# Does the Bar matter?

**Geoff Gibson** practised at the Bar for 15 years before going to a leading national firm as a partner in 1986. He returned to the Bar in 2002. In the article below he suggests that members of the Bar should take a little more responsibility for each other – not on a professional, but on a personal basis – that we all need the assistance of our fellows to cope with the problems of sole practice.

When I did a course in wine tasting many years ago, our tutor told us not to bother buying magazines about wine. He said all the wines were scored three stars or more because the industry was small and the publishers were beholden to its members and their advertisers. It is like those TV travel shows – inevitably bland, and everything is just dreamy. You are as likely to find an old Grange being described as cough syrup in a wine magazine as you are to find an agent describing his listed Toorak properties as lemons. You would not wish to thirst for truth.

Professional associations and their journals are likely to convey the same impression. You are not going to read much about the dark side of union life from ACTU publications. You may not leam all that much about medical malpractice from *The Lancet*.

We lawyers have the same diffidence about airing our dirty linen. We might experience a frisson of gossip when something goes wrong, but we are reluctant to discuss our real feelings on personal failure in any depth, either publicly or at all.

It is, I think, worse at this end of town than the other end of town. Among the reasons for the difference are the greater institutionalized insecurity of barristers and their reluctance to cast off the mantle or myth of the knight errant. They have not, apparently, taken seriously the lessons learned by Don Quixote. It is true that Don Quixote became a knight because he was crazy, and not the other way around, but in his madness, as was the case with King Lear, he acquired wisdom. He had the wit to observe (*Don Quixote* II, 3) that 'the wisest person in the comedy is the clown'.

Some of these reflections occurred to me after the publication of a piece I wrote on the suicide of Brendan Griffin that was headed 'Surviving the Law'. I had written it not for general publication, but for the comfort of the immediate colleagues and family of Brendan Griffin. When the editors of *Bar News* asked if they could publish it, we discussed it and with some hesitation we decided that it could be made public.

I am immensely glad that it was. I had not expected the response. It was entirely extraordinary. People – by the score – wrote to me, called on me, emailed me, phoned me, and crossed the road to talk to me. It was as if people had been sitting in a dark room and someone had jumped out the window. It was as if barristers had been forbidden to talk about these things or they had been punished if they did.

There were two themes in the response. One was that we in the community at large are not open enough in talking about illness of the mind or suicide. The other was that we in the law just do not talk at all, so people say, about the incidence of stress on this side of the profession or, for that matter, the other side. We just preserve our heroes on their pedestals and pretend that nothing is wrong. After all, if it could happen to one of those hot shots, how could I expect to survive?

These messages were expressed to me repeatedly. I still get them. Not one person has written to me to complain of what I said. Not one. This, you might think, is a symptom of the sterile meekness of public discussion within this profession. I agree

– this lack of public discussion is, I think, part of the problem.

You may get a different view of these things at the other end of town. Most lawyers there are involved in a partnership running a business. Cooperation is mandatory there; here, it is for the most part banned.

If you spend fifteen years or so as the insurance partner for a large international law firm, you get a broad view of the range of human fallibility. As the confessor of first and sometimes last resort, you get to see how personal failings become manifest in ways that may hurt others.

After a while, the pattern can become sickeningly familiar and predictable. You can see in some people, unhappily only after the event for a lot of them, a sad, downward progression that becomes a spiral. Not in any necessary order, you might see people out of their depth; people who do not know what they are doing; people stretched too far or worn out; anxiety; harassment; alcohol or other drug abuse; serious illness – of the mind or body; dishonesty, violence or other crimes; gaol; or in the end, death from stress or suicide. As, I said, there is no necessary order of degree. The categories of misery never close.

You get to recognize some of the symptoms of risk to your clients, yourself or your staff. A lot of the time you get no warning at all. Some people who get into trouble, morally or mentally, become fiercely adept at hiding it. The ones who terrify you are those who most need the help and could most benefit from it, but who, for whatever reason, are determined not to ask for help. They will just keep it to themselves although they know, in their hearts, that things can only end badly, and that in the end they must get caught. You recall the insight of Einstein: 'A person falling freely will not feel his own weight.'

