Waking in fright in the justice system

By John Hayward*

In the early evening of 29 May 2012, Registered Nurse G was travelling on the Bass Highway in Tasmania from Deloraine to Launceston to attend a training seminar. She was the Acting Nurse Unit Manager at the Deloraine Hospital.

An SUV traveling in the opposite direction carelessly strayed across double white lines and collided with her smaller sedan head-on.

Her injuries were horrific, with 14 bone fractures to the ribs pelvis, wrist, femur, tibia, fibula, cervical spine and lumbar spine vertebrae, lung injury, severe intracranial brain injury, lacerations, and an eye injury. She remained in a state of post-traumatic amnesia for 96 days following the accident.

G was transferred from the Launceston General to the Intensive Care Unit at the Royal Hobart Hospital where she remained until 17 July 2012 from where she was transferred to St John's Hospital in Launceston, from which she was released on 3 October of that year, pending further operations. She was told that she would be unlikely to ever resume her job.

The smash had countless repercussions. Her partner, A, had been compelled to take extended leave from his job as a District Nurse to care for her and their three school-age children. They were at least mercifully spared litigation over percentages of liability, as the other driver had admitted and been found to be 100% at fault.

The tasks of organising scheduled compensation benefits under Tasmania's no-fault Motor Accident Injury Board (MAIB), and common law claims against the other driver, required them to engage counsel. They were directed to a lawyer with experience in compensation claims.

The legal pear takes shape

The lawyer, whom I will call simply Lawyer, started off by insisting that he could represent only G alone due to possible conflicts of interest that could arise between A and G, though he declined to specify what those conflicts might be. Subsequent to the initial meetings, he had surprisingly little contact with either, despite the amount of data needed to assess a person's actuarial losses and probable needs in all matters for the balance of life.

Through an accountant friend, A & G discovered that they had only weeks to claim her superannuation refund, or lose a substantial portion. They began scouting for an alternative counsel.

In early 2014, Lawyer rang alarm bells when he suggested that G would need an administrator to manage what would be very substantial compensation. L did not reconcile this advice with the fact that G was in a stable relationship with a partner who was also a registered nurse, nor that an administrator would involve loss of control over her assets as well as not inconsiderable management fees.

Around the same time the Guardianship and Administration Board (GAB), the agency responsible for looking after those unable to do so for themselves, entered the correspondence. A & G presumed this was routine procedure rather than at the invitation of Lawyer.

I became involved in April 2014, when A dropped in to discuss the difficulties they were having with Lawyer. On top of Lawyer's seeming inattention to some procedural matters, and sparse communication with either of them, A & G had also received a copy of a questionnaire sent by the government insurer, MAIB, to a neuro-psychologist who had examined G.

The questionnaire asked the specialist to affirm that G was in need an administrator for her estate and sought his agreement to have a named person appointed to this task. This could only have come from Lawyer. Neither A nor G had been advised of nor consented to him seeking an external administrator for G's estate, but the named person was both a known friend of Lawyer and a retired employee of the Public Trustee. The MAIB subsequently acknowledged that the recommendation for the administrator had been at the request of Lawyer. A&G were gobsmacked to see L operating openly in concert with MAIB. Lawyer clearly had to go.

A & G decided on the course commonly taken by couples where the health of one or both has become precarious, which was for G to donate (assign) to A an Enduring Power of Attorney (EPA), a legal instrument which allows the assigned EPA holder to exercise the legal powers of the donor when necessary. More important in this case, it prevents an outsider from using incapacity to take extraneous actions.

A & G acquired an EPA, Lawyer was notified of his dismissal, and the MAIB and the GAB were notified of the new arrangements. It seemed the threat from Lawyer had been averted.

Down the Tassie legal rabbit hole

Lawyer did not acknowledge his dismissal – and still hasn't – but the reply from the GAB was astonishing. They informed A & G that the employment status and legal authority of the Lawyer was not their concern. At that point it became apparent that Lawyer was only a part of a more serious disorder.

