

THE COURT AS A WORKPLACE: Notes for starting a conversation within the County Court

Keith Mason

County Court of Victoria Conference

22 March 2016

Adversary trials are often stressful

Pressure to achieve outcome that is timely and just: much of that pressure is built into the system deliberately

The different “players” (judge included) perceive the stress points from their own perspective and are less aware of the impact on the others

Each participant is focussed on deadlines in an era of case management. Much extra work has to be done “out of court”.

Difficult self-represented litigants; sometimes aggressive counsel

Each participant has several lives outside the law any one of which may impact on performance generally or on a particular day

Judge has duty to control proceedings with the power to adjourn. Litigants, witnesses and profession have less control over what is happening.

Absolute privilege, but words can wound those sensitive about their reputation

Consider a time when as counsel or judge you felt frightened or overwhelmed. Or when in either capacity a painful injustice was done to you by an opponent, judge or appellate court.

Layers of scrutiny of judges in the modern world

Open justice, appellate review, media scrutiny (and attack)

Judgments on internet

Modern appellate sensitivity about procedural fairness, bias etc etc

Greater understanding about depression touching lawyers and judges

Bar Association, Judicial Commission

The duty of care with respect to psychological safety owed by employers (including the Crown as DPP and Public Defender) means that judges can expect greater awareness, sympathy and response in defence of advocates, solicitors and witnesses who are placed under unreasonable pressure. Hopefully Chief Judge and other judges will exercise pastoral care for colleagues, although judicial independence and individualistic work practices limit oversight.

If we viewed the court and the courtroom as workplaces (for all participants) what difference would it make?

OH&S laws apply already, at least to employees

Concerns about *physical* safety reflected in screening and emergency protocols which are mainly the responsibility of “government” working cooperatively with chief justices and court administrators

But what about *psychological* safety? And what should be expected of the trial judge who has a duty to control his or her own court?

- Witnesses (and legal practitioners) sometimes need and get protection from judge if they are assailed by parties or legal practitioners
- Although “the Crown” is the employer of judicial and registry staff, the Court and the individual judge have significant independent power and moral responsibility
- *Quis custodiet ipsos custodiet* as regards the conduct of the judge in his or her own courtroom and chambers?

Judges are no longer expected to sit Sphinx-like. Indeed, “there is a growing expectation that Courts should take a more interventionist role than in the past and some may want to run a tight ship....Courts have to act with courtesy but above all with authority. Instances of sharp words, incredulity, sarcasm or urgings may be no more than a technique to try and ensure parties concentrate on the issues before the Court and act constructively. Litigation in the courts would be simply unworkable if relief was available by way of certiorari each time a judge in effect was telling parties to ‘get on with it’....” [*AB v Magistrates’ Court of Victoria at Heidelberg* [2011] VSC 61 at [93] per Mukhtar AsJ]

However, there are limits. The denial of an opportunity for a litigant to fairly put his case and judicial treatment in “an arrogant, rude and inappropriate manner” resulted in a quashing of orders in the District Court of New South Wales in *Reznitsky v Director of Public Prosecutions (NSW)* [2014] NSWCA 79 at [38] per Tobias AJA.

Could this possibly happen in Victoria?

Whether or not judicial conduct passes appellate muster, all should all aspire to do their best to make the courtroom a safe and functioning workplace

Being honest with ourselves about individual and collective responses to the bullying issue

“Our adversary system needs vigorous cross-examination. Counsel are all different and need leeway.”

“It happened to me at the Bar and I learnt the hard way.”

“What else can one do with hopeless advocates?”

“I was having a hard day myself because....”

“I didn’t realise until ... that s/he was hurt by my remarks.”

Probably everyone has experienced bullying from the Bench (including from a higher court)

Is bullying in the courtroom a problem?

Can trial judges collectively or individually do anything about it?

What is bullying?

Bullying may be defined as having two key features:

- The first being that bullying involves the *repetition* of unreasonable behaviour such as public criticism, name-calling, intimidation, humiliation and verbal abuse.
- The second key feature is that the unreasonable behaviour causes (or has the potential to cause) *harm* to the individual who is experiencing the behaviour.

The law is showing increasing concern with bullying behaviour;

- Successful tort claims in the private and public sectors (eg *New South Wales v Mannall* [2005] NSWCA 367; *Sneddon v Speaker of the Legislative Assembly* [2011] NSWSC 508)
- OH&S legislation across Australia now defines “health” as meaning “physical and psychological health”. Section 19 of the *Work Health and Safety Act 2011 (Cth)* requires a person conducting a business or undertaking to ensure, so far as reasonable practicable, the provision and maintenance of safe systems of work etc.
- Complaints about judicial bullying have come before the New South Wales Judicial Commission or have been made the grounds of a new trial application in the Court of Appeal.
- Certain types of aggressive behaviour may create an appearance of bias; or at least strong dissatisfaction from litigants.

Bullying usually occurs where there is a power relationship where the victim is or feels restrained in responding or complaining.

