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A fragile bastion:¹ UNSW judicial traumatic stress study

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The UNSW study² examined 205 NSW judicial officers' survey responses regarding the prevalence and impact of three kinds of traumatic stress: threats to the person, vicarious trauma, and vilification and included two psychometric tests, measuring PTSD symptoms and psychological distress. It follows Carly Schrever's pioneering Victorian study on judicial officers' stress and well-being.³ The UNSW study reveals alarmingly high levels of psychological distress among respondents with 30% receiving tests scores indicative of likely PTSD. Over half reported being the subject of one or more type of threat, including 23% who had experienced death threats. Three quarters of judicial officers reported suffering negative effects associated with vicarious trauma and more than half of the respondents reported vilification in the form of harsh public criticism. The findings enable comparisons to be drawn between courts. Compared to judges in the higher courts, magistrates reported qualitatively and quantitatively different experiences, including significantly higher levels of trauma-related symptoms.

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1 The title, *Fragile Bastion*, comes from Sir Ninian Stephen's "Southey memorial lecture 1981: Judicial independence — a fragile bastion" (1982) 13 *University of Melbourne Law Review* 334.

2 A comprehensive study of the findings from the study's survey, K O'Sullivan, J Hunter, P Vines & R Kemp, "Traumatic stress in judicial officers – prevalence and impact" is under preparation for publication.

3 C Schrever, et al, "The psychological impact of judicial work: Australia's first empirical research measuring judicial stress and wellbeing" (2019) 28 *JJA* 141. This compared judicial stress with that of lawyers and the general population; see also C Schrever, "Australia's first research measuring judicial stress: what does it mean for judicial officers and the courts?" (2019) 31 *JOB* 41.

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Introduction

In Australia in the mid-1990s, the Honourable Michael Kirby AC CMG attracted criticism from the profession with his article on judicial stress (subtitled, “An unmentionable topic”).⁴ The general topic of judicial well-being then languished until 2017 when former magistrate David Heilpern spoke at the Federal Court-hosted Sydney Lecture of the Tristan Jepson Memorial Foundation (now known as “Minds Count”) with a personal account of the traumatic nature of his work presiding over trials involving evidence of horrific child abuse cases.⁵ As one Local Court survey respondent to the UNSW study noted, there have been tangible and tragic indicators of workplace pressures on judicial officers with the deaths in Victoria in 2018 and 2017 respectively of Magistrates Stephen Myall and Jacinta Dwyer.⁶

The tragic deaths in 2020 of Federal Circuit Court Judge Guy Andrew and of New Zealand District Court Judge Robert Ronayne, add further evidence to the contemporary challenge for judicial officers to maintain good psychological health.

In 1997, the Honourable John Doyle AC, then Chief Justice of South Australia, observed that “the judiciary as an institution has suffered in silence when it ... [has been] the subject of inaccurate and ill-informed discussion and criticism”.⁷ This observation has potency in the age of social media, and it is notable that these concerns are repeated in responses to the UNSW Study 20 years later showing continuing ill-informed or unfair media comment about judicial officers. An illustration of this “suffering in silence”

comes from one magistrate in the UNSW study who said that negative comment “without any true understanding of the case or decision” causes concern and “it is difficult not to be upset by it when family, friends and others comment on it to you”.

The researchers undertook the UNSW study with the working hypothesis that judicial officers are not exempt from the human condition⁸ and that many are confronted by the trauma of others’ lives in episodic and often relatively predictable ways. Vicarious trauma (known also as secondary traumatic stress or compassion fatigue or the “cost of caring”)⁹ is one of three focal points of the UNSW study. Recognising the presence of vicarious trauma to some extent challenges conventional wisdom that judicial officers adjudicate by putting to one side their emotions (along with their beliefs and personal predilections). Indeed, some respondents to our survey indicated that the mix of other potential trauma (such as threats to their safety, and vilification) and the intensity of their workload means there is little relief between trauma episodes.

A number of studies have shown that vicarious trauma can be a side effect of work as lawyers,¹⁰ as jurors,¹¹ as fire fighters,¹² among social workers,¹³ as well as those working in medicine.¹⁴ Of course, the dynamics of judicial officers’ exposure to vicarious trauma differs from that of first responders to crises. One difference is that judicial officers’ trauma burden is affected by the constraints of their role and features of their workplace. For instance, in the United States, Zimmerman¹⁵ observed in the 1980s, the consequence of judicial isolation¹⁶ is that judicial officers may have limited debriefing opportunities beyond

- 4 M Kirby, “Judicial stress” (1995) *Australian Bar Review* 1. See M McMurdo, *Should judges speak out?*, Judicial Conference of Australia, Uluru, April 2001 at <http://www.austlii.edu.au/au/journals/QldJSchol/2001/49.pdf>, accessed 9/2/2021.
- 5 D Heilpern, “Lifting the judicial veil – vicarious trauma, PTSD and the judiciary: a personal story”, address to the Tristan Jepson Memorial Foundation, Sydney, 25 October 2017.
- 6 See also N Towell & A Cooper, “Struggling magistrates cry for help”, *The Age*, April 2, 2018 at www.theage.com.au/national/victoria/struggling-magistrates-cry-for-help-20180401-p4z7bh.html, accessed 9/2/2021; P Wilmoth, “Loneliness, panic attack, insomnia: life for some on the judicial bench”, *Sydney Morning Herald*, 4 August, 2018, at www.smh.com.au/national/loneliness-panic-attacks-insomnia-life-for-some-on-the-judicial-bench-20180731-p4zukuq.html, accessed 9/2/2021; T Mills & A Cooper, “Overworked and burdened, death of a magistrate in a judiciary under pressure”, *The Age*, 7 August, 2020, at www.theage.com.au/national/victoria/overworked-and-burdened-death-of-a-magistrate-in-a-judiciary-under-pressure-20200807-p55jpf.html, accessed 9/2/2021.
- 7 J Doyle, “The well-tuned cymbal”, in H Cunningham (ed), *Fragile bastion: judicial independence in the nineties and beyond*, Education Monograph 1, Judicial Commission of NSW, 1997, 39, at 42.
- 8 See for example, TA Maroney & JJ Gross, “The ideal of the dispassionate judge: an emotion regulation perspective” (2014) 6 *Emotion Review* 142.
- 9 See CR Figley (ed), “Compassion fatigue: Coping with secondary traumatic stress disorder in those who treat the traumatized” (1995) 23 *Brunner/Mazel psychological stress series*.
- 10 J Chan, et al, “Lawyering stress and work culture: an Australian study” (2014) 37 *UNSWLJ* 1062; P Weir, et al, “Australian lawyers”, experience of exposure to traumatic material: a qualitative study” (2020) *Psychiatry, Psychology and Law* 1. See also Meritas, Australia & New Zealand Wellness Survey 2019, at www.swaab.com.au/assets/download/Meritas-Wellness-Survey-Report.pdf, accessed 8/2/2021, accessed 9/2/2020.
- 11 N Robertson, et al, “Vicarious traumatisation as a consequence of jury service” (2009) 49 *Howard J of Criminal Law* 1–12; M Lonergan, et al, “Prevalence and severity of trauma-and stressor-related symptoms among jurors: a review” (2016) 47 *Journal of Criminal Justice* 51.
- 12 JH Lee, et al, “Duty-related trauma exposure and posttraumatic stress symptoms in professional firefighters” (2017) 30 *Journal of Traumatic Stress* 133.
- 13 BE Bride, “Prevalence of secondary traumatic stress among social workers” (2007) 52 *Social Work* 63.
- 14 UO Imo, “Burnout and psychiatric morbidity among doctors in the UK: a systematic literature review of prevalence and associated factors” (2017) 41 *BJ Psych Bulletin* 197; K Ahola & J Hakanen, “Job strain, burnout, and depressive symptoms: a prospective study among dentists” (2007) 104 *Journal of Affective Disorders*, 103; CP West, et al, “Interventions to prevent and reduce physician burnout: a systematic review and meta-analysis” (2016) 388 *The Lancet* 2272.
- 15 IM Zimmerman, “Stress: what it does to judges and how it can be lessened” (1981) 20 *The Judges’ Journal*, ABA, 5.
- 16 IM Zimmerman, “Isolation in the judicial career” (2000) *Court Review* 4.