The very worst are those who do not know that something is wrong. 'I may have omitted to mention to you that I forgot to stamp that little debenture. The borrower folded and, unhappily, the bank is looking to us for the missing one hundred million dollars. I think you said our insurers are good for $50 million. Would it square things up if I offered to kick in my share of a lean-to at the back of Venus Bay? Oh my God, don't tell me that this might affect our Listing?'

I am not so interested for the moment in any potential liability of lawyers to clients for the faults of others. There is, however, no doubt that law firms can suffer damage as a result of inadequate or improper professional conduct. This extends far beyond financial liability to disappointed clients. Their reputation can be badly hurt. No firm wants to be accused of serial and serious over-charging, of suffering a culture of discrimination against or harassment of women, of being too close to corporations to discharge their obligations as officers of the court, or of having a partner sent to gaol for dishonesty that occurred, it seems, just because he could not keep up with his partners. Members of these firms have a keen interest in trying to spot any failing so that it can be dealt with, hopefully before anyone gets hurt.

Another way to learn of the reach of weakness in our profession is to give character evidence for a senior lawyer who has hit the fence. I have done it for a lawyer on either side in the most responsible position. Each had been a person and a lawyer beyond reproach. One was, and is, of towering professional and intellectual standing. Each was looking at not just disbarment but imprisonment, and the complete ruin of a life. One of those cases could, in my view, have been prevented by appropriate collegiate intervention. As you sit and listen to the proceedings unfold, you cannot help reflecting on that old saying about your being in their place but for the grace of God – what others call simply the luck of the draw.

As a professional association for lawyers, the Bar is exposed to similar damage to its reputation if its members fail or fall in one or other of the ways that barristers can and do fail and fall. But, at least until recently, the Bar has not reacted to the symptoms of trouble in the same way that members of law firms do. Some may think the problem with the Bar is that it lacks maturity as a body; others may take the contrary view that it gives too much credit and respect for maturity and authority.

The Bar, of course, is not a partnership and its members do properly prize their independence, but I would have thought that most barristers see themselves as having a moral duty to help, or try to help, a barrister who is in trouble. As a body of barristers, the Bar also has what might also be called a professional or even a political interest in trying to prevent aberrant behaviour by its members causing damage to others or to its members.

The main duty of barristers is to do what they can to ensure that their clients get good professional service. But the discharge of that duty will coincide with pursuing the interests of the Bar in trying to keep intact the collective standing of barristers as a whole. We need not kid ourselves. If a barrister misbehaves and is caught, and the process is public, the result will be to lessen, however slightly, the reputation of every other member of the Bar.

I am not for the most part here talking about legal duties or legal liabilities. I am talking of what I see as a moral duty and a professional interest that the Bar has in coming to the aid of barristers in trouble.

As time goes on, the difference between the Bar and major law firms may become more apparent than real. When I joined the Bar in 1971, there were about 400 of us. When I left the law firm I was a partner of in 2002, it had about 1,000 lawyers.

This Bar now has about 1,600 members. In the meantime, the ripe commercialism that was the hallmark of the other side is becoming more and more pervasive here. So, for that matter, is the concentration on the dollar. On the plus side, the Bar offers better prospects for professional self-esteem and membership for life; and a lot less of the internal knee-capping and throat-slitting. The Bar has also stayed true to its central function of offering access to all to the cream of the profession whose members are a collegiate body committed to giving the best legal advice and most importantly, independent legal advice. This has been an aspiration abandoned at the other end of town for the most part if there is a government or major public company in the field.

What we need to think about, in my view, is how we at the Bar can improve our provision of what may otherwise be called pastoral care and what managers call risk management for those who might need it.

