MEDICO-LEGAL SOCIETY OF NSW INC.

SCIENTIFIC MEETING

WEDNESDAY, 10 JUNE 2015 AT 6.15 P.M.

THE TOPIC: AGEING IN THE PROFESSIONS

SPEAKER: MR PETER DRIESSEN

DR MICHAEL DIAMOND: We will hold questions until the end of Peter's talk. It is my pleasure to introduce Peter Driessen. Peter is the general counsel at Lawcover Insurance, the legal profession indemnity insurer, and the largest of its type. It provides legal, regulatory and compliance advice to Lawcover and advises on claims, practice support and insurance related issues.

Peter has over 30 years of experience as a legal practitioner having worked both in general practice in New South Wales and in Tasmania, and also having had advisory roles for the AMP general insurance, Lloyds in London and now at Lawcover. Peter has also trained as a mediator and negotiator. He is a mentor to young lawyers and a member of the Australian Corporate Lawyers Association, Australian Insurance Law Association and was for many years a member of the NSW Law Society Ethics Committee. Particularly relevant tonight, Peter is also on the board of a not for profit aged care facility and in that role has encountered many of the sorts of issues that challenge ageing individuals.

With no further ado:

MR PETER DRIESSEN: Good evening. Thank you for the opportunity of speaking to you tonight. My topic is ageing in the legal profession, so I am looking only at lawyers. What I propose to cover is some of the statistics of the legal profession, particularly the elder lawyers. I will discuss the phenomenon in the legal profession of what I call the obsolescent practitioner or the obsolescence phenomenon. I will go into some case studies. Being an insurance lawyer and working at Lawcover, the insurer for solicitors, that is very much an interest and I will look at a number of individual cases. They are all authentic, but I have changed the names to protect their privacy. These are cases that will give you an example of the issues. I will then look at the regulatory response, which will not take long because the response at this stage is limited. Finally, I will look at some ethical considerations, focusing on dementia and Alzheimer's disease, which is a topic of interest of mine.

Treasurer Joe Hockey, has introduced us to the ageing landscape, particularly the retirement age rising to 70 years of age by 2035. There are quite a number of features of the landscape when you talk about ageing but I am only going to discuss three of them.

The first feature is Joe Hockey's announcement that Australians born after 1965 will have to work until they are 70 years of age before they are eligible for the age pension. This is encouragement from Government that people should work longer. It does assume, of course, that older Australians will be able to find suitable work and be fit for it.

The second feature comes from the 2014 Law Society National Profile of Solicitors in Australia, (Final Report, April 2015) which was released recently and points to an ageing profession. Solicitors are continuing to work later in life. The average age of New South Wales solicitors is 42 years and whilst that average age has remained the same for the past few years, there has been a 38 per cent increase in the number of solicitors aged over 65 years. In whole numbers, in Australia nationally, there are over 7,600 practising solicitors aged 60 plus years. From a claims point of view, as a risk group, this is a significant group. I do not know how much attention is paid to issues arising from ageing in this risk group. These are significant numbers in the context of a segment of the legal population to which I would observe there is a general ambivalence about whether older members should continue to practice; best summarised by the remark which is oft heard, "Why do they bother to keep working? Why don't they just enjoy retirement?"

The third feature in the ageing landscape is the slow and steady rise of dementia, which according to Access Economics (accessed on fightdementia.org.au) is the single greatest cause of disability in older Australians aged 65 plus years, and the third leading cause of the disability burden overall. Almost one in 10 Australians over 65 years of age suffers from dementia, and this rises to three in 10 over the age of 85 years. Dementia is forecast to increase by 17 per cent over the next 10 years.

The answer to the question: "Where do all the old lawyers go?" is they go into private practice, often into sole practice. There is no age barrier to practice. There is great pride within some areas of the legal profession when people become lawyers in their seventies or eighties and get their practising certificate. The 2014 National Profile of Solicitors reveals that there are nationally over 65,000 solicitors in private practice, the remainder being in corporate or government positions.

A unique feature for the legal profession when compared with their medical colleagues is that sole practice is still the largest practice style for solicitors.

