In deciding the facts of a case, determining the law and applying the law to the facts to reach a judgment, judicial officers exercise primarily analytical skills. However other aspects of the judicial role – such as promoting respect for the legal system and compliance with the law – also call for the exercise of interpersonal skills including the ability to listen and communicate effectively with an ethic of care and the ability to motivate others to consider positive change. Such skills are particularly called upon in problem-solving courts such as drug courts and family violence courts. But they should be skills exercised by every judicial officer. Drawing on the principles of therapeutic jurisprudence, this article illustrates how a judicial officer’s attention to process and the proper exercise of interpersonal skills in sentencing can promote justice system goals. Interpersonal skills and therapeutic court processes should be subjects included in judicial training.

INTRODUCTION

Therapeutic jurisprudence says that the operation of the law and its institutions impacts upon the wellbeing of all those affected by them. It recognises that the law’s operation is intimately concerned with human communication and behaviour and that the behavioural sciences share this interest. Therapeutic jurisprudence involves studying findings from the behavioural sciences as to what works in communication and behavioural change and adapting these findings for use in legal processes, including court processes. In taking a therapeutic approach, the law acknowledges that courts should not be like factory assembly lines relentlessly processing their human subjects at a rapid pace and that they can play an active role in promoting a comprehensive resolution to the legal problem. In adapting these findings, judicial officers, lawyers and other legal system professionals need to be mindful that there are other values the legal system upholds in its processes and that the impact of such processes on participant wellbeing may in some situations need to be subordinated to other concerns.

Courts in Australia and overseas have been sensitive to the negative effect that improperly conducted court or other legal proceedings can have on an individual’s psychology. For example, the Supreme Court of the United States emphasised the need for fair procedures in relation to revocation of parole and the possible negative psychological effects on a parolee denied such process.\(^1\) The Supreme Court of Western Australia warned of the possible aggravation of a domestic violence problem in relation to a respondent to a restraining order who was denied a fair hearing.\(^2\) Appeal courts have also commented on the negative effect on a defendant’s wellbeing of derogatory comments made by a magistrate to a defendant.\(^3\) The courts’ experience of the effect of the actions of courts on individuals has its parallel in the experience in counselling that the likelihood of behavioural change is influenced by the nature of interpersonal interaction.\(^4\)

Burt CJ in \(R v Peterson\) [1984] WAR 329 noted (at 332) that the causes of crime lay in the community and that the sentences that the courts impose are limited in what they can do to address...
The therapeutic dimension of judging: The example of sentencing

such causes. But the experience of applying therapeutic court processes in problem-solving courts and elsewhere suggests that courts can play an active and creative role in addressing underlying issues in relation not only to criminal but also to other legal problems before a court. Thus, therapeutic jurisprudence is said to explore the healing power of the law.

From this perspective, judicial officers should not only be concerned with the substantive law and procedure but with the way in which they interact with people in court and the potential impact of their actions on the wellbeing of those affected by them. Here, wellbeing can be considered in two respects: satisfaction with court processes, and personal problems that may have contributed to the legal problem. A positive impact of court processes on wellbeing is desirable because it can promote respect for the court and its orders and because it can contribute to the resolution of the legal problem. There is evidence that in a problem-solving program, such as a drug court or the Geraldton Alternative Sentencing Regime, positive interaction from the Bench with the participant promotes wellbeing and compliance with the requirements of the court program. That is, the actions of a judicial officer can promote positive behavioural change.

The purpose of this article is not to give an exhaustive overview of therapeutic jurisprudence – the website of the International Network on Therapeutic Jurisprudence provides a useful source of further information. The article is also not an exhaustive exposition of therapeutic jurisprudence and judging. The purpose, rather, is to give an overview of the essential principles of a therapeutic approach to judging, to illustrate them using the example of sentencing and to provide references for further research.