their own collegiate setting.¹⁷ As well as the impact of isolation in judicial practice, writers have also examined judges' and magistrates' exposure to and engagement with the details of acts of violence and sexual predation.¹⁸ Finally, in Pennsylvania, a 2001 empirical study with over 1,000 judicial respondents, initiated by the judiciary, found that 52% of respondents had received a threatening communication of some kind, including physical assaults during the previous year.¹⁹ A series of three studies by Monica Miller and colleagues²⁰ concluded, somewhat uncontroversially, that "stress likely affects judges in many ways".²¹ A 2020 US study adds a little more empirical data about events that contribute to traumatic impact. However, as indicated below, its response rate was very low.²²

The UNSW Study

The UNSW study's researchers, two academic lawyers, one psychology academic and a clinical psychologist, were aware of Carly Schrever's excellent work on judicial well-being undertaken in association with the Judicial College of Victoria.²³ The Victorian study applies a range of psychological scales to evaluate the prevalence and severity of judicial stress and also interviewed judicial officers. The UNSW study has taken a different approach in various respects. For example, it sought judicial officers' views and strategies on managing work-based distress and (like Schrever) employed the K10, a standardised scale

which is widely used to measure non-specific psychological distress.²⁴ Further, while Schrever employed the Secondary Trauma Stress Scale (STSS),²⁵ the UNSW study used the Impact of Event Scale (IES-R) to measure the extent to which respondents experience psychological distress related to a specific stressful life event following a traumatic event.²⁶ The Impact of Event Scale items, like the STSS scale, broadly align with the diagnostic criteria for PTSD.²⁷

Methodology of the UNSW Study

In mid-2019, 371 currently appointed and retired²⁸ NSW judicial officers were invited to participate in an online survey study of the frequency and impact of certain challenging circumstances in their work.²⁹

The Judicial Commission of NSW supported the project in crucial ways, assisting with the construction, distribution and de-identification of the survey and facilitating arms-length engagement between judicial officers and researchers. The Commission also communicated with heads of jurisdictions in all levels of the NSW court structure and hosted communications with an advisory committee of nominees of each jurisdiction.³⁰ A small pilot evaluation by some judicial officers finessed the survey's scope and detail. The survey responses were automatically de-identified before being released to the researchers, and additional checks were undertaken to remove inadvertent identification by respondents.

17 A Resnick, et al, "Surviving bench stress" (2011) 49 *Family Court Review* 610-617; IM Zimmerman, *ibid*.

18 Resnick, *ibid*.

19 DJ Harris, et al, "Violence in the judicial workplace: one State's experience" (2001) 576(1) *The Annals of the American Academy of Political and Social Science* 38.

20 M Miller & J Richardson, "A model of causes and effects of judicial stress" (2006) 45 *Judges' Journal* 20; D Flores, et al, "Judges' perspectives on stress and safety in the courtroom: an exploratory study" (2008) 45 *Court Review* 76; M Miller, et al, "An examination of outcomes predicted by the model of judicial stress" (2018) 102 *Judicature* 50; M Miller, et al, "Judicial stress: the roles of gender and social support" (2018) 25 *Psychiatry, Psychology and Law* 602.

21 M Miller, et al, "An examination of outcomes predicted by the model of judicial stress", *ibid*, at 55.

22 See D Swenson, et al, "Stress and resiliency in the US judiciary" (2020) *Journal of the Professional Lawyer*, ABA 1. For a comprehensive review of studies on judicial stress, see E Rossouw & S Rothmann, "Well-being of judges: a review of quantitative and qualitative studies" (2020) 46 *SA Journal of Industrial Psychology* 1.

23 Note that at the time the UNSW study was conceived and the survey administered, we were not aware of Schrever's methodology, or her findings. See C Schrever, et al, "The psychological impact of judicial work: Australia's first empirical research measuring judicial stress and wellbeing", above n 3. This compared judicial stress with that of lawyers and the general population; see also C Schrever, "Australia's first research measuring judicial stress: what does it mean for judicial officers and the courts?", above n 3.

24 RC Kessler et al, "Screening for serious mental illness in the general population" (2003) 60 *Archives of General Psychiatry* 184; G Andrews & T Slade, "Interpreting scores on the Kessler Psychological Distress Scale (K10)" (2001) 25 *Australian and New Zealand Journal of Public Health* 494.

25 That is, "a 17-item, five-point scale measuring the frequency (1 = never; 5 = very often), over the past seven days, of intrusion, avoidance and arousal symptoms associated with the indirect exposure to traumatic events via one's professional contact with traumatised individuals": Schrever et al, "The psychological impact of judicial work: Australia's first empirical research measuring judicial stress and wellbeing", above n 3, p 152 and see BE Bride et al, "Development and validation of the secondary traumatic stress scale" (2004) 14 *Research on Social Work Practice* 27.

26 There are subscales for intrusion, avoidance and hyperarousal (the three clusters of PTSD symptoms): M Horowitz, et al, "Impact of event scale: a measure of subjective stress" (1979) 41 *Psychosomatic Medicine* 209; DS Weiss & CR Marmar, "The impact of event scale-revised" in JP Wilson & TM Keane (eds), *Assessing psychological trauma and PTSD: a practitioner's handbook*, Guilford Press, 1997, at 399.

27 The psychometric properties of the IES-R are well established (JG Beck, et al, "The impact of event scale-revised: psychometric properties in a sample of motor vehicle accident survivors" (2008) 22 *Journal of Anxiety Disorders*, 187. Although not designed to diagnose PTSD, IES-R cut-off scores have been widely adopted including 33 as cut-off for probable diagnosis of PTSD (M Creamer, et al, "Psychometric properties of the impact of event scale-revised" (2003) 41 *Behaviour Research and Therapy*, 1489) and a cut-off of 37 as high enough to suppress normal functioning of the immune system (N Kawamura, et al, "Suppression of cellular immunity in men with a past history of posttraumatic stress disorder" (2001) 158 *American Journal of Psychiatry* 484).

28 That is, those who had held a commission in NSW in the previous 10 years.

29 Ethics approval was granted by the University of NSW: HC no 180920 UNSW.

30 Two judges of the Supreme Court, one judge of the Land and Environment Court, one judge of the District Court, two magistrates from the Local Court, two judicial officers with a close association to the Tristan Jepson Memorial Foundation (now called "Minds Count"), and a retired judicial officer.

Survey responses and findings

Both the overall response rate of 205 out of 371 judicial officers (55.3%), and the Local Court response rate of 71.8% (125 of a total of 174 Local Court judicial officers) are very high, particularly in light of the survey's demands on respondents' time.³¹ Notwithstanding lower response rates in the higher

courts, the overall response rate provides a rich insight into NSW judicial officers' experiences and views, particularly within the Local Court. That respondents took time to provide over 200 additional comments indicates that the subject matter is of considerable interest to respondents. These comments are a valuable source of information relevant to formulating effective practical responses to the study's findings.

Table 1: Demographic particulars

Demographic Variable	N	% Sample [^]
Jurisdiction		
Supreme Court/Land and Environment Court	21	10
District Court	23	11
Local Court	125	61
Missing	36	17.6
Total years on the bench		
0–5	51	24
6–10	48	23
11–15	34	17
16 or more	47	23
Missing	24	11.7
Gender		
Male	110	54
Female	78	38
Missing	17	8.3
Location in last 12 months		
Metropolitan	121	59
Regional	51	25
Remote	4	2
Missing	29	14.1
Age		
24–34	0	0
35–44	5	2
45–54	41	20
55–64	83	41
65 and over	47	23
Missing	29	14.1
Status of appointment		
Current	173	84
Retired	11	5
Missing	21	10.2
TOTAL number of respondents	205	

[^] = Not all categories were completed by all respondents. Note, percentages are rounded.