Judicial officers and bullying

The Bar Association occasionally receives feedback and sometimes makes representations about judicial bullying to the Chief Justice and others. Barristers will certainly discuss these issues.

Judges have legal and ethical duties to protect witnesses and others from bullying by third parties *as well as* from themselves.

Some lawyers and judges have a *reputation* for bullying whether or not they are aware of it.

Experience in the New South Wales Judicial Commission reveals that bullying by a judge may evidence his or her own psychiatric issues.

Some barristers have bullied judges or their staff.

Registry staff need particular care in relation to bullying from some litigants and practitioners.

A suggestion: Could the Court become a signatory to the Tristan Jepson Memorial Foundation Best Practice Guidelines?

The Supreme Court of Victoria is a signatory

Justice Virginia Bell's 2014 lecture about the Guidelines is available in hard copy and video through the website of the Foundation

The following information about the Guidelines is from the website:

Introduction

As part of the Tristan Jepson Memorial Foundation's commitment to support psychologically healthy workplaces in the legal profession, we are pleased to introduce the TJMF Psychological Wellbeing: Best Practice Guidelines for the Legal Profession, intended for use by all within the Australian legal profession, including students, sole practitioners, barristers, in-house legal counsel, practitioners within law firms of all sizes, and the judiciary.

The purpose of the Guidelines is to provide a resource for those within the Australian legal profession by using evidence-based approaches to promoting a psychologically healthy workplace. The Guidelines are intended to support lawyers, law firms and others working within the profession to raise awareness of mental health issues, and to understand the initiatives and methods of management that assist in the creation and maintenance of psychologically healthy and supportive workplaces.

The Guidelines have been developed through the work of a Sub-Committee of the Tristan Jepson Memorial Foundation, representing a broad range of people within the profession. They build on a range of international and national activities, including the work of the Mental Health Commission of Canada (MHCC), under the auspices of the Canadian Standards Association and the Bureau de Normalisation du Québec (BNQ), and, in Australia, the Mental Health Alliance.

The Guidelines also recognise the value of providing specific guidance tailored to the particular workplace issues that arise in the legal profession and aim to provide that guidance in a way which reflects the varied nature of the profession, particularly in terms of size and resources.

Why?

It is recognised that all legal workplaces are stressful and it has been shown that legal professionals are disproportionately at risk of suffering from psychological distress and illness.¹

Workplace factors have been proven to contribute to this risk,² causing harm to people's health and adverse impacts on the organisations that employ them (including absenteeism, "presenteeism", staff attrition, and WHS liability risks).

The aim

The Guidelines promote psychologically healthy legal workplaces. The aim of the Guidelines is to assist legal organisations to create workplaces that fulfil each of the Psychosocial Factors, identified by extensive research as critical to psychological health:

Psychosocial Factor A work environment characterised by:

Organisational culture	trust, honesty and fairness
Psychological and social support	support for employees' psychological and mental health concerns
Clear leadership and expectations	employees that know what they need to do and how their work contributes
Civility and respect	employees are respectful and considerate of each other
Psychological competencies and requirements	a good fit of interpersonal and emotional competencies and roles
Growth and development	encouragement and support of interpersonal, emotional and job skills
Recognition and reward	acknowledgement and appreciation in a fair and timely manner
Good involvement and influence by staff	employees that are included in discussions about their work and how important decisions are made
Workload management	responsibilities that can be accomplished successfully within the time available
Engagement	employees that feel connected to their work and are motivated
Balance	recognition of the need for balance between work, family and personal life
Psychological protection	appropriate action is taken to protect employees' psychological safety
Protection of physical safety	appropriate action is taken to protect the physical safety of employees

How?

The Guidelines are a voluntary framework for legal organisations to utilise.

Signatories are encouraged to implement the Guidelines at their own pace and in their own way; implementation of the Guidelines can be tailored to each individual legal workplace. The Guidelines framework is based on a spectrum of self-motivated improvement.³

The Guidelines framework encourages ongoing improvement within the profession. In time, the Guidelines will assist cultural change and change of attitude; changes in the way we think, speak and act in addressing psychological health and safety.

In turn, the structure, policies and processes of legal organisations will change to match that new attitude and culture. By becoming signatories to the Guidelines, legal organisations are demonstrating that they are leaders in the profession and they are committing to putting psychological safety at the heart of their organisational culture and at the forefront of their minds.

13 Psychological Factors

PF1: Organisational culture

A work environment characterised by trust, honesty and fairness.

1. All people in the workplace are held accountable for their actions

2. People at work show sincere respect for others' ideas, values and beliefs
3. Difficult situations at work are addressed effectively
4. Staff feel that they are part of a community at work
5. Staff and management trust one another

PF2: Psychological and social support

A work environment where co-workers and supervisors are supportive of employees' psychological and mental health concerns, and respond appropriately as needed.

