to serve the community.

And of course the mental health issues and stresses and strains of life affect work life. I don't mean that we are necessarily unable to do our jobs, or even that we will do them badly, but we may do it more slowly, or hesitantly, or arrogantly or grumpily at different times due to those circumstances. This is not something to fear or turn away from - I'm sure the same is true of surgeons, airline pilots, police and politicians too.

There is a veil based on assumptions regarding judicial officers. The sooner that veil is lifted, the sooner judicial officers can admit to difficulties, access help and better serve the

community. So, this paper is not primarily about helping judicial officers meander through struggles of life and work - it is the community's interest that is my focus.

4. My Story

I wish to preface this part of the paper by paying tribute to the others in the court process who suffer direct trauma as a result of crime. First and foremost are the victims. Victims of sexual assault, domestic violence, robbery and the like suffer first hand trauma which is tragic and deep. Seeing them bravely confront their tormentors and give evidence is a humbling experience and I pay homage to them. Secondly, the first responders such as the police who have to deal day in and day out with the violence, death and despair that they see often struggle with trauma and I appreciate that their experience is much more direct and immediate than from the perspective of the bench. Thirdly, I acknowledge the trauma encountered and experienced by the legal practitioners on both sides of the adversarial system. They often live, breathe and eat their cases, striving for justice by representing the accused or crown.

I have been a Magistrate for 18 years. I do not drink, and I am a committed meditator, yoga practitioner and I took my lay Buddhist vows a decade ago. Prior to that I was a criminal lawyer and an academic. I represented those charged with child sexual assault, murder and serious domestic violence. I taught mainly criminal law and co-wrote a leading case book, that meant reading copious transcripts and judgments of a violent nature. I researched and published papers and a book on sexual assault of prisoners – primarily by interviewing victims and perpetrators. I thought I had a pretty good 'distance' from my work, in the sense that whilst it occasionally upset me, it did not stay with me too often in my personal life.

About 12 years ago I was sitting in a series of cases involving child pornography in Batemans Bay. In those days, it was necessary for the court to view the pictures and videos to determine the seriousness of the charges – fortunately that is far less often today due to computer classification. As is regularly the case, the charges included thousands and sometimes tens of thousands of images and hundreds of videos. I will not re-traumatise all of us or re-victimise the victims by describing the images except to repeat something that the Chief Magistrate wrote in the case of *Police v Power* [2007] NSWLC 1 at 36:

To see the pale death of innocence and trust in the eyes of so many young children is to bemoan the capacity for some members of the human race to descend into the dark and depraved side of the human condition.

I dealt with over a dozen of these cases within a couple of months. I started dreaming of these children and the torment perpetrated upon them. I would wake up in the witching hour

screaming, sweating and panicked. I thought it would pass, but it did not. I was pretty scared about going to sleep, and that fear was well placed. I began thrashing around in my sleep, making it impossible for my wife to remain in bed with me for fear of getting struck. After a period of weeks of this, I sought professional help and was referred to a trauma psychologist who engaged in some talk therapy by way of de-briefing. I also informed the Chief Magistrate of my difficulties, and asked his permission to avoid such cases for a time. He was extremely sympathetic and my colleagues from Nowra and Queanbeyan carried the load for that time. The relief from the nightmares was immediate and dramatic. 'Cured!' I thought.

I interpose to note that the help I received at that time was via the then newly formed Judicial Assistance Program in New South Wales. This program provides judicial officers and their families with confidential psychological counselling. The service was excellent then, and continues to this day.

In the intervening years, and up to the present, my involvement in judicial education increased, and I became a lead trainer of new magistrates in Australia and the Pacific. One of the sessions I ran, and still run, is on mental health, and I would use my Batemans Bay experience as a salutary lesson.

Some 10 years later I had a bad six months on my current circuit. Over all of that time, I dealt with a child sexual assault case which was later accurately described by the sentencing judge as the "worst of the worst". She sentenced the father to 48 years imprisonment, and the mother to 12 which is probably all I need to say about the horrors that were perpetrated on this poor child. I had to deal with bail applications, contested interim apprehended violence orders, committal hearings and subpoena issues all of which required reading and making determinations on the evidence. My grandchildren had been born around that time, and I think I was in, as we on the north coast of NSW would say, a 'heart opened' state. I now know that empathy is a key determinate of vicarious trauma. I now know that empathy is not a static – it fluctuates with time. I think I was particularly empathetic at that time.