The first thing to do is to scrap all this claptrap about men being men; big boys don't cry; if you don't like the heat, stay out of the kitchen; this is a contact sport; and all the other inane slogans of the locker room or barracks room that went west with the relief of Mafeking, and which are the first and last resort of people who have difficulties with the process of

rational thought. Educated adults in the year of 2008 know that people under stress can fail and become ill or turn to crime, and in either event become able to harm others as a result. This frequently occurs in circumstances where that harm could have been avoided if the person under stress had got help quickly enough.

Secondly, and relatedly, we need to stop beatifying our ancestors. Leave that process to a different kind of faith that knows how to manage the process. It promotes a culture of unreality if not dishonesty to refuse to tell or acknowledge the truth about those who are no longer with us. This is becoming something of a national trait in Australia. It would be silly to pretend that anyone is without fault. No mortal can claim immunity in death, not even a barrister. Even poor old Manning Clark, who never seemed to me to do any harm to anyone, gets routinely dug up to face allegations not put to him when he was with us, frequently by his friends, and frequently by people of the ilk who are the first to accuse others of not behaving like gentlemen.

Voltaire may not have got a lot right, but he was in my view dead right when he said: 'One owes respect to the living, but to the dead one owes nothing but the truth.' (That observation was cited on the title page of a biography of Nellie Melba. If people knew all the truth about a woman who was alleged to have abandoned her child to pursue her career, you wonder whether she might still have her picture on our $100 note. To the unbeliever, beatification will always entail falsehood.)

The next thing is to overcome our diffidence in talking about these problems. If you are a lawyer and you have a heart attack, all of the nursing staff will say, when they learn of your occupation, 'Well, another stress case.' This is for them a fact of life – it is just like a soiled sheet. But most victims will not have admitted it. Women, for the most part, do not have the same problem in talking about personal difficulties. They seem better placed to talk through emotional problems. The problem may not be so bad nowadays with younger men. The failing may be characterized, I think as one of age and gender.

Fourthly, we are not talking about dobbing, or what is now fondly called 'the nanny state'. Nobody likes dobbing, but dobbing involves informing for spite or reward, or arises because the informer is a member of the Gestapo manque. We are not talking about this.

Let me give an example. I have only once complained about a cab driver. This is because I do not want to do anything that might cost someone their job. But one night about fifteen years ago I had a driver who was very jumpy. When I politely questioned him on his route, which was bizarre, he jammed on the brakes and asked if I wanted to get out there and then – in the middle of very heavy traffic. I was alarmed – enough to ring his depot and say that I thought his condition made him a risk to others if not himself. I was not thinking of the damage to the name of the company (what we now call 'the brand') – just the risk that the driver posed. I thought then, and I think now, that refusing to do anything would not have been morally right. (I doubt whether the person at the depot who took the call had the same view – she sounded like I may as well have been playing a part in *Blue Hills*.) In my view, we face similar issues in dealing with our colleagues more often than we acknowledge or even realise.

Finally, and with more difficulty, we need to find a way of raising some kind of alert if that needs to be done. It is not just a matter of clearing away the outmoded views of the kind I have described. Some of the unfortunate failings we see around us suggest that we may have a problem which, in the revolting argot of our time, may be described as truly 'systemic'. Barristers who do not believe that we have this problem and that we are suffering harm to our reputation as a result, are in my view living in Fantasyland.

There are not many lawyers at the Bar who would want to be heard to boast that they have less interest in the character or fate of lawyers in their group than do lawyers at, say, firms like Freehills or Allens Arthur Robinson. A requirement of professional independence is not a prescription for moral blindness or commercial insanity.

Take an example of moral duty. You are tracking a robed barrister who is walking to court down William Street to Lonsdale Street. She is so preoccupied with reading her brief and talking on her mobile that she does not see that the traffic light has turned against her and that she is about to step into the path of a speeding cement mixer. Should you stand by silently waiting for the laws of physics to do their work? (You reflect that the last time you showed courtesy to a woman barrister you got a verbal backhander.) Or do you opine that the cure for this kind of behaviour is stiffer penalties for jay walking?