1. The organisation offers services or benefits that address employee psychological and mental health
2. Staff feel part of a community and that the people they are working with are helpful in fulfilling the job requirements
3. The organisation has a process in place to intervene if an employee looks distressed while at work
4. Staff feel supported by the organisation when they are dealing with personal or family issues
5. The organisation supports employees who are returning to work after time off due to a mental health condition
6. People in the organisation have a good understanding of the importance of employee mental health

PF3: Clear leadership and expectations

A work environment where there is effective leadership and support that helps employees know what they need to do, how their work contributes to the organisation, and whether there are impending changes.

1. In their jobs, employees know what they are expected to do
2. Leadership in the workplace is effective
3. Staff are informed about important changes at work in a timely manner
4. Supervisors provide helpful feedback to employees on their expected and actual performance
5. The organisation provides clear, effective communication

PF4: Civility and respect

A work environment where employees are respectful and considerate in their interactions with one another, as well as with customers, clients and the public.

1. People treat each other with respect and consideration in the workplace
2. The organisation effectively handles conflicts between stakeholders (staff, customers, clients, public, suppliers, etc.)
3. People from all backgrounds are treated fairly in the workplace
4. The organisation has effective ways of addressing inappropriate behaviour by customers or clients

PF5: Psychological competencies and requirements

A work environment where there is a good fit between employees' interpersonal and emotional competencies and the requirements of the position they hold.

1. The organisation considers existing work systems and allows for work redesign
2. The organisation assesses employee demand and job control issues such as physical and psychological job demands
3. The organisation assesses the level of job control and autonomy afforded to its employees
4. The organisation monitors the management system to address behaviours that impact employees and the workplace
5. The organisation values employee input particularly during periods of change and the execution of work
6. The organisation monitors the level of emphasis on production issues

7. The organisation reviews its management accountability system that deals with performance issues and how staff can report errors
8. The organisation emphasises recruitment, training, and promotion practices that aim for the highest level of interpersonal competencies at work

PF6: Growth and development

A work environment where employees receive encouragement and support in the development of their interpersonal, emotional and job skills.

1. People receive feedback at work that helps them grow and develop
2. Supervisors are open to employee ideas for taking on new opportunities and challenges
3. People have opportunities to advance within their organisation
4. The organisation values employees' ongoing growth and development
5. People have the opportunity to develop their "people skills" at work

PF7: Recognition and reward

A work environment where there is appropriate acknowledgement and appreciation of employees' efforts in a fair and timely manner.

1. Immediate supervision demonstrates appreciation of employees' contributions
2. People are paid fairly for the work they do
3. The organisation appreciates efforts made by employees
4. The organisation celebrates shared accomplishments
5. The organisation values employees' commitment and passion for their work

PF8: Good involvement and Influence by staff

A work environment where employees are included in discussions about how their work is done and how important decisions are made.

1. Staff are able to talk to their immediate supervisors about how their work is done
2. People have some control over how they organise their work
3. People's opinions and suggestions are considered with respect to work
4. People are informed of important change that can impact how their work is done
5. The organisation encourages input from all staff on important decisions related to their work

PF9: Workload management

A work environment where tasks and responsibilities can be accomplished successfully within the time available.

1. The amount of work employees are expected to do is reasonable for their positions
2. People have the equipment and resources needed to do their jobs well
3. Staff can talk to their supervisors about the amount of work they have to do
4. People's work is free from unnecessary interruptions and disruptions
5. Staff have an appropriate level of control over prioritising tasks and responsibilities when facing multiple demands

PF10: Engagement

A work environment where employees feel connected to their work and are motivated to do their job well.

1. People enjoy their work
2. People are willing to give extra effort at work if needed
3. People describe work as an important part of who they are
4. Staff are committed to the success of the organisation
5. People are proud of the work they do

PF11: Balance

A work environment where there is recognition of the need for balance between the demands of work, family and personal life.

1. The organisation encourages people to take their entitled breaks (e.g. lunchtime, sick leave, annual leave, parental leave)
2. Staff are able to reasonably meet the demands of personal life and work
3. The organisation promotes life-work harmony
4. Staff can talk to their supervisors when they are having trouble maintaining harmony between their life and work
5. People have energy left at the end of most workdays for their personal life

PF12: Psychological protection

A work environment where management takes appropriate action to protect employees' psychological safety.

1. The organisation is committed to minimising unnecessary stress at work
2. Immediate supervisors care about employees' emotional wellbeing
3. The organisation makes efforts to prevent harm to employees from harassment, bullying, discrimination, violence or stigma
4. People would describe the workplace as being psychologically healthy
5. The organisation deals effectively with situations that can threaten or harm staff (e.g. harassment, bullying, discrimination, violence, stigma, etc.)

PF13: Protection of physical safety

A work environment where management takes appropriate action to protect the physical safety of employees.

1. The organisation cares about how the physical work environment impacts mental health
2. People feel safe (not concerned or anxious) about the physical work environment
3. The way work is scheduled allows for reasonable rest periods
4. All health and safety concerns are taken seriously
5. Staff asked to do work that they believe is unsafe, have no hesitation in refusing to do it
6. People get sufficient training to perform their work safely
7. The organisation assesses the psychological demands of the jobs and the job environment to determine if it presents a hazard to people's health and safety