During this period the Ice problem was escalating in my area, and there were four violent incidents inside the court, including a young addicted man who jumped out of the dock, fought his way out of the courtroom and jumped over the balcony at the front, breaking his spine. I dealt with two juveniles from the far west of NSW who, having been bailed, that very night held a toddler at knife point while they raped his mother, a nurse. And I dealt with another horrible case of child pornography where I had to watch a video which involved binding, gagging, suspending upside down and violating a conscious two year old. That week, a friend died in a freak surfing accident and at the funeral I was very messy. I was very nervous for my own and my family's safety. I now see this as hyper-vigilance. I found making hard decisions in court really painful. Actually physically painful - my head would hurt (just like Winnie the Pooh) when trying to decide whether to imprison someone, or refuse them bail, or admit evidence. A good night's sleep had become a distant memory. I would wake myself up screaming.

My family and friends had been concerned about me for some time. They were encouraging me to take some time off work and to seek help. I stubbornly refused.

In retrospect of course this stubbornness was completely unreasonable. I would like to try to explain it though without excusing it. Firstly, my reaction seemed so pathetic in comparison to the victims. I kept thinking what a wuss I was. I saw victims work their way out of psychiatric care and through university with flying colours, the calm determination of domestic violence victims and the shaking voices of police officers in coronial matters and I was thinking that my reactions were just so much 'weak little me me me'. Second-hand trauma just seemed so, well, second-hand. Secondly, up to that point, in my entire working life I had rarely had a single sick day. This was a question of pride and I saw it as part of my reputation as a reliable, dependable rural magistrate. After all, if the magistrate gets sick at short notice literally hundreds can be inconvenienced, hearings that have been waiting with defendants in custody and witnesses from interstate may have to wait another six months. I think that one of the symptoms of trauma is catastrophisation, and another is an inflated sense of irreplaceability. Thirdly there were the usual reasons people don't want to admit to mental fragility, especially men.

After probably three months of bleakness I took the 'advice' of my GP and took a couple of weeks off. Advice is in inverted commas because she was utterly insistent. I wrote a letter to the Deputy Chief Magistrate responsible for leave, and spilt the beans on my state of mind. She was a friend and colleague of many years standing and to this day I cannot believe how hard this letter was to write. It was achingly difficult, and I can honestly say it was the hardest letter I have written in my life. Crazy but true.

Being a practitioner of Buddhism I went on retreat with a long term teacher at Chenrezig on the Sunshine Coast. This was an ice breaker and over the period of the next few months I progressively improved. I do not wish to be proscriptive on treatment, as I'm sure different processes work for different people. I started with talk-based therapy (good, but sometimes re-traumatising), tried medication (a nice mental holiday, but didn't last) and then EMDR (Eye Movement Desensitisation Reprocessing) which was brilliant. If someone had once told me that wiggling fingers in front of eyes could actually work I would have laughed out loud. I do not mean to belittle EMDR. It has truly been a wonderfully successful treatment for me. I did nine sessions with a terrifically skilled psychologist, and from the outset felt a lifting of anguish.

During this time support of my colleagues and the Chief and Deputy Chief Magistrates was magnificent. Calls, emails, check-ins were almost but not quite overwhelming. I am fortunate indeed that the NSW bench is collegiate and supportive. This is no accidental development. As the Chief Magistrate has often commented – the strength of the bench, in the end, comes down to the health of the people who sit on it.

Apart from the two weeks at Chenrezig and normal leave I have been back at work while getting better. I approach my ability to cope with traumatic cases with a mixture of confidence and trepidation. Did it affect my ability to competently do my job during my

darkest days? It is difficult to tell. Certainly, there was no rash of appeals from my decisions or criticisms by higher courts. There were no complaints to the Judicial Commission. I probably consulted more with my colleagues on harder cases to check I was on the right path, and perhaps I was gruffer than usual with lawyers who I perceived as incompetent or worse.