The 2014 National Profile estimated the mean income for solicitors working in smaller firms was lower than their counterparts in larger firms. The stories of lawyers earning huge amounts of money are really only about a small proportion of the profession, predominantly in the larger firms. What is interesting about lawyers in the larger firms is that their life expectancy in terms of career and age at which they are expected to retire is usually limited. Most of the profession is at the mid to lower end of the earnings scale. In one to four partner firms it was reported that the mean income was about $96,000.

Whilst there is no specific age beyond which it is held that a practitioner should not practise, common knowledge suggests that many larger national law firms are unlikely to employ anyone beyond the age of 55 years. They are unlikely to keep anyone, even a partner, even those pivotal to the practice, beyond the age of 55 to 60 years.

Why is there a perception or expectation even that beyond age 55 years people need to leave or have much less chance to get a job in a larger, well structured law firm? It cannot be competence because this can be applied to all ages. In many ways this is more of an issue for younger practitioners who may lack the knowledge, experience and wisdom of their elders. Perhaps it is burn out. Older practitioners may no longer have the motivation or the financial incentive to work the very long hours demanded of younger practitioners in such practices. However, “burn out” occurs at any age. Chanaka’s graph was most interesting for us to see that burn out is perhaps a feature more of younger practitioners. I would certainly echo that is my experience in the legal profession. It is often heard remarked, somewhat cynically, that this is a useful attrition method to weed out graduates in larger firms and young lawyers who are not going to make partnership. After all there can only be a few partners and this competition leads to a struggle to secure the top positions.

I find this is an interesting phenomenon, particularly with larger practices, and for want of a tag I have called it the “obsolescence phenomenon”. It is hard to

understand why practitioners when reaching 55 to 60 need to depart, but most larger firms do have mandatory retirement ages. These practitioners may still be at the top of their game, quite competent, confident and very experienced but are then perceived as obsolete. They are perceived as needing to make way for the younger generation. Many of these practitioners do continue to practise law after their retirement. They go into boutique law practices, sole practice or act as consultants or mediators. However, I do wonder what this says about the role of mentoring within the legal profession and making use of the talents these practitioners have. Do we utilise the wisdom and experience of the older practitioner in the same way that younger lawyers do, when first starting out? Mentoring has perhaps been sacrificed for financial and other self interests.

Once practitioners go into sole practice, or if they have always been in sole practice, which by definition means they work alone, with perhaps a secretary, an accountant or a junior bookkeeper and a receptionist, there is little possibility for mentoring. There is also limited supervision if age related issues catch up with them. This is a challenge for the profession.

I will now consider some stories of individual elder practitioners. The first story is about Len. In his prime, Len had been a partner with a large national law firm and when it came to the mandatory retirement age and he had to leave, he set up his own practice. This was quite successful, with Len handling multi-million dollar property developments around Sydney. One of these development deals, however, has come back to haunt him. He is now in his mid-seventies and sadly this deal is exposing him to a rather tragic end to what has otherwise been a great career. A large property development failed and the bank called on the borrower’s guarantees and sought possession of the security property, including the borrower’s home. In the fight to stave off foreclosure, the borrower and the bank called Len to give evidence as a witness. He performed poorly, struggling to remember details of the transaction and the advice he had given. His evidence turned on a file note of the adequacy of that advice. Len could not find the original file note. Instead he recreated one in the same or similar format to the original. Len also prepared a side note explaining the reason why the replacement file note had been created.

When the file note was tendered in evidence, Len did not try to pass it off as the original. He did not deny that it was a recreation of the original, which he could not find. However, the explanatory side note had become detached and Len was still trying to locate it at the time he was called to give evidence. Unfortunately, this rather intricate story, together with a patchy memory, was met with incredulity and heavy criticism from the judge, who asked Len to show cause why his papers should not be referred to the Legal Services Commissioner. A witness for the bank attested that Len was always a very careful solicitor, whose practice was to take contemporaneous notes. He recalled seeing Len on the crucial night in question with pen in hand and in discussion with the client. Unfortunately, the witness was out of earshot and did not recall seeing Len writing anything down.