The next shock occurred less than a fortnight later, when A & G received a copy of an 18 April application to the GAB from Lawyer, in which he sought to have the GAB revoke the EPA on the grounds that G lacked the cognitive capacity to donate it.

This seemed a departure from legal normality of a Lewis Carroll extravagance:

- How does this sit with the sacrosanct lawyer-client confidentiality and the contract between them?
- How can a lawyer challenge the cognitive competence of a client to enter a legal agreement when he had previously insisted that only she alone could engage him?
- What legal standing did Lawyer have to challenge an EPA approved by a JP in a matter in which he did not have a legal interest?
- What expertise did Lawyer have to independently determine the cognitive competence of anyone, but particularly in a matter where there was absolutely no expert evidence that she lacked the competence to donate an EPA to her own partner, nor any evidence that her partner was unsuitable to receive it?

These and other questions were put to the GAB in the following weeks, without response.

Shortly after receiving the Lawyer's application, the GAB advised A & G that they would be conducting an investigation into the matter. Whatever the GAB sleuthing did, it didn't involve any contact with A & G.

Some 18 days later, GAB advised A & G that their investigation led them to decide to conduct a hearing into the application, to be held on 13 June. They did not disclose then, nor later, despite requests, the full details of Lawyer's application.

But GAB did provide some information that left us cautiously jubilant. They advised A & G of two grounds for the revocation of an EPA:

- If the attorney has asked the GAB for advice or guidance on the exercise of an EPA.

- If the GAB determines that the EPA was designed to circumvent the application to have the estate managed by the Public Trustee.

Both these grounds were put in writing, both are fallacious, and neither could be characterised as honest mistakes. These irregularities should blow up on them in a proper court.

At the same time, the GAB's seeming recklessness to imputations of misconduct led us to suspect A & G couldn't expect a fair hearing in the Tasmanian system. (My

own experiences in litigation involving Tasmanian forestry had left me a profound cynic).

G now had no lawyer as the June hearing approached. Efforts to find a replacement had been curiously unavailing, given the prospects of substantial compensation and lucrative protracted negotiations.

One firm had shown positive interest but offered to take the case on a contingency, or "no win, no pay", basis. On this basis, the client pays substantially more for this sort of arrangement, but in this case, the other driver's admission of total responsibility had removed the judgment contingency.

Other lawyers contacted displayed a reluctance to challenge the extravagant irregularities in Lawyer's conduct, or claimed unfamiliarity with even the relatively simple legal issues in the GAB hearing.

A & G decided the best remaining strategy was to bring as much publicity as we could to the case, in the hope that a wider spotlight might induce GAB to abandon their increasingly audacious gambit. The then leader of the Tasmanian Greens sent GAB a letter reciting the irregularities in the case's procedures, but a prominent opposition MP bolted without explanation after claiming initial interest. A & G invited friends, neighbours, and sympathetic councillors to attend the hearing.

Kafka, in the coils of M Python

The hearing was held in the Magistrates Court, despite essentially being a tribunal matter. The GAB tribunal, or Board, turned out to consist of a single lawyer. He had the same name as the lawyer I had once noticed as representing a logging firm before the Forest Practices Tribunal some years before. (As lawyers are expressly barred from acting before the FPT, I had put this to the then FPT chair, who promptly stood down from the FPT hearing I was then about to face).

At the GAB hearing, a representative of the Public Trustee was in attendance and was listed in the notice of hearing as a party to the hearings, but A & G had not been invited to call any witnesses for themselves. Though the hearing would decide the control of G's estate, which amounted to most of their joint income while A was on extended leave, it was scheduled for only 45 minutes.

The first witness was Lawyer, who related that he had made his application solely out of concern that G was in need of assistance to manage her affairs. Both A & G reminded him that he had never been asked to do this nor had he ever informed either of them of what he was doing. When questioned by both of them, he admitted that he had indeed never told them of his plans.