Of course you would be subject to what I regard as an absolute moral duty to do all that you can to prevent harm to this colleague, and short of moral insanity every barrister would do just that. Indeed, in some jurisdictions, you might be looking at your moral obligation as the subject of criminal sanctions.

Take another example. (For the removal of doubt, you should treat these examples as hypotheticals, as a kind of optional reality.) A colleague on your floor is having a bad run. He has lost his main client. He has suffered a terrible divorce. (The wife, he said, got custody of the money.) He has a child on hard drugs. He was knocked back – yet again – for silk. He is obviously drinking too much – obviously because you can see the effect of it every afternoon, and now on some mornings. You now suspect he is on the grog when he gets in to work. What support he had among solicitors is evaporating quickly. There are mutterings from them as well as from the Bar. Clients have been known to walk out pale-faced and wide-eyed.

This person who was once a reasonable and courteous lawyer is now becoming at best a useless relic and at worst a dangerous wreck. He is, as they say on the terraces, an accident waiting to happen, a train waiting to go off the rails. The only people he gets on with are his colleagues on his floor. What are they to do?

He regards as quite mad anyone who suggests that he might have a problem. (His father smoked 50 Craven A and drank a bottle of Bond 7 a day and he lived until he was 90. He then got hit by a speeding cement mixer.)

Another example. A barrister with a very good practice appears to be subject to mood swings. Those who know her, or who know something about this medical condition, suggest that she is bipolar. She has a bluff way of dealing with the issue (in the manner of some case hardened minorities who think that everybody else should just mind their own business). Colleagues – barristers and solicitors – make slightly nervous jokes about whether

she is on green pills or yellow ones each day. In truth there are occasions, even in court, when her behaviour appears to be nothing short of what ordinary people would describe as manic. Part of her charm is that she treats most of our protocols as nonsense; part of the problem is that she does not care.

This has been going on for some time. Then you hear that a large, nasty case which her client lost is now the subject of a costs application against the solicitors who instructed her. Someone has taken the view that she is immune as a barrister to this sort of claim. That view is probably wrong, because this is a disciplinary procedure, but for all sorts of reasons – professional, commercial, personal and political – the solicitors are reticent to join her in the claim. (This reticence is shared by an informed client who is a PI insurer – but the incident is doing nothing to soften the attitude of this insurer to lawyers.)

Now, if the liability of counsel came to be tested in a court, nice issues of law and causation would arise. But would any one of us want it to come to that?

Another example. It is not a simple thing to terminate the services of counsel during a trial. A junior behaves so badly during a trial that senior counsel is professionally embarrassed. The junior is bullying a young solicitor. The bullying is subtle, but it is there. It is as if she cannot help herself. The clients are by and large oblivious, or happy enough to pretend that they are, because of the performance of both counsel in court. This is, as usual, both superb and assured. But outside court, her behaviour is so bad that senior counsel feels constrained to apologise formally to the solicitor. The trouble is that junior counsel has been manifesting these symptoms for some time, but no one has been able to manage the problem.

Notice that this problem, as in the previous two, is not just an issue of conduct. There is a real risk that the interests of the client are being adversely affected by the bad behaviour of counsel. Assuming that in this case senior counsel was not acting irrationally in apologising to the solicitor for the behaviour of her junior, is this in not a serious problem for both counsel and the solicitor, and above all the client?

One final example, to move up one rung. Judges are difficult to manage because, at the Bar, they have spent the whole of their professional lives away from management, at either end, and those who have the awful task of trying to manage them may suffer from a similar disability.

One hypothetical member of senior counsel, who enjoyed many good lunches at the Bar, finds life on the Bench so boring that he is driven to wind up proceedings each day well before lunchtime so that he can spend the rest of the day at leisure lunching with his mates at a gentlemen's club. His judicial colleagues are unhappy because they, or most of them, are putting in the hours. The Bar is unhappy because this does not look good and fewer cases are being dealt with. By and large the truth is kept from the clients and the press. Some lawyers make a blokey attempt to cover up the mess by saying that his Honour disposes of more cases in a morning than others do in a week. The judge remains serenely impervious to criticism, comment or direction. The problem, then, is intractable.