Note: Varying across categories, between 17 (8.3%) and 36 (17.6%) respondents did not provide a response to the questions on demographic details.

31 Responses were sought for 428 potential variables using Likert scales and yes/no questions. These strong response rates are comparable (but not as high as) Schrever's study (with response rates between 51% and 85%, averaging 67%), above, n 3. The study conducted in Pennsylvania at a 1999 trial judges meeting achieved a response rate of 1029/1112 (93%): DJ Harris, et al, above n 19. Compare however the US Judicial and Resiliency Survey from 2020, the first United States national picture of judicial stress. Its data reflects only 6% of the entire US judiciary. See D Swenson, et al, above, n 22.

Distinction between trauma and stress

The survey drew a distinction between trauma and stress. *Trauma* was used to indicate the result of a deeply distressing event that shocks the organism and is not processed in the way other life events are processed.³² *Stress* was used to mean the impact of ongoing demands in the ordinary course of a person's life. *Stressful events* included a large workload, unfair allocation of work, poor administrative support, legal or other constraints on determinations, public expectations and negative public comment on the judiciary. We provided three categories of trauma events in the survey:

- *experience of threat*: with 10 different types (for example, aggressive and threatening behaviour by parties, or others)
- *vilification*:³³ including personal vilification in print, broadcast or social media and negative references of a personal nature from a higher court
- *vicarious trauma*: that is, accounts of trauma in the lives of others (exposure to graphic material).

The survey presented a list of 15 events that might cause stressful or traumatic distress. Respondents were asked: *How often did it happen?*³⁴ *How big a negative impact did it have?*³⁵ Two aggregate scores gauged the overall level of distress by summing the scores for responses to the first question: *prevalence of events* and for the second question: *impact of events*.³⁶ These scores were called *Potential Distress Experience* (PDE) and *Potential Distress Impacts* (PDI), measuring perceived severity of impact. We also calculated subscores within these two measures for events that were related to traumatic distress (PDE-Trauma, PDI-Trauma), and those related to stress (PDE-Stress, PDI-Stress).

Eleven of the 15 potential distress events were reportedly experienced by more than 75% of the respondents.³⁷ Four of these experiences³⁸ were endorsed by over 90% of respondents; only four were endorsed by fewer than 75% (one of these by 74.9%). This indicates a very high level of exposure to events which have the potential to contribute to significant levels of traumatic stress. Impact scores were similarly spread with at least 40% of respondents reporting a more than "slight" impact from eight of the 15 events, with "excessive workload", endorsed by 84.8% of respondents; exposure to graphic material endorsed by 54% of respondents and inadequate administrative support by just slightly fewer respondents (53.3%).

Variation by gender, location and jurisdiction

Both the *Potential Distress Experience* (PDE) and *Potential Distress Impacts* (PDI) scores varied by gender, location and jurisdiction, summarised below.

- Perhaps the most striking finding is that Local Court judicial officers reported more stressful and traumatic events than those sitting in the higher courts. The Local Court respondents reported also suffering a greater impact from these events overall, both for stressful events and for trauma events.
- Compared to judicial officers in metropolitan courts, those in regional locations reported experiencing events significantly more often (PDE) and reported a significantly greater impact of all events, of stressful events (PDI-Stress), and traumatic events (PDI-Trauma).
- Men and women reported experiencing these events to a similar degree, but compared to men, women reported significantly greater impacts both overall and for trauma (PDI-Trauma).
- There is a hint that retirement may be beneficial for judicial officers' mental well-being, with slightly lower K10 scores reported by retired compared to serving judicial officers. However, the IES-R score (that is, a measure of PTSD symptomatology) shows a significant increase with more years of service as a judicial officer but, given the small number of retired judicial officers in our sample, this difference was not statistically significant.

Figures 1 and 2 below map the responses in the two psychological well-being scales (K10 and IES-R)³⁹ across the court hierarchy. IES-R is a 22-item self-report scale which measures PTSD symptoms. Scores can range from 0-88, with a score of 33 widely adopted as a likely indicator of PTSD. The K10 is a 10-item scale which is used to screen for psychological distress and possible mental illness. Scores can vary between 10 and 50, with a score of 30 or greater indicating the respondent is likely to be experiencing severe distress. A total of 124 respondents answered all items on the IES-R and 143 answered all K10 items, and of these respondents, some chose not to indicate the court they worked in. This resulted in small numbers of valid scores for the higher courts, so for the purposes of statistical analysis, these courts were combined to form one "Higher Court" category.

32 Trauma is defined in the DSM-5 as resulting from being "exposed to one or more event(s) that involved death or threatened death, actual or threatened serious injury, or threatened sexual violation": APA, *Diagnostic and Statistical Manual of Mental Disorders*, 5th edn, 2013.

33 "Vilification is a rhetorical strategy that discredits adversaries as ungenue and malevolent advocates": ML Vanderford, "Vilification and social movements: a case study of pro-life and pro-choice rhetoric" (1989) *75 Quarterly Journal of Speech* 166.

34 Using the Likert scale responses where 1 = never; 5 = constantly.

35 Using the Likert scales responses where 1 = none; 5 = very significant.

36 Applying the approach of JH Lee et al, "Duty-related trauma exposure and posttraumatic stress symptoms in professional firefighters", above n 12.

37 The four events scored by less than 75% of respondents were (i) threatening behaviour by others (not parties) (74.9%); (ii) personal vilification in the media (67.6%); (iii) bullying (38.9%), and (iv) negative references of a personal nature from a higher court (28.3%).

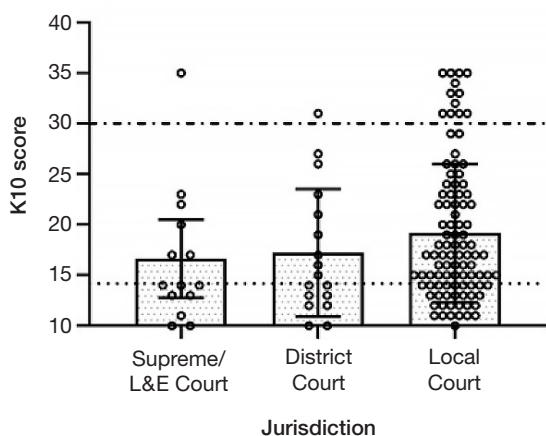
38 These were excessive volume of workload (98.9%); aggressive and threatening behaviour by parties (94.1%); exposure to graphic material (93.5%); and negative public comment on the judiciary (90.3%).

39 Scores were only calculated for respondents who answered all items on the K10 (143 respondents) and IES-R (124 respondents) scales.

Figure 1 shows the distribution of responses applying the K10 scores by jurisdiction.

- Almost 10% of respondents (14, 9.8%) scored 30 or higher on the K10 compared to 2.2% of the general Australian public. A score of 30 is widely accepted to indicate severe mental distress.
- Overall, only 50 (35%) of judicial officers scored below 15 indicating they were likely to be well. This compares to 68% of the general population of Australia.
- The mean K10 score for respondents (18.4) was significantly higher than the mean for the Australian population (14.2) which is shown by the lower line in Figure 1 below ($t=7.42$; $df=128$; $p<.001$).
- Average K10 scores were slightly higher for the Local Court than for the higher courts (19.2 vs 17.0) but this difference was not statistically significant ($t=1.57$; $df=127$; $p<.001$). There were also no significant differences in K10 scores as a function of gender or location of the court, or jurisdiction.