We noticed that a single pocket tape recorder lying on the bar table appeared to be the sole recorder of the hearing, and asked the GAB lawyer about it. We were

assured it was working (it appeared to be turning). We were also assured that he had complete discretion to decide the issue of G's competence, despite her very clear and cogent arguments that she wished her partner, rather than a fee-charging stranger, to assist her with her financial affairs.

As the hearing progressed, Lawyer expressed increasing reluctance to continue with his application and declared his desire to withdraw from the matter and leave his application to be prosecuted by GAB. The GAB lawyer remained insistent that Lawyer remain the applicant. The issue was still undecided some three times later than the original 45 minute hearing duration when it was adjourned until further notice.

It was July before A & G were notified that a hearing on 30 June had decided that GAB would conduct a hearing on the matter on its own motion. A & G had been told nothing about any 30 June hearing. After remonstrations from A & G, the GAB emailed that the 30 June announcement had been a "clerical error".

A & G requested a recording of the 13/6/14 hearing. (One of my own previous tribunal experiences was of having a transcript of an FPT hearing reveal that all the forestry testimony had been transcribed perfectly, while that of plantation objectors was largely rendered as "unintelligible" while perhaps the most significant witness had disappeared from the record entirely. My purchase of the tape of a Magistrates Court hearing some years later had yielded a tape that an IT PhD acquaintance could not open, but I declined to purchase the more expensive transcript).

Strangely, the tape recorder had apparently suffered an "operator's error", and there was no audio version or transcript of the hearing…at all.

In any event, the GAB lawyer belatedly undertook to reconstruct the hearing from his own memory and hearing notes, but we found the result comically unrecognisable.

Undeterred, the GAB announced its plans to conduct a hearing into both G's capacity to assign an EPA and A's suitability to receive it, though they provided no reasons for this decision

The watchdogs

In an increasingly desperate effort to introduce some light and oxygen into the case, we applied for Special Case opinions from the Supreme Court on seven issues in the conduct of the case, such as Lawyer's standing to use his client's confidential information against her, or his authority to make conclusive medical assessments. The GAB lawyer considered the application himself, largely ignored the issues in the Special Case, and refused to submit them to the Supreme Court.

Failing the Special Case option, A & G also lodged a complaint with the Legal Profession Board of Tasmania (LPBT), which is purported to be a professional conduct regulator. The replies from that office largely ignored the substance of all the complaints, concentrating on lauding the validity of Lawyer's post-sacking revocation application. They also implied they had doubts about the validity of Lawyer's sacking, though didn't disclose the reasons.

We did mention, however, that we were seeking legal counsel on the mainland. The LPBT correspondent quite improperly demanded all details of A & G's dealings with the then still nameless, and still non-existent, mainland lawyers. Gobsmacked by the response, A & G ceased corresponding with the LPBT. They would later be notified that their complaint had been considered and refused.

Searching for a white knight

The more than two years years following the accident had been ones of enormous stress and anxiety for A & G and their children. They now faced a hearing, without legal counsel, before a GAB which appeared to have abandoned legal orthodoxy as well as any concern with censure.

We stepped up the search for mainland counsel. My partner was acquainted with a retired Melbourne barrister, who proposed we contact a colleague, one of the most prominent QCs in the country and who had achieved added renown through a notable interest in human rights issues. While many barristers now claim an interest in some altruistic ethical or environmental issue as self-promotion, this QC was regarded as genuine.

The prospective lawyers tipped by the QC turned out to be unavailable. Some were possibly incredulous that the state of Tasmanian legal affairs could be as deranged as we described.

As the hearing date approached, and the suspense soared, the QC offered to take the case himself. It seemed to be deliverance, not because the case necessarily required a person of his pre-eminent legal stature, but because he was independent from the Tasmanian legal culture.