COMMUNICATION, BEHAVIOURAL CHANGE AND THE JUDICIAL PROCESS

Judging and the behavioural sciences

Courts are often concerned with the modification of human behaviour. As a key component of the justice system, courts are expected to play a role in deterring crime. But modification of behaviour is not only a goal of criminal law proceedings. Restraining order proceedings seek to prevent violence and other misconduct. In family law proceedings, courts have to be mindful of means to improve the parties’ relationship to one another and to their children and to prevent violence. While in the past the focus has been on the deterrent and coercive function of the court through the orders it makes, therapeutic jurisprudence suggests that the conduct of the proceedings is also important, particularly the manner in which the judicial officer interacts with the parties.

Therapeutic jurisprudence suggests that findings from research on procedural justice and the behavioural sciences can be particularly helpful in designing therapeutic court processes and in avoiding anti-therapeutic effects. But how are judicial officers to determine what findings from these fields should be applied in court proceedings and in what manner? Judicial officers are trained in the law, rarely in psychology or other behavioural sciences. The field of the behavioural sciences is vast and there are various theories relating to the human psyche, development and behaviour. There are also differing approaches to counselling and other ways of resolving problematic behaviour. Who is to decide what is useful and what is not, in relation to the conduct of a judicial officer in court? Is this to be a matter of experimentation, with litigants the guinea pigs in courtroom research as to “what works”?

One approach is to examine “what works” in relation to practices in the behavioural sciences that are directly relevant to the judicial function, such as communication and behavioural modification. For
example, in their development of therapeutic jurisprudence and its application to judging. Wexler and Winick refer to findings in relation to counselling and health, such as the importance of self-determination for health and the value of motivational interviewing in promoting self-determination in the context of behavioural change.\(^8\) The principle of self-determination and motivational interviewing is explored further below.

Another approach is to study courts where therapeutic principles are already applied. Drug courts have been in operation in the United States since the 1980s. Children’s courts that seek to take a therapeutic approach have been in operation for much longer. Studying how judicial officers interact with participants in such courts is one way of determining what is useful and what is not. For example, Petrucci studied the interaction between a domestic violence court judge and defendants and isolated elements of the therapeutic interaction between the judge and participants.\(^9\) One factor that she noted to be important was the mutual respect shown between judge and participant. Judges experienced in this approach also have a role in instructing others concerning what works in a courtroom.

There is also research in procedural justice, such as studies on the reactions of litigants to court and other justice-related processes.\(^10\) Such research has isolated factors that are valued by litigants in promoting their satisfaction with, and respect for, justice system processes. This provides the basis for developing strategies to improve the judicial response in court.

The application of therapeutic jurisprudence and judging implies that the art of judging is not static; it should be a matter of ongoing research and development. As our understanding of human nature, communication and behaviour develops through the work of the behavioural sciences, so relevant findings should be considered for application in courts and in the justice system generally. It is here that academics and professionals in the fields of law and psychology could usefully collaborate on the development of strategies in judging. However, as factors other than the impact of court processes upon the wellbeing of a participant must always be a consideration, it may be that such strategies cannot always be applied.

**Procedural fairness, court processes and psychological health**

Putting aside cases where an accused is unrepresented, a criminal case typically involves the prosecutor, defence lawyer and judicial officer doing most of the talking and decision-making in relation to the conduct of the case and the accused simply sits and observes, almost as a witness. A lack of knowledge of substantive and procedural law and of the “courtroom wisdom” of the criminal lawyer is understood to put an accused at a disadvantage. The accused may bring up something damaging to the case if he or she is permitted to communicate in court without first speaking to the defence lawyer. From that perspective, it is better to keep the process in the hands of the experts.

A defence lawyer will typically try to restrict what the client says to acknowledging the client’s name at the start of the case, the entry of the plea and the giving of evidence. All other communication is handled by the lawyer. Certainly, a decision to proceed by way of a plea of guilty or not guilty is a matter for the accused but the general conduct of the case is in the hands of counsel. Traditionally, a judicial officer would not communicate directly with a represented accused except in limited circumstances such as in the delivery of sentence or the taking of a plea by a magistrate.