Figure 1: Kessler Psychological Distress Scale (K10) by Jurisdiction



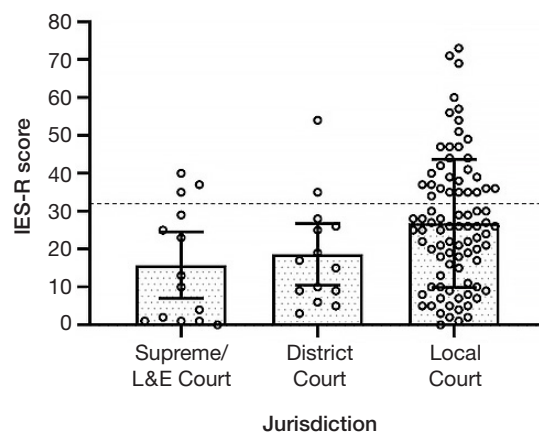
KEY: Distribution of K10 scores for Supreme (N=14), District (N=17) and Local (N=98) Court respondents. Top line (a score of 30) indicates cut-off for severe mental distress.

Dotted line at 14.2 indicates Australian population mean K10 score (judicial mean =18.4).

Figure 2, below, shows the IES-R scores across the courts.⁴⁰

- 38 (30%) respondents scored high enough (score of 33) to suggest a probable PTSD diagnosis⁴¹
- 27 (22%) had an IES-R score high enough (score of 37) to indicate possible suppression of normal immune system functioning⁴²
- Mean IES-R scores were significantly higher in Local Court respondents than in the higher courts (26.8 vs 17.2; $t=2.71$; $df=113$; $p<.01$).

Figure 2: Impact of Event Scale-Revised (IES-R) Score by Jurisdiction



KEY: Dotted line indicates cut-off point for probable diagnosis of PTSD (score of 33).

The three trauma incident variables summarised

Vilification

Across all court levels, 108 (59%) of current or retired judicial officers in the study reported experiencing commentary from various sources that they considered vilifying. The vast majority took no action and “suffered in silence”. In terms of public criticism, the pattern of responding to questions about vilification indicated that this was experienced at a marginally higher rate in the higher courts relative to the Local Court. More than a quarter of respondents identified print (58, 28%) and broadcast (54, 26%) media as sources of such vilification; and an additional 29 (14%) respondents pointed to such comment occurring in court. Other sources of unfair and distressing comment included online sources (31, 15%) and social media (33, 16%). Respondents offered detailed accounts in their additional comments in relation to “unfair” and “distressing” media vilification. One Local Court magistrate described “The ‘shock jocks’ (having) had a field day ... Unfortunately, the judicial officer has to fend for themselves. There is no ‘time out’ from court”.

Threats

Overall, 125 (60.9%) of respondents indicated they had been subject to one or more type of threat, including threats to kill the respondent (47, 23%), their family (7, 4%), or their children (5, 2%), or to otherwise harm them (86, 42%), their family (22, 11%), children (10, 5%) or staff (16, 8%), to damage property (9, 4%), or threats in the form of offensive language (100, 49%) or gestures (84, 41%).

40 DS Weiss & CR Marmar, “The impact of event scale-revised”, in JP Wilson & TM Keane (eds), *Assessing psychological trauma and PTSD: a practitioner's handbook*, Guilford Press, 1997, p 399.

41 See n 27, above.

42 See n 27, above.

Almost one quarter (46, 22%) of respondents reported being the recipients of at least four different types of threat. The experience of threats was more common for members of the Local Court than for the higher courts (mean of 2.6 vs 0.75 threat types).

One Local Court magistrate reported receiving “several serious threats on my life”.

Vicarious trauma

In this “cost of caring” category, respondents were asked to describe the “most distressing incident”. Common examples included sentencing proceedings and the consequences flowing from a determination (bail, AVO, etc) and evidence of fatal injuries. However, evidence of violent and degrading offending against children dominated, with more than half of respondents reporting exposure to violence (132, 64%), sexual violence (137, 67%) and degradation (102, 50%) of children. Their descriptions took the form of graphic images and evidence of brutal and sometimes fatal harm to young children. They were particularly raw when accompanied by chilling indifference from those whom one would have expected to intervene. For example, a Local Court magistrate recalled a case involving the violent abuse of a child victim which was ignored by neighbours despite being heard well beyond the home.

In another response, a judicial officer described repeated child sexual assaults on a young girl, requiring restorative surgery and followed by acts of callous indifference by the girl’s mother. The description concluded with, “I cried.” Other responses described similar (or worse) acts of brutality and tragedy. Overall, 66% of respondents reported experiencing negative effects from exposure to one or more of these forms of evidence, and respondents from the Local Court (79%) were significantly more likely than those in the higher courts (21%) to report experiencing negative effects from exposure to one or more of these forms of evidence ($x = 6.2$; $df = 1$; $p < .05$).

Conclusions

This study found that judicial officers identified the main stressors as including large and/or unfairly allocated workload, poor administrative support, legal or other constraints on determinations, public expectations and negative public comment on the judiciary.⁴³ The impact of these stressors is likely to be accentuated when combined with the range and frequency of distressing and traumatic events experienced by judicial officers. Given these experiences, it is perhaps unsurprising that many judicial officers experience significant levels of psychological distress (K10, Figure 1) and trauma-related symptoms (IES-R, Figure 2). These findings are alarming and require a

response. While vicarious trauma may be unavoidable, it is not part of the judicial officers’ job to be vilified, threatened or placed in danger from threats, acts of aggression, nor poor security.

Our findings are broadly consistent with Schrever’s findings based on Victorian judicial officers’ experiences. Although our respondents reported a slightly higher mean K10 score (18.4 vs 16.6), the distribution of scores across the two studies is very similar. In the UNSW study, 54.5% of the judicial officers reported some degree of psychological distress (K10 scores >15), and 28.7% reported high or very high levels of psychological distress (K10 scores >21). The comparable figures from the Schrever study were 52.9% and 14.8% respectively.

In the UNSW study, judicial officers also reported very high levels of PTSD-related symptoms. The two studies’ use of different psychological instruments to measure slightly different constructs prevents direct comparison of respondents’ level of trauma symptoms. However, there are broad similarities. A total of 30% of the respondents in the NSW study had IES-R which placed them in a category in which full clinical assessment for the presence of PTSD is indicated, while Schrever reports that 30.4% of judicial officers returned a score on the STS Scale indicative of needing formal assessment for PTSD.

Unlike Schrever’s Victorian study, the NSW study compared judicial officers’ experiences across the court levels and across geographic locations. Compared to judges in the higher courts, magistrates⁴⁴ reported qualitatively and quantitatively different experiences (including significantly higher levels of trauma-related symptoms). Judicial officers in regional courts reported experiencing events significantly more often, and with a greater impact, than their metropolitan peers. It should be noted that the particularly high response rate from Local Court magistrates gives rise to confidence in the finding of high levels of distress among judicial officers in these courts. The lower response rates from the District, Supreme Court and Land and Environment Courts means that we cannot have quite the same degree of confidence about distress among these respondents.

We sincerely thank our respondents for taking the time to describe their experiences to us. We hope our reports of these experiences will contribute to reforms which can help protect the mental health of all judicial officers.

43 See *Gilham v Ministry of Justice* [2019] UKSC 44 for an account of the negative impact of budget cuts on English judicial officers.

44 See also the discussion of stress by magistrates in S Roach Anleu & K Mack, *Performing judicial authority in the lower courts*, Palgrave Macmillan, 2017, pp 74–79.

Retirement of the Honourable Justice Virginia Bell AC



The Honourable Justice Virginia Bell AC, the 48th High Court judge and fourth woman to be appointed to that court, retires next month after serving as a judge on the Supreme Court of NSW and High Court of Australia since 1999.