The hearing was eventually set for 4-5 December. But there was also the matter of finding a briefing solicitor for the QC. This seemingly simple process turned into a nightmare. We much preferred someone from Victoria, while the QC believed that a standard Tasmanian lawyer, with local knowledge, would be adequate.

The firm he preferred was a small Hobart branch office of a prominent national firm. We had previously sounded them out and been told they were unavailable. This time, with QC in the picture, they accepted.

The briefing solicitor (BS) had graduated from law school the previous year. He began by expressing skepticism that the QC had the requisite skills for the job, noting that he was not experienced in either Tasmanian nor guardianship law. We reminded him that administrative law, which covered A & G's case, was one of the QC's specialties.

BS also urged that A & G hire a specific Hobart barrister for a formal opinion on whether the QC or the barrister should be handling the matter. BS further recommended that A be represented by another Hobart barrister, rather than being jointly represented with G by the QC. This would be considerably more expensive than representing clients jointly, and hardly necessary without an obvious conflict of interest. A & G's astonishment at the BS's advice was not tempered when we discovered that the senior lawyer in the office was a former employee of Lawyer.

There is a convention that clients and barristers deal directly only with the briefing solicitor. Though the QC was scrupulously discreet about his estimation of the BS, we were not confident that A & G's evidence was reaching the QC intact. A & G continued to copy the QC into their evidence to the BS.

The trial

The GAB hearing was to be again held in the Magistrates Court, on 4-5 December. This time it would be before a tribunal of three, consisting of the Board lawyer, a retired civil servant, and a senior psychiatric nurse.

In addition they had availed themselves of a regulation permitting them to invite in additional expertise to assist. Their appointee was a prosecutor from the office of the Director of Public Prosecutions. As this was eminently a civil case focusing on neurological matters, it seemed an odd choice, not only because the GAB panel was already headed by a lawyer presumably very conversant with the relevant legislation, and had no high level neurological expertise, but also because GAB had decided on its own motion to prosecute the Lawyer's case itself without disclosing their reasons for this decision. We also learned that the DPP person was a former employee of Lawyer.

As the hearing date approached and QC became more conversant with the facts and actors involved, he expressed some bafflement as to what credible case the GAB could bring. He also expressed surprise after speaking to G on the phone and finding she was the same person the GAB was characterising as all but insentient.

Once the hearing commenced, we were none the wiser, as there was still no clear explanation of the GAB's reasons for prosecuting. It soon became clear that the DPP's role was to attack A & G's credibility, which he did with what seemed unusual aggression for such a matter. The GAB lawyer followed much the same course. The public servant was likewise hostile to A & G, but had fewer contributions, while the psychiatric nurse did not ask a single question in the course of the 1.5 day hearing.

There were no questions or answers from GAB on the legality or propriety of their own actions.

The GAB case ran into serious problems when they called their two witnesses, a neuro-psychologist and a psychologist. Though each had provided professional opinions that G would need some help in the future, neither would assert she was incompetent to donate an EPA. The expert witnesses had never been asked to address this issue, nor the competence of A to be the attorney. They were no doubt keenly aware that their responses could end up being scrutinised by their own professional bodies much differently than complaints going to the LPBT.

The GAB case against G deflated.. Their remaining arrow was their argument that A was an unsuitable attorney. It appeared that they may have intended to simply bypass the issue. The sole evidence from Lawyer consisted of four unattested statements; no authors or witnesses were listed. These had no evidentiary value whatsoever.

The tribunal turned to arguments that administration of estates generally should be in the hands of lawyers able to defend them in the Supreme Court. The nonplussed QC remarked that the arguments were "extraordinary" The GAB case degenerated into repeated paraphrasing of the same arguments, which the QC eventually described as a "filibuster". It was not an edifying demonstration of legal processes.

But it was the moments after the first day's adjournment that took our breath away.