Yet from a psychological perspective, self-determination is considered to be important for health and a paternalistic approach is thought to be counterproductive and often offensive to the person. Clearly, an accused has choices in relation to a plea in a criminal case and as to whether the accused is represented or not, but should the ideal of self-determination mean that a court and counsel should do more to involve the person in the proceedings? The author’s own experience in court is that often

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\(^8\) Winick and Wexler, n 7.


an accused may be champing at the bit to say something after there has been an exchange between the prosecutor, defence counsel and the court where the accused believes essential points have not been stressed.

Findings from procedural justice research confirm the value that litigants place on the fairness of the process. United States research suggests that litigants place greater value on the fairness of the process than on the outcome.11 Australian research on family law litigants found that, although they placed value on the fairness of the process, the outcome was also important in determining satisfaction with the court.12

What, then, is important for litigants in determining the fairness of the outcome? United States research suggests that the answers are neutrality, respect, participation and trustworthiness. Interestingly, trustworthiness is not a factor that United States judges list in evaluating judicial performance. As to the meaning of trustworthiness in this context, Judge Roger Warren comments:

Whether a judicial officer is trustworthy does not depend primarily on the officer’s honesty or reliability. Rather, “trustworthiness” is based upon a perception of the judge’s motives, ie, whether the judge truly cares about the litigant (demonstrates “an ethic of care”) and is seeking to do right by the litigant. Trustworthiness is not a measure of the judge’s knowledge, skills or abilities. It is a measure of the judge’s character, not the judge’s competence.13

Australian research also lends support for the value of litigant participation in promoting satisfaction with the outcome, finding that family law litigants who perceived that they had some control over the outcome of the case “were also likely to be satisfied with the time the case took to resolve, to feel that they had won or at least partially won their case, to have not changed their expectations after consulting with their lawyer, and to have reached a result they expected”.14

Voice, validation and respect in practice

Procedural justice research emphasises the importance of voice, validation and respect. “Voice” is providing an environment where a person can present their case to an attentive tribunal, and “validation” is the acknowledgment by the tribunal that the case has been heard and taken into account.

“Respect” has been referred to above. It relates to the manner in which the judicial officer interacts with the person, whether the judicial officer takes time to listen to the party, the tone of voice and language used and the body language of the judicial officer in interacting with the participant. Lawyers having practised in the courts over the years can recount cases demonstrating a lack of respect shown by the court for those involved in a case. For example, one judge in Western Australia, now retired, used to turn his chair to face away from counsel when the judge became exasperated with submissions. Other past judicial officers were known to become demonstrably angry in court and heatedly so. The effect such mannerisms would have on a litigant can only be imagined. Thankfully, they are far less common in contemporary courts. Where the judicial officer promotes respect for the litigant, the litigant is more likely to respect the judicial officer and this becomes the basis for compliance with court orders and, where applicable, successful compliance with a problem-solving court program.

Promoting voice, validation and respect can also help to promote the healing process for a person coming before the court in a variety of contexts. A claimant in a civil proceeding may wish to tell the court – a tribunal in authority representing the community – what happened as a result of a tort committed in relation to her or him and the effect on the person’s life and to receive the vindication of a judgment in the person’s favour.15 This process may help to allow the person to let go and move on

11 Tyler, n 10.
14 Hunter, n 12.
with life. Similarly, a victim of crime may wish to be heard as to the wrong committed against her or him, to receive the vindication of the court and to witness the imposition of punishment upon the offender through the sentencing process. An offender telling what has happened to cause a drug problem and offending behaviour and the steps of healing that are taking place to a concerned judge or magistrate can help the process of rehabilitation in a problem-solving court process such as a drug court.

Voice, validation and respect go to the communication skills of the judicial officer involved. Listening, speaking, body language and awareness of matters that may impact upon communication that arise from the personal experience of the judicial officer or, where it is possible to know this, the party, are important aspects of this process.

The art of listening
Listening is, of course, an essential part of the work of the judicial officer. A judicial officer listens to what is said, evaluates it and formulates a response according to the needs of the situation, whether in delivering a sentence or judgment or responding to a submission put by counsel in court during the course of a trial or other proceeding.

From a therapeutic perspective, listening is a vital aspect of voice, validation and respect. Voice requires an attentive tribunal, meaning a judicial officer who listens. Without proper listening, the judicial officer cannot give validation to the party involved and certainly does not show the person proper respect.