Eventually the alcohol gets to this judge and he dies. The precise agent of death does not matter. The normal obsequies are performed. The ceremony of innocence is again drowned, and the breach of public trust goes unremedied and unremarked.

On any defensible meaning of the word 'responsible', can we say that we are running this profession responsibly if that kind of behaviour at the top is tolerated? This problem, you may think, is just the logical result of our failure to deal adequately with the expressed failings of those climbing up the ladder. The history that will be alleged against us is our repeated, generational failure to do enough to stop our failures from hurting innocent people. It will be said that we are guilty of culturally permitted misbehaviour. How often does the Bar disqualify or even suspend one of its members?

There are some things to notice from the last example. One is that because we are talking of the Bench, there is a breach of public trust. It is not different for the Bar. Barristers are a privileged profession enjoying a statutory monopoly which at its upper level is endorsed by a form of royal warrant (not quite in the same manner as Benson & Hedges). So central is their importance to the system that disappointed clients are not allowed to claim compensation from them if they botch a job in court – because, for example, of a hard night out on the tiles.

The professional obligations of us lawyers are, at least to my mind, much, much more significant than those imposed by black letter law. But, for what it is worth, the statute that purports to regulate the profession in Victoria does impose an obligation of candour on all barristers.

If this case were not hypothetical, a public discussion of it might upset the family and friends of his Honour. But we no longer live in a world where sensitivities

## FEDERALISM AUSTRALIA

We live in an 'indissoluble Federal Commonwealth under the Crown'. But, due to the actions of 'unelected' judges, that federalism is one in which: (a) the states are dependent on the Commonwealth for funds to balance their budgets (courtesy of the *Second Uniform Tax Case*); (b) the Commonwealth, whose limited powers are spelled out in the Constitution, can now legislate in almost any field in reliance on the external affairs power or the corporations power (courtesy of the *Tasmanian Dams Case, Richardson v The Forestry Commission* and *New South Wales v the Commonwealth*).

A federation? Who is kidding whom? Provided the Commonwealth frames its legislation correctly it can interfere in any sphere of State activity.

We have not had a referendum to alter the relative powers of State and Commonwealth. The judiciary has enlarged the Commonwealth's powers. But no one protests.

One wonders, then, why there should be so much concern expressed that 'unelected' judges may be given power, under a Charter of Human Rights and Responsibilities, to interfere with the impact of legislation on the fundamental rights of the individual.

Is it so important that the individual be subjugated to the will of the majority?

can dictate that issues of public importance be dealt with 'in club'. How much more upset were all those litigants who were denied their Magna Carta rights because his Honour cared more for himself? And what about the eight hundred years' spadework put in by the professional ancestors of this devotee of the long lunch?

The other matter to notice is the way a problem – in this case the abuse of alcohol – may result in the termination of life. When I spoke in my previous note of the suicide of a partner, I spoke of an event that we could foresee but which we could do little to prevent. I had meant to refer to another partner that we lost.

Rod Bush was much younger than me. He frequently got in earlier than me. I used to arrive at about 6.45am and if Rod was arriving then, he would be putting his tie on. If we left about thirteen hours later, he would come back that night. The cancer he died of did not therefore come from nowhere.

At the funeral, his brother told us – and his widow and his three children – how Rod had just lived to be a partner of the firm. Well, he left me with the clear conviction that Rod died for the firm too, and that we his partners were morally complicit in his death. It was too predictable a result of the way he was ruining his life, and we had not done enough to save him. We, who knew more about these things, had not gone to help him.

The lesson is, I suppose, that some exercises in self-destruction just take longer than others – and they are therefore so much more painful for others. That was, I had hoped, the point of my previous note. Whether you elect to kill yourself with a rope or a bottle may itself be the result of an accident of history.