The DPP man handed QC emails of recent correspondence between himself and Lawyer in which he offered Lawyer, the same man who had been dismissed by G, the job of pursuing negotiations with MAIB over G's claims in the event GAB elected to turn her estate over to the Public Trustee. Lawyer had eagerly accepted.

While the QC purported to be mystified by DPP's admission, there seemed one simple explanation.

This was that DPP was frantically seeking to prevent GAB lawyer, who had previously displayed a seemingly reckless disregard for legal conventions, from a decision to revoke the EPA and turn a substantial estate over to the Public Trustee (whose observer was again attending). It took scant legal nous to foresee the likelihood that a decision like this would have compelled QC, or an honest colleague, to pursue the case to whatever higher forum offered justice. There, it seemed to me, it could well have been perceived that the GAB tribunal was involved in something that looked like a conspiracy to defraud. On this reading, the leaked emails would save DPP from disaster.

Had the QC pursued this course, however, he might have faced the prospect of a protracted entanglement in a criminal prosecution through the state jurisdiction before reaching a mainland court.

The close of the case was followed a few weeks later by the GAB's terse notice that the application, which they had pursued themselves, had been refused. A & G were saved, though at considerable cost. Fascinated as to how GAB had come to find so resoundingly against themselves, we requested a statement of reasons for the decision. GAB may have presumed the request had emanated from the QC, since A & G received a statement of reasons so comprehensively rejecting all the grounds for the hearing that it seemed to have come from a different body.

Aftershocks

QC flew out shortly, and no doubt gratefully, as soon as the hearing ended, All that was left to A & G was the financial mopping-up. Lawyer's bill had been tendered at slightly more than two and a half times his initial estimate. He had not responded to requests for that portion of his bill attributable to surreptitious activities intended to remove administration of G's estate to the Public Trustee. Instead, he sent his suspect bill to a collection agency.

A & G began searching for lawyers to challenge the bill and mount a counter-claim. We could find no one, one large firm stating that no one there had the time. Another lawyer appeared to accept, but omitted crucial evidence from the draft counter-claim. Others claimed inexperience in what seemed to be rudimentary litigation. Rather than risk inflated costs in enemy territory, A & G paid up in full.

The QC's fees ended up as slightly less than those of his BS, who, in the manner of Lawyer, refused to itemise the portion of his bill spent trying to dispense with the QC. Despite requests and having been paid in full, BS has not yet relinquished A & G's file for some months.

There remained the task of negotiating with the government accident insurers. A & G finally returned to a lawyer who had initially declined the case when it still involved the GAB matter. This time she accepted.

Despite the full settlement of the bill, Lawyer had returned only a portion of the file. When the new lawyer broached the remainder issue, Lawyer replied that she could examine them at his office. When instructed by A & G to demand their return as a matter of right, she replied that it would be impolite. After their initial experience with the LPBT, A & G declined to lodge another complaint . There it stands.

The moral of the nightmare

A & G were hardly winners of this affair, merely freak survivors, after paying more than $60k for a legal attack which should never have happened. Those responsible were not at all chastened and there were no rulings to prevent vulnerable people, particularly the sick, elderly, and single, from falling prey in the future.

A & G weren't saved by legal argument, but rather by the a prospect of a real hearing in a real forum, which QC's presence threatened and which one member of the tribunal foresaw.

As with the numerous religious bodies previously entrusted to look after children, it's clearly time that rigorously independent watchdogs be established to monitor the conduct of similarly-sacrosanct legal institutions which have likewise been found to have serious problems regulating themselves.

* John Hayward is a qualified but non-practising lawyer who lives in Tasmania. Civil Liberties Australia has embarked on a 10-year campaign for 'Better Justice' in Australia. A thorough examination and some formal, independent monitoring of criminal and civil justice processes in Tasmania (and other states and territories) would be a useful adjunct to what we propose. This article appeared first on the Tasmanian Times online newsletter: http://tasmaniantimes.com/index.php/

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