Listening requires not only hearing what is said but understanding the intellectual and emotional content of what is being said. A party to legal proceedings often not only communicates what has happened but how the person felt about what happened. The person may be upset, angry, frustrated, fearful or anxious about the subject matter of the court proceedings and/or the very court proceedings or have mixed feelings about the matter. The person may well want the judicial officer to not only appreciate the nature of the person’s case but that the person is angry or upset about it. He or she may communicate these feelings not only through the content of what he or she says but in the tone and volume of the voice and through facial expressions and other mannerisms. Indeed, for some people the feeling may well be communicated more in the tone of voice or in mannerisms than in the content of what is being said.

But it is not uncommon for a judicial officer to be doing something else while listening to someone in court. In a trial, the judicial officer will be taking notes of evidence and evaluating it in her or his mind as the trial progresses. In trials and other matters, a judicial officer may be reading documents or attending to other paperwork while a person is speaking. Some such activity is unavoidable, particularly in trials. But such activity may have the anti-therapeutic effect of telling the person that what he or she is saying is not important enough to warrant the judicial officer’s full attention. That effect may be so significant as to not be counteracted by the judicial officer summarising the party’s case in delivering reasons and showing that the judicial officer was listening after all. It also may prevent the judicial officer from fully appreciating both the emotional and intellectual content of what is being communicated and from providing proper validation.

In isolating the matters of law and fact at issue, it is common for counsel and a judicial officer to enter into an exchange where the judicial officer asks questions to test the strength of what is being presented. A critical question can quickly stop a baseless submission in its tracks. It can also open up for examination dimensions of the problem that require further examination. Counsel are, of course, trained to deal with the sometimes robust nature of such an approach. The use of such an approach with an in-person litigant may have the effect of causing the person to think that he or she is not being given a proper opportunity of being heard. Even if the person is represented, such an effect may be created in the litigant who is present in court by the overuse of interruptions to submissions made by counsel or by penetrating questions that bring a line of argument to an abrupt end. This is not to say that questions, appropriately framed, cannot be used to clarify what a person is saying and to demonstrate that the judicial officer is listening.

Interrupting, rushing or cutting short a person who is trying to present her or his case to the court can lead to the person thinking that he or she has not been given a fair hearing. On the other hand,
there are issues of time management for any judicial officer and, in particular, for a magistrate who has
a busy list. The time that a magistrate sitting in a busy list can spend on any one case is limited. An
alternative to stopping the person who is in the course of submissions is to explain that the time
available to deal with the matter that day is limited due to the number of other cases to be heard and
to offer the party an adjournment to another date to complete the matter.

If one is to show a party that one is listening then, as far as is possible, it is best not to be doing
something else while the party is speaking and to give the person one’s full attention. While it is
tempting to evaluate what is being said as one goes along, it may be preferable in some situations to
suspend the process of evaluation until any submission to the court has been completed. This allows
the judicial officer to take in the whole content of communication as much as possible. In some
situations in court, such as a trial or where there are lengthy submissions in complex matters, there
may be only limited opportunity to take this approach.

There are commonly recognised ways of demonstrating that one is listening and these help to
promote the values of voice and validation. Nodding is a common way of demonstrating attention to
what a person says. Another method is for the judicial officer to repeat the gist of what someone has
said and ask for confirmation from the person that that is correct. The latter approach should be
applied judiciously. Often the exchange between party and the Bench may be only over a few minutes
and the overuse of the technique will become anti-therapeutic. During such a communication it is
important for the judicial officer, where possible, to refer to both the rational and emotional content of
what is being said so as to show the party that he or she really has taken in what has been put to the
court. Body language is also important. A judicial officer whose seat is turned in the direction of the
speaker and whose eyes are directed at the speaker and who appears to be giving her or his full
attention demonstrates that he or she is listening.