This matter is ongoing. However, there is now a real risk that Len may become the object of the party's claims. The whole experience in court has "knocked the wind out of his sails" so to speak. Notwithstanding the potential of this claim being in the many millions of dollars, Len is no longer competently co-operating with us, the insurer, and appears to have given up. He wants it all to go away.

The next person is John. John is an example of those people who come to law in mid-age, having had a career change. John was previously a building inspector for many years before he studied law and became a lawyer. John has only ever worked in sole practice and did not have many files. Now in his late seventies John was suffering hearing loss. John was instructed in a family dispute, to stop the sale of the elderly parents' property by one of four sons acting under a power-of-attorney. John sought an interim injunction restraining the first son from selling or otherwise disposing of the property. During the course of the injunction proceedings John was asked by the judge to provide an undertaking personally from another son, who had been made the new attorney by the parents, and that was an undertaking as to any damages that might result from the delay in the sale of the property. John unfortunately misheard the judge's enquiry and interpreted it as an order. John acknowledged the undertaking was provided without going back to the son and getting the instructions to provide the undertaking. As it transpired the property was sold at a reduced price, giving rise to a claim in damages as a result of the sale

being delayed by the family dispute. The son who had purportedly given the undertaking, then had a claim made against him. That son then claimed indemnity from the solicitor for providing the undertaking without instructions.

Sadly for John he has had a number of matters that have resulted in claims. It could be said a causative factor in those claims was the solicitor's failure to hear or accurately understand the client's instructions. We always knew when John called us, because the solicitor handling his enquiry had to shout down the phone. Ultimately it was a panel lawyer handling one of John's claims who eventually persuaded him to retire from practice. John did not go easily but eventually the panel lawyer convinced him it was the best thing to do.

Vince is another example of the isolation of being in sole practice in the suburbs where there are appearances to keep up, both with respect to clients, and other practitioners who are your competitors. These days there is a dwindling supply of easy general practice work. This is the result of increased government regulation in the personal injury area where the larger specialist firms dominate that market, and routine conveyancing being lost to conveyancers who do it more cheaply. Vince had experienced financial difficulties in his law practice for some years. He was also suffering from depression. This, together with eventual bankruptcy, caused Vince to become suicidal. Vince's southern Italian background added to his denial of his situation and to the perception that he had disgraced his family such that he had to make amends.

With treatment Vince recovered and went back to work for only one or two days a week. When Vince was asked why he returned, he said he needed to prove to himself and to his family that he could still do it and besides, he needed the money. Selling a sole law practice in these circumstances is not an easy option, due to the lack of goodwill.

Alan is another example of a practitioner in his mid sixties in the suburbs of Sydney who feels obliged to continue working. He has remarried and so has a young wife and very young children. It is difficult with general practice work to make a predictable income. As a result, some practitioners are forced into unusual employment arrangements. Alan took on a younger "hot gun" associate by way of a profit sharing agreement. The

associate still had a restricted practising certificate but promised to increase the firm’s profile in the local community. The associate, for his part, might have thought that this was a practice that he could take over in a few years once Alan had retired. However Alan's new lease on life, his trusting character and his need to work due to his young family, may have been factors in the associate then deciding to moonlight. The associate began seeing the firm's clients out of hours, effectively stealing them from Alan and building his own practice for when he gained his unrestricted practising certificate.

Next, Alfred’s story is of a 90year old sole practitioner who quietly went to work most days. Alfred only came to the attention of the authorities when he had a minor traffic accident and was at a complete loss as to what to do next. It transpired that Alfred had been heavily supported by a trusted and experienced secretary, who was almost as old as he was and had worked for him for decades. Alfred and his secretary had performed routine conveyancing work, at least in the latter years of their practice, for his small and loyal clientele. So long as it was nothing out of the ordinary, everything went well.