I now view my mind as a big sponge when dealing with traumatic cases. It sucks up some of that trauma vicariously, and I am watchful to ensure that the sponge does not get too full. I would not hesitate to seek help should the sponge feel close to full, and I am certainly better placed to watch for the signs given my experience.

It is certainly not my intention to become some sort of poster boy for vicarious trauma or PTSD and the judiciary. Nor can I remain silent. I am convinced that it is time to lift the veil for the benefit of the judiciary, but also for the system of justice itself. The community is best served by recognising and acknowledging this issue, rather than hiding it.

5. Random Reflections

Having given this some issue some thought over the last few years it seems that there are some issues that require addressing.

Technology

Obviously, the key causation issue is exposure to trauma. For country magistrates the sheer volume of traumatic work is hard for those outside the criminal justice system to comprehend. We are also coroners, and I will often spend my lunch time running through gruesome evidence and reading suicide notes. Responses to trauma for judicial officers are often cumulative and exponential.

Modern technology has made the trauma much more ‘in your face’. I can read a violent scene in a book and be unaffected, but a movie is far more challenging. Real violence is now captured on CCTV, smart phones, in-car-videos and DVEC’s. When I started in this job, some form of graphic video or photographic evidence was a rarity. Now there are few cases without it. I have put in place protocols to protect myself and my staff as much as possible. Our coronial files have the on-scene photographs in a sealed envelope. The reality is that accessing them is rarely necessary. I resist observing child pornography videos, and having them played in open court is a very last resort. Similarly, once tendered, photographs of wounds are sealed to avoid accidental exposure.

The Intimacy of the Decision Maker

In our court there is no jury, and so we alone must determine guilt or innocence, largely based on the evidence of the victim and the defendant. That means we have to assess the truthfulness of the witnesses very carefully. This involves, to some extent, ‘getting inside the head’ of both. Often that is a very frightening place. Did the victim really get touched like that? Did the defendant really believe the victim was consenting? Is the inconsistency of the

victim's first complaint and evidence today suggestive of fabrication? Is a person of such fine character really likely to have done such an abhorrent thing?

These are tough questions to answer, and for a conscientious judicial officer requires a determined focus and concentration. My hypothesis is that this level of absorption makes vicarious trauma unsurprising. We cannot just listen dispassionately to the evidence; we have to digest and ruminate on each morsel and literally judge the people before us. This is a level of intimacy, for want of a better word that perhaps fills the sponge more rapidly than one would expect.

Decision Fatigue

The relationship between decision fatigue and vicarious trauma is, as far as I can tell, completely un-researched. However, in my view there is a fair chance that each exponentially affects the other. In the Local Court, on my current circuit I have four list days per week. Most of those involve in excess of 100 cases. On average I will have over 15 people in custody, and deal with around eight bail applications every list day. I will have fifteen to twenty coronial matters on the boil inevitably involving gore and grief. Some days I will come home and be asked some innocuous question involving choice - what would you like to eat for example - and I will respond that if I have to make one more decision I will actually just dissolve or burst. This pressure, felt at all levels of the judiciary to some extent or other, is I suggest poisonous to maintaining a vicarious trauma shield.

Emotion Bad/Intellect Good¹

Throughout our education, our practice and our role as a judicial officer we are taught to suppress our emotions in a quest for apparent objectivity. It is perhaps time to recognise that the expression of emotion is not the opposite of administering justice. I have laughed on the bench, and I have teared up on the bench. This is neither good nor bad. It just is, and part of recognising that judicial officers are humans not automatons. I have learnt that suppress emotion every day is a recipe for mental health fragility.

Statutory Barriers to Disclosure

One great fear of Judicial Officers is that if they have a mental health issue of some sort or other they could lose their appointment. In New South Wales, there is a process established under Part 6A of the *Judicial Officers Act 1986* which indeed could lead to this result. In essence, pursuant to s39G(1), the Conduct Division must assess if the judicial officer is

"physically or mentally unfit to exercise efficiently the functions of a judicial office"

¹ I am grateful to Justice Jennifer Coate for this heading.

If so, the Conduct Division is to present a report to the Governor. This in summary means that there is a parliamentary vote of both Houses to determine dismissal. In reality, those with mental health issues have nothing to fear if my experience is anything to go by. I am aware of others of my colleagues who have suffered mental health issues, and returned to work after months without any suggestion of referral to the Judicial Commission.