Her Honour began her legal career in 1978 as a volunteer at Redfern Legal Centre where she became involved with the Women Behind Bars reform movement, assisted with the establishment of the Prisoners' Legal Service, provided legal advice and representation to prisoners, and worked on landmark civil liberties cases. This included representing 58 people who were charged for participating in the first Mardi Gras parade in Sydney in 1978.¹

From 1994–1997, Justice Bell was counsel assisting the 1995 Wood Royal Commission. In November 1997, her Honour was appointed Senior Counsel. After serving as a part-time commissioner of the NSW Law Reform Commission 1998–1999, her Honour was sworn in as judge of the Supreme Court of NSW in March 1999.

During her time on the Supreme Court, her Honour actively supported the Judicial Commission. She served as Chair of the Judicial Commission's Aboriginal Cultural Awareness Committee (now the Ngará Yura Committee), established in 1992 in response to the final recommendations of the Royal Commission into Aboriginal Deaths in Custody that judicial officers should receive instruction and education on matters relating to Aboriginal customs, culture, traditions and society. Her Honour published several articles in the *Judicial Officers' Bulletin* and *The Judicial Review*, including an article about a judicial visit to Walgett.² In the article, her Honour highlighted the social problems experienced by First Nations Australians as a result of poor literacy rates and lack of employment opportunities. Her Honour was also a member of the Supreme Court Education Committee.

In January 2008, Justice Bell was elevated to the Court of Appeal and in February 2009, to the High Court of Australia. At her Honour's Supreme Court farewell ceremony, then Chief Justice JJ Spigelman AC described her as a judge who was

“unfailingly polite”, whose judicial work manifested “generosity and fairness” and who brought to her work “a high level of social consciousness, compassion for the unfortunate and a strong sense of justice, whilst recognising that those instincts could only be properly expressed within the bounds of fidelity to the law”.³

During her time on the Supreme Court bench, her Honour delivered landmark judgments on such matters as the validity of an indictment not signed by a Crown Prosecutor;⁴ on the failure to pay group tax deductions as defrauding the Commonwealth;⁵ the pioneering judgment on the application of the new system for detaining serious sex offenders after their sentence had been served;⁶ and the applicability of the privilege against self-incrimination in the Coroners Court.⁷ In his valedictory speech, the Chief Justice recorded his gratitude for her Honour's brilliant exposition of the structure of the Commonwealth Criminal Code in *R v Sengsai-Or*.⁸

As a High Court judge, Justice Bell formed part of the majority in landmark cases including *Kirk v Industrial Court of NSW* which stated there is but one common law of Australia;⁹ *Bugmy v The Queen* on the sentencing of Aboriginal offenders which found that “[an] Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence”;¹⁰ the series of cases which explicated the approach to achieving consistency in sentencing, notably *Hilli v The Queen* and *Barbaro v The Queen*;¹¹ the series of cases on the admission of tendency evidence in *IMM v The Queen*, *Hughes v The Queen*, and *The Queen v Dennis Bauer (a pseudonym)*;¹² on whether the meaning of “parent” under the *Family Law Act* encompassed an artificial donor in *Masson v Parsons*;¹³ and on the unique constitutional status of Aboriginal Australians in *Love v Commonwealth of Australia*. In that decision where her Honour was in a majority of 4.3, her Honour stated that: “[t]here is an incongruity of the recognition by the common law of Australia of the unique connection between Aboriginal Australians and their traditional lands, with finding that an Aboriginal Australian can be described as an alien [under s 51(xix) of the Constitution] within the ordinary meaning of that word”.¹⁴

In 2012, her Honour was awarded a Companion of the Order of Australia, Australia's highest civic honour for “eminent service to the judiciary and to the law through leadership in criminal law reform and public policy development, to judicial administration, and as an advocate to the economically and socially disadvantaged”.

Words: Kate Lumley and Elie Choueifaty

1 M Hole, President NSW Law Society, Swearing In Ceremony of the Honourable Virginia Margaret Bell, SC as a Judge of the Supreme Court of NSW, 25 March 1999, p 2.
 2 V Bell, “Judicial officers visit to Walgett” (2004) 16 *JOB* 65.
 3 JJ Spigelman AC, “Farewell ceremony for the Honourable Justice Virginia Bell upon the occasion of her retirement as a judge of the Supreme Court of NSW”, 19 December 2008, at www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Assorted%20-%20A%20to%20K/bell_speeches.pdf, accessed 10/2/2021, p 2.
 4 *R v Halmi* (2005) 62 NSWLR 263.
 5 *R v Iannelli* (2003) 56 NSWLR 247.
 6 *R v Tillman* [2007] NSWSC 528; *Attorney General for the State of NSW v Tillman* [2007] NSWSC 605.
 7 *Correll v Attorney General of NSW* [2007] NSWSC 1385.
 8 (2004) 61 NSWLR 135.
 9 (2010) 239 CLR 531 at [99]–[100] in the context of finding invalid a privative clause which purported to oust the ability of a Supreme Court to grant relief for jurisdictional errors made by courts and tribunals of limited jurisdiction.
 10 (2013) 249 CLR 571 at [37].
 11 *Hilli v The Queen* (2010) 242 CLR 520; *Barbaro v The Queen* (2014) 253 CLR 58.
 12 *IMM v The Queen* (2016) 257 CLR 300; *Hughes v The Queen* (2017) 263 CLR 338; *The Queen v Dennis Bauer* (2018) 266 CLR 56.
 13 (2019) 266 CLR 554.
 14 [2020] HCA 3 at [71].

Case updates

COVID-19 cases

Supreme Court

Procedure

Criminal Procedure Act 1986, s 132 – judge-alone trial ordered – murder – interests of justice in s 132 extend to trial proceeding as soon as possible

The accused pleaded not guilty to the murder of his wife, and applied to be tried by judge alone pursuant to s 132(1) of the *Criminal Procedure Act 1986*. The Crown opposed the application.

Section 132(4) of the *Criminal Procedure Act* provides that, if contested, the court may order a judge-alone trial if it is in the interests of justice.

Although the experts for the accused and the Crown opined the defence of substantial impairment was available, the Crown argued the accused lied to the experts, and that the defence of substantial impairment and the issue of the accused's credit should be left to a jury.

The court (RA Hulme J) granted the application.

It is in the interests of justice the accused be tried by judge alone: at [55]. The interests of justice in the present case extend to the interests of everyone involved in seeing it proceed as soon as possible: at [54].

It is not only the potentially available trial dates for the present matter that are affected by this decision. Every trial in this court that proceeds with a jury has an impact upon the available time for future trials to be listed: at [53].

The dispute as to the credibility of the accused's accounts to the psychiatrists will entail the tribunal of fact assessing them on their own merit but also with comparison to the position before the accused was charged. It seems apparent there is a reasonable amount of evidence from quite a number of witnesses that will bear upon the issue of the accused's mental condition. Neither a jury nor judge is better qualified to determine this credibility issue: at [45].

The defence of mental illness will rise or fall on the question of whether the histories provided by the accused to the experts are accepted as sufficiently credible. No issue of community standards arises: at [46].

Ordinarily, the potential availability of a defence of substantial impairment might be persuasive in determining a contested application for a judge-alone trial. However, the coronavirus pandemic continues to disrupt and delay criminal jury trials. Regrettably, restrictions imposed continue to apply and this court continues to have a substantially decreased capacity to list criminal trials which will continue for the foreseeable future: at [51]–[52].

R v Kerollos [2020] NSWSC 1758

Evidence

Evidence (Audio and Audio Visual Links) Act 1998, ss 22C(2A), (7A) – appearing by AVL – accused may be arraigned by AVL including while outside NSW

In May 2020, in response to the COVID-19 pandemic, s 22C was inserted into the *Evidence (Audio and Audio Visual Links) Act 1998* (“the Act”) to provide that an accused who was not in custody may appear by audio visual link (AVL) in certain proceedings during the prescribed period ending on 26 March 2021: *Evidence (Audio and Audio Visual Links) Regulation 2015*, cl 4B. In October 2020, s 22C(7A) was inserted into the Act to clarify that the provision also applied to an accused person outside NSW.