This last one is an example for me of the risk presented by the onset of dementia. The most common form is Alzheimer's disease which does not readily announce its presence but rather sneaks up, only dropping hints of its existence in forgetfulness or odd behaviour. This can result in wreaking havoc in the lives of loved ones and for solicitors, in their clients’ affairs. My experience is that those suffering from the gradual onset of dementia can function seemingly quite normally with routine tasks, with the disability only becoming apparent when something unusual occurs.

One impression I have gained from these stories is the increased vulnerability of such practitioners, particularly to sharp practice by clients or work colleagues. Whilst this is a risk for practitioners of any age or stage of career, older practitioners are perhaps a more obvious target because of the popular perceptions that older people are physically weaker and it is easier to take advantage of them.

Another impression I get from younger practitioners when talking about older solicitors, is that they seem reluctant to let go and retire, even when it is clear that they are ‘past it’. A common experience is the solicitor who increasingly utilises the network of

friends and colleagues built up over many years to 'help out'. It may be with either legal advice (due to the problem of not keeping up to date with the law), or not taking on matters that are too complex (reducing your workload to the easy, predictable matters) and passing along to colleagues anything that is out of the ordinary. Whilst technology undoubtedly benefits modern legal practice, elder practitioners do have trouble adapting to and using these innovations to their benefit. I wonder whether these challenges for the elders in our profession would be alleviated if the more common practice style was a group practice, which I understand is perhaps more the norm in the medical profession.

What has been the regulatory response?

The first thing to report from my research into the regulatory response is the absence of a lot of reported cases.

In *Legal Services Commission v Papantoniou* (No 2) [2014] NSWCATOD 141 (28 November 2014), the solicitor was judged unfit to remain on the roll due to an absence of any explanation as to professional misconduct arising from a misappropriation of trust monies. There is passing reference in the decision to the solicitor's statutory declaration of medical certificates, including one that advises of the solicitor "being investigated for progressive cognitive dysfunction as a result of a possible progressive neurodegenerative disorder."

The Legal Services Commission tells me that most cases are unpublished, and that after investigation by the Commission, the practitioner is persuaded to hand in their practising certificate and to cease practice. These investigations are usually initiated by complaints from clients. The Commission sees its main responsibility as protecting the public. They do not otherwise collect any data.

The Law Society of NSW does have power to demand a medical examination of a legal practitioner to determine fitness to practice. The relevant section of the *Legal Profession Act 2004* (NSW) is s105 and under the new *Legal Profession Uniform Law 2015* (NSW), which comes into effect on 1 July, it is section 95. Both of those sections also have a provision that a failure to comply with a notice or a failure to comply with the requirement for a medical examination can be a ground for making an adverse decision in relation to an action by the

regulatory authority or the Council of the Law Society in determining whether the person is fit to practice.

In *Doughty v Law Society of NSW* [2015] NSWSC 174 (10 March 2015) there was a description of the processes undertaken by the Law Society in this area. Dr Doughty describes himself on the internet as a "spry octogenarian". Whilst he is in his early eighties, he was only recently admitted to the law, having previously worked as a butcher and then as a certified accountant. However, he had managed to complete a Bachelor of Business, a Master of Laws and a Doctorate in Jurisprudence. The judgment describes Dr Doughty's challenge of the Law Society's use of section 105. Although, Dr Doughty says he never in fact refused to be medically examined, he did delay the medical examination requested of him and failed to attend one that had been arranged by the Society. As a result, the Council of the Law Society moved to find him unfit to engage in legal practice. Subsequently he did undergo a medical examination and was found to be fit. The case was, in essence, an argument about costs and whether each of the parties had acted reasonably. Schmidt J found that both Dr Doughty and the Law Society had acted at one point in the process unreasonably. On the Law Society's part, it was being too hasty in rejecting Dr Doughty's request for an adjournment of the medical examination.

Otherwise, there is no policy or regime by which the Law Society routinely tests the fitness to practice of older practitioners or requires certain practitioners to provide medical evidence of fitness to practice. There is no mandatory reporting regime.