Community Acceptance

In New South Wales, two magistrates in the last decade survived a parliamentary vote after the Conduct Division referred the matters for misconduct in office. Both magistrates made references to mental health issues in their address to parliament. One had undiagnosed bipolar disorder, and the other explained her conduct in part by reference to a change in her depression medication. I have carefully reviewed the media surrounding these referrals. The commentary and discussions showed a degree of acceptance of their mental conditions, and there was no outcry at the decision to permit them to continue on as magistrates despite this. In my view, this is indicative of a level of acceptance that judicial officers are indeed mere mortals, and that even those with significant mental health conditions ought be able to continue their work as judicial officers after being properly treated.

In Victoria, the Judicial College has established its Judicial Wellbeing program and associated research, which frankly and controversially addresses issues relating to judicial officers and mental health. In 2012, Justice Marshall of the Federal Court of Australia publically acknowledged his personal struggle with depression, again with little fanfare or controversy.

Politicians have long since broken through perceived barriers with John Brogden, Andrew Robb, Scott Ludlam and Geoff Gallop all disclosing mental health issues with a high degree of bipartisan acceptance.

Security

Security threats are inherently traumatic experiences, and like many judicial officers I have had a significant number over the years. I had a makeshift bomb put on a gas tank at a court related to a family court matter, the KKK graffiti my house, specific death threats that resulted in 24 hour surveillance and presently there is a person in custody charged with allegations relating to a contract killing. These threats pose a real danger to the mental health of judicial officers for obvious reasons, and it is difficult to separate hyper-vigilance from realistic precautions at times.

Loneliness of the Job

I have worked in both the city and the country, and the job can feel exceptionally lonely despite the collegiate nature of the bench. There are real limits on your social life, and in particular the mates and friends from the legal profession are likely to give you some distance. Many judicial officers work in single courts and are away from loved ones for days

or weeks at a time. There is little opportunity for the kind of informal talk therapy or debriefing that can empty the sponge in that scenario.

In discussing the tragic fall from grace of former Attorney General and Supreme Court Justice Jeff Shaw QC, then Chief Justice James Spigelman wrote:

“There is a loneliness about it...and that’s what really got to Jeff. He started drinking alone. It was a huge personal tragedy and I actually attribute it to the loneliness of being a judge. He had a predilection and the loneliness of the job tilted him into this world that he couldn’t escape from”

6. The Need for Research:

Clearly there needs to be more research into mental health issues and the judiciary. There has been some limited and now out-dated research on vicarious trauma and PTSD in judges in the United States.

In the first study in 2003, 105 Family and Juvenile Court judges from across the USA were surveyed. The majority of judges (63%) reported one or more symptoms of work related vicarious trauma. Most at risk were female judges, and those of seven or more years of experience. In the second study in 2009, nine judges underwent detailed assessment and the researchers found that all were at risk of secondary trauma and most displayed symptoms. A similar result was found in Immigration Judges.

Similar research obviously needs to be undertaken in Australia. Particular focus could be on the following issues:

- What are the current rates of vicarious trauma/PTSD in Australian judicial officers? I see no reason why it would be any lower than in the USA.
- When does the issue become more acute? After 5 -10 years on the bench? The research would suggest that this would be likely.
- Is there a relationship between judicial officers sitting alone and in country courts and increased levels of PTSD. I suspect so. My father sits on the Mental Health Review Tribunal and he often comments on the joy of having tribunal members to bounce issues off. In England, there are usually two or three Magistrates making decisions. Comparative research would be useful.
- What percentage of disciplinary matters involving judicial officers have an underlying mental health issue. For lawyers it is reportedly 80 %.
- Is there evidence to support the hypothesis that an annual ‘mental health’ check-up for judicial officers would be of assistance?
- Does opting out of certain types of cases for a time help? It certainly did for me.

- What are the most effective methods of increasing resilience – mentoring, education, buddying, debriefing, supervision?

7. Conclusion

I am grateful for the support of the Tristan Jepson Foundation for facilitating this paper. This is an organisation of extraordinary import, and I pay tribute to its founders and board. It is clear that the guidelines promulgated by the Foundation and adopted by some courts, ought to be embraced by all courts. In my view, the bench should lead by example in the area of mental health. We are blessed by incumbency, security of tenure and status absent for many in the private profession, and those benefits should provide a firm basis for making a safer workplace.