The five accused were charged with offences of conspiring to bribe a foreign public official to obtain or retain business contrary to ss 11.5(1) and 70.2(1) of the *Criminal Code* (Cth).

Bail had been dispensed with for four of the accused who resided in Victoria and NSW. Bail was granted to the fifth accused on conditions including he reside at an address in the United Kingdom and personally attend court when required to do so. At the first mention in the Supreme Court, the question arose as to whether the court had power to arraign the accused persons by AVL on 9 December 2020. Although the Crown did not object to this course, none of the parties at that time had formally applied for a direction under ss 22C(2A) or (7A) or consented to this course.

The court (Adamson J) held, after obtaining formal consent from each party, that all the accused could be arraigned via AVL.

Section 22C(2A) entitles each accused to appear by AVL if the court directs or the parties consent. Any potential ambiguity as to the territorial operation of s 22C(2A) is removed by s 22C(7A) which expressly provides that appearance by AVL may take place from a place within or outside NSW, including a place outside Australia “if the court directs or the parties to the proceedings consent”: at [26].

The starting position is that an accused, even one who has had bail dispensed with, is required to attend court in person, except where expressly excused by the court: *Bail Act 2013*, s 13. Section 3A of the Act displaces s 13 of the *Bail Act* by providing that a requirement that a person appear is taken to be satisfied if a person appears by AVL under the Act. As the proposed arraignment is to occur on 9 December 2020, s 22C of the Act has effect since the prescribed period has not expired. The arraignment of an accused other than on the day appointed for trial is not a “physical appearance proceedings” within the meaning of s 3 of the Act: at [24]–[25].

R v Douglas [2020] NSWSC 1731

Case updates

Court of Criminal Appeal

Sentencing

Crimes (Sentencing Procedure) Act 1999, s 22A — discount for facilitating course of justice — no error in judge's approach — no requirement to quantify discount provided

The applicant was sentenced, following a judge-alone trial, to 44 years imprisonment with a non-parole period of 33 years for the murder of her partner's former wife. The applicant's partner, Man Monis, planned to murder the victim to secure custody of his two sons. The applicant carried out his plan by stabbing the victim 18 times and setting fire to her.

The judge discounted the applicant's sentence for facilitating the administration of justice because of defence co-operation before and during the trial: *R v Droudis (No 16)* [2017] NSWSC 20 at [112]–[113]. Section 22A(1) of the *Crimes (Sentencing Procedure) Act 1999* provides that “the degree to which the administration of justice has been facilitated by the defence” during a trial may result in a lesser sentence.

The applicant appealed on grounds including that the judge erred in his application of s 22A.

The court (Bathurst CJ, Hoeben CJ at CL and Hamill J) allowed the appeal (on another ground) and resenteded the applicant to 35 years imprisonment with a non-parole period of 26 years and 3 months.

While it is not clear the judge treated the applicant's assistance in the administration of justice in the conduct of the trial as a mitigating factor rather than granting a discount pursuant to s 22A, even if he did so, that was not an error: at [99], [100].

Adopting a two-stage process of allowing a discount for matters having a utilitarian value, as distinct from dealing with them as part of the instinctive synthesis process on sentencing, depends on the terms of the legislation in question: at [101]–[102]. The statement in the Second Reading Speech that s 22A “merely provides the ability to reduce a penalty where the course of justice has been facilitated” does not suggest a two-stage process is required as distinct from taking the matter into account as part of the instinctive synthesis approach: at [76], [103].

Unlike the language used in s 23 [which requires, in s 23(4), specification of any discount for assistance to authorities], the terms of s 22A do not require a judge to specify a percentage discount or quantify mathematically the extent by which the sentence has been reduced. That approach is consistent with the matters referred to in ss 22, 22A and 23 of the Act being treated as mitigating factors in s 21A(3)(k), (l) and (m): at [104]. It would be desirable to specify the penalty which would be imposed but for the facilitation of the administration of justice where it makes a significant difference to the sentence which would

otherwise have been imposed. It provides transparency to the sentencing process and encourages accused people and their legal representatives to conduct criminal trials efficiently and expeditiously. However, a failure to do so will not, by itself, establish error: at [105].

Droudis v R [2020] NSWCCA 322

Sentencing

Drug Court Act 1998, s 12 — “reconsidering” initial sentence imposed — judge complied with s 12 in imposing final sentence

The appellant was referred to the Drug Court pursuant to s 6 of the *Drug Court Act 1998* (“the Act”) in relation to 14 offences. She pleaded guilty to the offences and for eight of them received an initial aggregate sentence of 3 years imprisonment. This was suspended to enable the appellant to enter the Drug Court program. The appellant failed to comply with the conditions of the program and committed three further offences. For these additional offences and the offences that were the subject of her initial sentence, the appellant received a final aggregate sentence of 3 years, 6 months imprisonment with a non-parole period of 2 years.

The appellant appealed under s 5AF of the *Criminal Appeal Act 1912* on grounds including the sentencing judge erred by not reconsidering the initial sentence and then determining the final sentence pursuant to s 12 of the Act.

Section 12(1) and (2) provides the Drug Court must “reconsider” the offender's initial sentence when terminating a drug offender's program and, in reconsidering the initial sentence, must take into consideration the nature of the offender's participation in the program, among other things.

The court (Ierace J; Johnson and N Adams JJ agreeing) dismissed this ground of appeal but allowed the appeal on another ground and resenteded the appellant to an aggregate sentence of 3 years imprisonment, with a non-parole period of 1 year, 9 months and 3 weeks.

The sentencing judge did undertake her task pursuant to s 12 of the Act: at [1]; [2]; [81].

The logical purpose of the initial sentence, which is “suspended” in view of the participant's acceptance into the program, is clearly to set their sentence on the basis of the evidence before the court at that time, subject to their performance in the Drug Court program, so that they understand exactly what is at stake if they abandon the program: at [74].

It is illogical and inconsistent with the object and scheme of the Act that the initial sentence is intended to be disregarded in the final sentencing exercise. The initial sentence would lose its potency as a warning of what awaits a participant who decides to abandon the program, if it is irrelevant to the final sentence. It is also inconsistent with the terms of s 12, which make clear the central role of the participant's performance in the Drug Court program in reconsidering and determining the final sentence. The obvious meaning of “reconsider”, in that context, is to take into account the matters enunciated in s 12(2): at [76].

The terms of s 12 do not exclude the court from also taking into account matters other than those identified in s 12(2) in determining the final sentence. There is no impediment in the Act to the court handing down a different sentence for offences that were the subject of the initial sentence, in light of evidence or submissions advanced for the first time by the appellant in the final sentence hearing: at [77].

Beal v R [2020] NSWCCA 357

Procedure

Criminal Procedure Act 1986, Sch 2, Pt 29, Div 3, cl 89(5) – judge erred by declining to revoke witness intermediary’s appointment

The applicant was charged with 16 child sexual offences committed against GC and one like offence committed against MC. GC was between 14 and 17 years old and MC was aged 6 years at the time of the alleged offending.

A witness intermediary was appointed in respect of GC, MC and a Crown witness, JC, under Sch 2, Pt 29, Div 3, cl 89(3) of the *Criminal Procedure Act 1986*. Before the appointment, the intermediary, a speech pathologist, had conducted an initial session with MC, and assigned a speech pathologist under her supervision to work with MC for a nine-week period.

Clause 89(5) provides a person must not be appointed as a “witness intermediary” (cl 88(1)) for a witness if the person:

- (a) is a relative, friend or acquaintance of the witness, or
- (b) has assisted the witness in a professional capacity (otherwise than as a children’s champion), or
- (c) is a party or potential witness in the proceedings concerned.