Usually the Law Society will only hear about cases through referral by the Legal Services Commission or the judiciary, or a complaint to the Professional Standards department. Ageing practitioners are often persuaded to retire by relatives, who will be the first to notice declining capacity. The Law Society tells me that spouses or children will telephone them to say that the law practice is closing and the practitioner will not be continuing in work. Another factor is economic necessity from declining clientele. Such practitioners may end up only having a handful of clients or files and then realise that they are no longer financially viable. In this case it is the clients who shut them down.

I will conclude with a highlight of the ethical considerations as regards dementia, as seen from the land

of television. Episodes of *The Good Wife* (CBS, Series 1, episodes 9, 18 and 19)raised the ethical conundrum of representing a lawyer with Alzheimer's Disease. This was the scenario:

In the first episode a young lawyer is retained to represent a partner of her law firm in a legal matter. It comes out that her client, the partner, has Alzheimer's Disease. She now knows that a senior lawyer, a firm partner, is impaired, and unable to represent clients competently, at least some of the time. Her supervisor is one of the other partners. The client/partner tells her that the existence of his condition is confidential, and she cannot tell anyone, even her supervisor. This is TV drama of course so at this point in real life the young lawyer would have to seriously consider withdrawing from the case in order to avoid being put into a position of conflict. It is also unlikely that such a high profile partner would not have had someone else figure out his condition by this point. However, we will leave it to the drama of television. Personally I think credit is due to the CBS drama for raising this particular issue.

The young attorney continues to represent the partner/client, who keeps the information from the other lawyers in her firm. She even refrains from writing it in the file, because the file is firm property, it is not her property. The partner/client then announces he is leaving the firm and taking most of the clients with him. He reminds her she has to keep his condition confidential. Hence she is in a position where she is stuck and she cannot tell anyone. The story avoids going into the issue of the young attorney's fiduciary issue to the firm and her duties of care to the firm's clients that would arguably limit the confidentiality.

In another episode, the young lawyer is handling a new matter for her firm. The former partner/client, who now is his own firm, makes a surprise announcement, namely in this particular litigation he is the opposing counsel. You do need to assume that the young lawyer has come to the firm after the original partner left, so there is no conflict. After all it is TV drama. The young attorney is now in a position where she knows that the lawyer on the other side has Alzheimer's Disease and that he is possibly incompetent. Could she seek to have the ex-partner cease representing his client? She now has information advantageous to her current client. However, she cannot use it because she obtained it from her former

client, the ex-partner and now opposing counsel, and therefore it is confidential.

An American Bar Association opinion (ABA Committee on Ethics and Professional Responsibility Formal Opinion 03-431 – *Lawyer's duty to report rule violations by another lawyer who may suffer from disability or impairment*, August 8,2003) on dementia impairment observed that, when it comes to ethical considerations, professional conduct rules generally do not give much leeway to incapacitated lawyers, regardless of the cause of their impairment. Hence when an impaired lawyer is unable or unwilling to deal with the consequences of his/her impairment, the firm's partners and the impaired lawyer's supervisors have an ethical obligation to step in. The firm's paramount obligation is to take steps to protect the interests of its clients. The article says, "A lawyer may not shut his eyes to conduct reflecting generally recognized symptoms of impairment (e.g. patterns of memory lapse or inexplicable behaviour not typical of the subject lawyer, such as repeated missed deadlines". Although lack of fitness evidences itself through a pattern of conduct, a lawyer's behaviour in social settings should not be the basis for judging his/her performance in practice settings. "A lawyer must know that the condition is materially impairing the affected lawyer's representation of clients." I will end there because of time constraints.

To conclude, this area also presents ethical conundrums or considerations in terms of the profession, and how to deal with people who are ageing. There is no age barrier to legal practice and it is important not to be ageist. However, at the same time there is the duty of protection of the client. This duty to the client is paramount. Therefore ethically there are obligations on practitioners, even practitioners who are not in the same practice as the practitioner if the majority are in sole practice, to either raise the issue with the practitioner or to then raise it with the Law Society.

My impression in my research of the Law Society's approach to this is that it prefers to adopt a fairly gentle and softer approach. It would appear that perhaps the bar is not as high for legal practitioners as it is with medical practitioners. However, that is just my own impression.