This paper is not intended to be a final word on these issues. I hope that it engenders debate, and that my personal experience is useful in formulating approaches in protecting the law's most precious assets – its people.

Reading List

BOOKS

Heilpern, David M, *Fear or favour: Sexual Assault of Young Prisoners* (Southern Cross University Press, 1st ed, 1998)

Milne, A.A, *The World of Christopher Robin* (Methuen & Co Ltd, 2nd ed, 1960)

JOURNALS

Anleu, Sharyn Roach, Kathy Mack and Jordan Tutton, 'Judicial Humour in the Australian Courtroom' [2014] 24 *Melbourne University Law Review*

Eels, T.D, C.R Showalter, 'Work-Related Stress in American Trial Judges' (1994) 22 *Bulletin of the American Academy of Psychiatry and the Law*

Hampel, Felicity, 'From Stress to resilience' (2015) 89 (9) *Law Institute Journal* 33

Queensland Law Society, 'Best Practice Guidelines for the Legal Profession' (2016) *Tristan Jepsom Memorial Foundation: Psychological Wellbeing*

Schrever, Carly, 'Judging Stress' Law Institute of Victoria (2015) 89(9) *Law Institute Journal* 33

Zimmerman, I.M, 'Isolation in the Judicial Career' (2000) 36(4) *Court Review*

Zimmerman, I.M, 'Helping judges in distress' (July- August 2006) 90(1) *Judicature*

CASES

Police v Power [2007] NSWLC 1

LEGISLATION

Judicial Officers Act 1986 (NSW)

OTHER

Australian Bureau of Statistics, *Mental Health Statistics*, 2015, Catalogue No. 4330.0 Canberra: ABS

<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4330.0>

Brooke, Henry, 'Judges and vicarious trauma'

<https://sirhenrybrooke.me/2017/04/28/judges-and-vicarious-trauma/>

EMDR Institute Inc, *Eye Movement Desensitisation and Reprocessing, Providing an Effective Therapy for the Treatment of Trauma*

<http://www.emdr.com/>

Judicial College of Victoria Judicial Wellbeing Literature Pages

<http://www.judicialcollege.vic.edu.au/judicial-wellbeing/judicial-stress/literature>

Gibson J and Snow D 'My brother judge's tragic fate: Chief Justice speaks out' *Sydney Morning Herald*, 18 October 2010

Kirby, Michael, 'Judicial Stress' (Speech delivered at the Annual Conference of the Local Courts of NSW, Law and Justice foundation of NSW, 2 June 1995)

<http://www.lawfoundation.net.au/ljf/app/&id=E812A4B4C60E3A26CA2571A8002344A5>

Kirby, Michael, 'Lawyers' Suicide- The Influence of Legal Studies and Practice, Stress, Clinical Depression and Sexuality' (Speech delivered at the launch of the Daniel Solomons Memorial Scholarship, Ashurst Lawyers, UNSW Law, Sydney, 20 April 2015) 38(4) *University of New South Wales Law Journal*

Law Society of NSW, *Mental Health Statistics and Seeking Help*

<https://www.lawsociety.com.au/about/YoungLawyers/MentalHealth/Statistics/index.htm>

Lee, Jane, 'Judge tells of depression struggle in bid to help many in legal circles', *The Age* (online), 14 September 2013 <http://www.theage.com.au/victoria/judge-tells-of-depression-struggle-in-bid-to-help-many-in-legal-circles-20130913-2tqci.html>

Lustic SL et al 'Inside the Judges Chambers: narrative responses from the National Association of Immigration Judges stress and burnout survey' *Georgetown Immigration Law Journal*, 23 Geo. Immigr. L.J. 57

Marshall, Shane R, 'Depression: An issue in the study of law' (Keynote address delivered at the National Wellness for Law Forum, Australian National University College of Law, February 2015)

Queensland Government, *Mental Health Review Tribunal* (2010) <https://www.mhrt.qld.gov.au/>

Tristan Jepson Memorial Foundation Resources and Publications

<http://www.tjmf.org.au/resources/online-publications/>