The applicant objected to the appointment on grounds including the witness intermediary shared a previous “professional connection” with MC and GC and was a potential witness in relation to MC. The trial judge declined to revoke the appointment.

The applicant appealed the judge’s order under s 5F(3) of the *Criminal Appeal Act 1912*.

The court (Meagher JA, Walton and Beech-Jones JJ) allowed the appeal, and set aside the order and the witness intermediary’s appointment in respect of MC.

The witness intermediary assisted MC in a professional capacity before her appointment. Accordingly, she was not eligible to be appointed and her appointment must be revoked: at [68].

The judge misconstrued cl 89(5)(b) in two related respects. First, her Honour imported a requirement that any assistance provided to the vulnerable witness must have been of such a kind warranting a conclusion the intermediary is no longer neutral or impartial. That is not what the plain words of the clause describe. This aspect of Pt 29 simply imposes a prohibition on appointing an intermediary with a prior professional association: at [65].

To require the District Court to embark on an inquiry as to whether previously proffered professional assistance has compromised the witness intermediary’s impartiality is likely to be costly and time consuming, as well as counter-productive in terms of maintaining trust between the legal representatives and intermediary: at [35].

Second, her Honour limited the form of professional assistance to which cl 89(5)(b) refers to direct assistance with a therapeutic component or function. Nothing in the text or structure of Pt 29 provides any support for such a restrictive interpretation: at [66]. The words “professional” and “assisted” are ordinary English words. Their exposition is best undertaken on a case-by-case basis without attempting to exhaustively describe or impose limits on them by reference to words not found in the statutory provisions: at [36].

In this case, the initial consultation between MC and the intermediary was at the very least diagnostic and certainly involved either an exchange of information or the making of observations by the intermediary in a professional capacity in an endeavour to assist MC: at [66]. Further, the intermediary’s supervision of speech pathology students assisting MC most likely amounted to a form of professional assistance to MC: at [67].

Clause 89(5) disqualifying conditions

Clause 89(5) does not impose ongoing qualifications on the appointment of a witness intermediary after their appointment. Where the evidence confirms that, by reason of events occurring before the person’s appointment, they were disqualified under cl 89(5)(a), (b) or (c) at the time of their appointment, then the court must exercise its power to revoke the appointment. Otherwise, the power is discretionary: at [33]. The exercise of the court’s discretion to revoke an appointment is informed by the matters identified in cl 89(5)(a), (b) and (c), but only in the context of considering the witness intermediary’s capacity to perform their functions under cl 88(1) consistently with the duty imposed by cl 88(2) and the accused’s right to a fair trial: at [34].

A determination of whether the intermediary’s appointment should be revoked (and when) depends upon, inter alia, the extent to which the circumstance that they might be a witness affects their capacity to perform their functions under cl 88(1) and duty under cl 88(2). In turn, this requires an assessment of the likelihood that they will be called as a witness, the nature and importance of the issue of fact that their evidence is said to be relevant to and the nature of the evidence it is said the intermediary can give: at [34].

Decision Restricted [2020] NSWCCA 314

Court of Appeal

Offences

Crimes Act 1900, s 530 – serious animal cruelty – judge correct to find animal a “pest animal” within s 530(2) – judge’s approach to construction of available defences in s 530(2) erroneous

The respondent was convicted in the Local Court of two counts of serious animal cruelty contrary to s 530(1) of the *Crimes Act 1900*. He owns a mobile petting zoo which includes a camel. Two dogs entered the property where the camel was kept and caused it significant injuries. The respondent captured one dog, tied it to a tree and stabbed it repeatedly with a pitchfork. He left it to attend to other matters but on his return it was still alive. He then repeatedly beat it with a mallet and it died.

Section 530(1) creates an offence of serious animal cruelty when “[a] person who, with the intention of inflicting severe pain ... tortures, beats or commits any other serious act of cruelty on an animal, and ... kills or seriously injures or causes prolonged suffering to the animal”. A person is not criminally responsible for the offence if “... the conduct occurred in the course of or for the purposes of routine agricultural or animal husbandry activities, recognised religious practices, the extermination of pest animals or veterinary practice”: s 530(2)(b).

The magistrate found the dog was not a “pest animal”, that all the elements of the offence had been established (without identifying what the elements were) and that the respondent’s conduct, not being an act of “extermination”, did not fall within the defence in s 530(2)(b).

The respondent appealed to the Supreme Court pursuant to ss 52 and 53 of the *Crimes (Appeal and Review) Act 2001*. The judge quashed the respondent’s conviction and dismissed the charges, finding the defence was made out.

The applicant (an RSPCA inspector) appealed to the Court of Appeal.

The court (Bell P; Basten JA agreeing; Simpson AJA agreeing with the proposed orders) granted conditional leave to appeal and sought written submissions on the proposed orders: at [98], [107]–[108]; [109]; [143].

The judge was correct to find the dog was a “pest animal” within the terms of s 530(2)(b): at [40]; [82]–[88]; cf Simpson AJA at [135]–[138]. However, the judge erred in finding that the respondent’s conduct involved conduct undertaken “in the course of or for the purposes of ... the extermination of pest animals” and that the defence was established: at [40], [90], [97]; [139].

In considering the meaning of “extermination” in the context of the expression of the subsection as a whole, the judge departed from the correct approach to statutory construction: at [91]; [124]; [134]. Section 530 was introduced to supplement rather than replace the existing regime for the regulation of the prevention of cruelty to animals and should be considered as part of a suite of

legislation dealing with the prevention of cruelty to animals: at [45]; [109]; [127]. It should therefore be construed in the context of s 530 as a whole as well as in a way that is consistent with the language and purpose of all the provisions of the statute in which it is contained and statutes which are in *pari materiae*: at [48]. The interpretation of “extermination” adopted by the judge, “to destroy utterly, to get rid of or to eliminate” does not sit comfortably with s 22(10) of the *Companion Animals Act 1998* which provides authority to destroy a dog in a manner “caus[ing] it to die quickly and without unnecessary suffering”: at [95]. This is reinforced by considering the other circumstances in s 530(2)(b) including the concept of “recognised religious practices” which all have a systemic or accepted aspect to them: at [96]. Care must be taken not to rely too heavily on dictionaries for the definition of single words, although they have some value: at [53]–[57]; Basten JA at [111]–[116].

The judge erred in finding the plural “pest animals” in s 530(2)(b) provided a context to import the singular. There is a conspicuous shift from the singular “animal” in s 530(1) to the plural in s 530(2)(b). More significantly, the word “extermination” carries with it a connotation, reinforced by the use of the expression “pest animals”, of a systematic process designed or directed to rid a place or location of a particular class of pests. This does not describe the respondent’s conduct: at [93]–[94]; [122]; [134]–[135].

A finding of error is usually a powerful reason to grant leave and allow the appeal. However there is a question as to whether the magistrate could have been satisfied beyond reasonable doubt as to the respondent’s subjective “intention of inflicting severe pain” on the dog compared with a simple intention to kill it as a response to its attack on the camel: at [101]. As the magistrate did not address the meaning of the expression “with the intention of inflicting severe pain” in s 530(1), it was not clear whether he found the respondent had the actual subjective intention of inflicting severe pain on the dog or was satisfied the consequences of severe pain were foreseeable: at [28]. The reference to intention in s 530(1) should bear the former meaning: at [62]–[69]. It may not be just to allow the respondent’s convictions to stand when it is unclear that, in convicting him, the magistrate proceeded in accordance with the proper construction of s 530(1): at [98]–[103]; [109]; [141].