Now, none of this will come as a surprise to any member of the Bar, unless perhaps they have led a very sheltered or a very privileged life. The point of this note is to raise for discussion whether we can and should be doing more to help colleagues at the Bar who are showing signs of distress.

As I have indicated, you can look at it as pastoral care, or risk management, but look at it I think you should. At the moment we are at risk of being compared to someone who has been selected to represent his country in Test cricket but who claims to be unexaminable about the suggestion that he turns up to every after-match party loaded on spirits or something worse. He takes the view that he was brought up on – what happens on the field stays on the field, and what happens off the field is none of their business.

Well, that may have been the case in the good old days, and some of us may mourn their passing, but they have passed. Those were the days, the good old days, when such women as there were at the Bar were liable to be treated as a commodity. We have, I think, greatly improved here, and I agree with those who believe that alcoholism was a worse problem at the Bar one or two generations ago. But it is simply silly to say that an organisation as big as ours will have no members who have very big problems.

May I say something about drugs other than medicinal drugs or alcohol? I have not seen any evidence of their being used by barristers. I suppose in a group of 1600 it is statistically inevitable that there will be some users, but I have not seen it. I have, though, seen it at the other end of town. One young lawyer with a bright future succumbed to a habit. That led her to steal from us. She was very fortunate not to go to gaol. As it is, she just finished her career and ruined her life.

What I am not seeking here is a further phalanx of people in grey, people who have no knowledge of or sympathy for the profession, but who are very jealous of those who do. If there are professional problems, they should be dealt with by and within the profession. One thousand years of legal history gives no comfort to those who say that change to the profession is only of use if it is inflicted from above by people who do not know what they are doing and, in the end, do not much care one way or the other.

But while it may be the case that the collegiate life and credit of this body are being leached out of it by life-deniers in drab cardigans, this is not in itself a ground for reverting to a time when the whole Bar could be found in Selbourne Chambers; when barristers charged in guineas; when we got notified of the defrocking of a lawyer in a confidential pink slip; when the Bench was manned from the schools of the Protestant Ascendancy or the Jesuits; and when the pubs shut at 6 o'clock – as a matter of law.

Members of the Bar may claim immunity for their failings in court but the Bar as an institution cannot assert irresponsibility for all of their failings outside of court.

If we continue to insist that our heroes remain untouchable, and unexaminable, and if the Bar does not accept responsibility for the conduct of its members out of hours, where does that leave us with League footballers? Beneath them or above them? Which is worse?

When I have referred to a moral obligation, I have done so on the footing that our ideas of professional conduct presuppose such obligations. If authority is sought, I would claim it from the man the present Pope describes as having been of 'undeniable greatness', Immanuel Kant (*Groundwork of the Metaphysics of Morals* (1785) 77/434; 78/435).

> In the kingdom of ends, everything has either a *price* or a *dignity*… Skill and diligence in work have a market *price*; wit, lively imagination and humour have a fancy *price*, but fidelity to promises and kindness based on principle, rather than instinct, have an intrinsic worth, that is *dignity*.

I am suggesting that we need to do more to preserve our dignity, in the sense that we use the word, and in the sense that Kant used the word. It may sound old fashioned, but I believe that dignity matters for lawyers. It is like courtesy. A professional group that cannot conduct itself with dignity and courtesy no longer matters.

I raise these questions in the temper of the words uttered three lines from the end of *King Lear* by one of the few survivors of that disaster in human relations: 'Speak what we feel, not what we ought to say.' Now, I acknowledge that Cordelia got rudely taken out of play by a silly old king for doing just that, but the whole point of the play – the whole cause of the tragedy – is that the king was both silly and nasty to condemn his daughter for plain speaking.

Kings, even kings – especially kings – can be both silly and nasty. People who do not wish to confront the truth are part of the problem. If we as a professional body do not learn these lessons, and if we insist on staying in the moral or intellectual equivalent of the mindless dreamtime of commercial television, we are at risk of being hit by a speeding cement mixer.

GEOFF GIBSON