Will v Brighton [2020] NSWCA 355

Civil procedure

Uniform Civil Procedure Rules, rr 6.24(1), 6.29 – joinder and removal of parties – no necessity for State to be joined – named defendants remain proper parties

The applicant was charged with three offences of contravention of non-publication orders contrary to s 16 of the *Court Suppression and Non-publication Orders Act 2010*. The charges were withdrawn and the applicant and another party commenced proceedings for damages

for malicious prosecution against the NSW DPP and the secretary of the NSW Department of Communities and Justice. The applicant sought an order that the proceedings be heard by a jury.

The State of NSW sought orders under rr 6.24(1) and 6.29 of the Uniform Criminal Procedure Rules (UCPR) that the State be joined as a defendant and the two named defendants be removed. Rule 6.24 empowers the court to order joinder of a person where that person ought to have been joined as a party; or where it is necessary to the determination of all matters in dispute in the proceedings. Rule 6.29 permits removal of a party where the person has been improperly joined; unnecessarily joined; or ceased to be a proper or necessary party.

A District Court judge granted the orders sought by the State and dismissed the applicant's motion to have the proceedings heard by a jury. The applicant sought leave to appeal to the Court of Appeal.

The court (Payne JA and Simpson AJA; Brereton JA agreeing with the orders in separate reasons) allowed the appeal and set aside the orders joining the State and removing the named defendants, but refused leave to appeal against the dismissal of the application for a jury trial.

Payne JA and Simpson AJA: The joinder of the State was not “necessary to the determination of all matters in dispute in any proceeding”: at [30], [43]; UCPR r 6.24(1). Neither of the named defendants was improperly joined and each defendant is a necessary party: at [46], [49], [51]; UCPR r 6.29.

To be joined, the State must bring itself within the language of r 6.24. Joinder under r 6.24 is discretionary; no occasion for the exercise of discretion arises unless and until the court is satisfied of the existence of one of the two pre-conditions: at [42], [49]. All parties continue to enjoy common representation and there is no suggestion that the evidence to be led or the legal approach of the defendants would or even might diverge from that sought to be advanced by the State. It cannot be concluded that “the State ought to have been joined” by the applicant. It has also not been shown that the joinder of the State is necessary to the determination of all matters in dispute: at [31], [32], [43]; *Foxe v Brown* [1984] HCA 69. While s 5 of the *Crown Proceedings Act* 1988 and s 8 of the *Law Reform (Vicarious Liability) Act* 1983 may render the State “an appropriate

party,” they do not render it “the appropriate party”. They do not preclude proceedings against individual named employees: at [38].

Even if the State were to be joined as a party, there is no evidence of any disputed issue that would require separate representation of the defendants and the State. Indeed, the State's acceptance of vicarious liability strongly points in the opposite direction. It is the defendants' conduct that is in question, and it is their conduct on which the applicant relies to establish the tort he alleges. Hence, they are proper parties: at [46], [51]; UCPR, r 6.29.

The applicant's challenge to the competency of the State's decision to accept vicarious liability is rejected. It is a matter for the State whether it agrees or declines to accept liability, and its decision in that respect is not open to challenge by a plaintiff who alleges tortious conduct against a State employee. In this case, the State has voluntarily accepted vicarious liability for any of the pleaded torts found to have been committed by either of the named defendants. The applicant has no standing to challenge that decision: at [21].

There is no support for the proposition that members of the public would perceive that a judge would lack impartiality in relation to either defendant: at [59]. By s 76A of the *District Court Act* 1973, trial by judge alone has been designated by Parliament as “the norm” except if the interests of justice require a trial by jury: at [53]–[54]; *Maroubra Rugby League Football Club Inc v Malo* (2007) 69 NSWLR 496.

Brereton JA: Assuming the State is vicariously liable for any tort established against the defendants, the legal consequence is that the State and its relevant officer(s) would be joint tortfeasors, or jointly and severally liable to the applicant. However, UCPR r 6.21 provides that a court may require the joinder of parties who are jointly but not severally liable: at [75]–[76].

The applicants have chosen to sue the named defendants only. Where they seek no relief against the State, the State is not a party which ought to have been joined or whose joinder is necessary for the purposes of UCPR r 6.24. The fact that their “employer” desires to be sued in their place provides no basis for removing the (alleged) tortfeasors, who are the parties that the applicant wishes to sue: at [78].

The interests of justice do not require trial by jury: at [65].

Burton v Babb [2020] NSWCA 331

Vale Judge Peggy Hora



It is with sadness the Commission notes the recent death of Judge Peggy Hora, retired California Superior Court judge and a globally recognised leader in the solutions-focused courts movement. Judge Hora was one of the founders of the Drug Court movement in the United States, and founder and President of the Justice Speakers Institute. In February 2019 she gave the keynote address at the 20th anniversary of the Drug Court of NSW conference in Parramatta. Judge Hora was recognised for her contributions to therapeutic jurisprudence as a judge, author and mentor. The Judicial Commission published her article on “The trauma-informed courtroom” in the March 2020 *Judicial Officers' Bulletin*. Among her many connections to Australia, Judge Hora was appointed “Thinker in Residence” by then Premier of South Australia, the Honourable Mike Rann, in 2009. She spent a year providing training on therapeutic jurisprudence and promoting the establishment of drug courts.

JIRS update

Updates to resources recently published on JIRS include:

- **Update 30** to the *Sexual Assault Trials Handbook*
- **Update 139** to the *Local Court Bench Book*
- **Update 12** to the *Children's Court Resource Handbook*
- **Update 64** to the *Criminal Trial Courts Bench Book*.

These may be accessed through the "Announcements" menu on the JIRS home page. Summaries of important criminal law decisions from the Court of Appeal, Court of Criminal Appeal, and Supreme Court, have been published under "Recent Cases and Papers".

New program recordings on JIRS

The recording of the following recent webinar can be found under the "Programs" menu on the JIRS homepage:

- Cross-jurisdictional webinar: "Sexual harassment prevention and response in the workplace — a new approach"

Judicial moves

Local Court

- Ms Robyn Richardson has been appointed a magistrate.

Continuing Judicial Education Program update

February — March 2021

Land and Environment Court of NSW Twilight Webinar: strata property — emerging issues for planning, development practices and building quality 25 February

Associate Professor Hazel Easthope, Scientia Fellow at the City Futures Research Centre at the University of NSW will discuss issues and practices relating to strata property.

Local Court of NSW Southern Regional Conference 3–5 March and

Local Court of NSW Northern Regional Conference 24–26 March

These residential programs for magistrates facilitate the development of judicial knowledge and skills encouraging peer-based learning through discussion and problem-solving.

Ngara Yura Webinar: Solutions to reducing the Indigenous prison population — role of a specialist court (County Koori Court of Victoria) 17 March 2021

Her Honour Judge Irene Lawson and Ms Terrie Stewart of the Victorian County Koori Court will discuss the role of a specialist court in contributing to a reduction in the number of incarcerated Indigenous people.

Obituaries

Vale the Honourable Lancelot (Bill) John Priestley QC, the Honourable William Henric Nicholas QC, the Honourable Robert Shallcross Hulme QC, his Honour Anthony Garling, and Mr Thomas Geoffrey Cleary

It is with regret the Commission notes the recent deaths of the following judicial officers:

- the Honourable Lancelot (Bill) John Priestley QC, former judge of the Court of Appeal
- the Honourable William Henric Nicholas QC, former judge of the Supreme Court of NSW
- the Honourable Robert Shallcross Hulme QC, former judge of the Supreme Court of NSW
- his Honour Anthony Garling, former judge of the District Court
- Mr Thomas Geoffrey Cleary, former magistrate of the Local Court.

The *Judicial Officers' Bulletin* informs Judicial Officers of current law and promotes consideration of important judicial issues. To respond to articles or to make a contribution to a future issue of the *Judicial Officers' Bulletin* please contact the Editor, Kate Lumley at: klumley@judcom.nsw.gov.au.

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