Communication from the Bench

In terms of the manner in which a judicial officer communicates to a person in court, Petrucci’s
analysis of the interaction between a domestic violence court judge and participants in the court
program is instructive in the therapeutic approach:

The judge spoke loudly and clearly to the defendants during their appearances. The judge spoke loud
enough to be heard by all those present in court, as well as those sitting in the audience. He also spoke
at a slow enough pace so that what he was saying could be understood by those present.

The judge referred to defendants by name (for example, Mr Smith or Ms Jones), rather than using the
word “defendant” … the judge also took particular care in pronouncing names carefully and to the best
of his ability, using as close to correct pronunciation as possible.

As important as what the judge says is how he says it. Through body language and tone of voice, the
judge conveys messages to the defendant. The judge’s tone of voice when he spoke to defendants
conveyed concern for the defendant as a person without pity, disdain or condescension. The judge
appeared to believe what he was saying … He gave the defendant his full attention during the hearing.
He regularly asked if the defendant had any questions, to which many defendants said yes, and
proceeded to ask their questions. At the same time, he did not allow defendants to “get away” with
excuses or inconsistent information – the judge would directly confront defendants and call them on
anything that he was not absolutely clear on. This also worked to clarify any misunderstandings or
miscommunications that did sometimes occur.16

The process is one of dialogue between the judicial officer and the participant rather than the
judicial officer lecturing the participant. When communicating with a layperson, simplicity, avoidance
of technical language and attention to cultural issues relating to that person that have a bearing on
communication are also important. Naturally, a respectful tone of voice and avoidance of sarcasm or
jokes at the expense of the accused are desirable.

Communication can also be affected by past experience. Adverse experiences can make a person
sensitive to certain issues. This is common to see in relation to accused persons in criminal
proceedings. For example, past experience of court proceedings may make them reticent to speak

16 Petrucci, n 9 at 285-286.
frankly with a judicial officer in open court. Judicial officers should also be aware of experiences in their own past that may make them sensitive to particular issues and that may impact upon communication. Like any professional, judicial officers are not immune to life’s vagaries. Awareness of such matters helps the judicial officer to handle communication issues more effectively.

Therapeutic court process and promoting change

In considering the concept of change, it is important to note that change in behaviour is a natural phenomenon, happening without any formal intervention in some cases. This is what health sciences have called “spontaneous remission”. Treatment and the intervention of a problem-solving court program such as a drug court is therefore “facilitating what is a natural process of change”.17

This natural process of change is often initiated by a life crisis. Here the person reflects upon what has brought her or him into the crisis situation and what needs to be done to resolve it. The crisis of coming into the justice system is no different. Often those coming before a judicial officer will have already initiated change, such as those in criminal cases who have sought substance-abuse counselling following arrest but before coming to court on a criminal matter or those who seek counselling to help with relationship issues before family law proceedings are heard in court. Courts therefore are a natural venue for facilitating positive life change that is needed for the comprehensive resolution of legal problems.

The experience in relation to the Geraldton Alternative Sentencing Regime was that many participants previously saw the role of the court as being to punish rather than helping them with their problem.18 The negative perception of courts may well reflect the experience of many people coming to court and has been a bar to courts acting as agents facilitating positive change in their lives. The experience of participants in the Geraldton Alternative Sentencing Regime was that the positive attention of the court helped in the rehabilitation process.

Where does this change lead? Is it an absence of offending or an absence of offending-related problems such as substance abuse? While problem-solving courts aim to address all of these issues, increasingly they are also taking a broader approach, promoting a positive rather than a negative. Some seek to promote the ability to lead a constructive and law-abiding life in the community, not only addressing substance abuse but promoting life-skills, including vocational and relationship skills.19 From this viewpoint, offending and other problems are an interruption to a path towards realisation of individual potential, towards self-actualisation. Maslow commented: “What is psychotherapy, or for that matter any therapy or growth of any kind? Any means of any kind that helps to restore the person to the path of self-actualisation and of development along the lines that his or her nature dictates.”20 Such a process produces healthier people.21 A therapeutic court process falls within this concept.

The effectiveness of any court’s approach to promoting change in behaviour will depend on the attitude of the party and the strategy that is used to promote change. Here the behavioural sciences can contribute a framework for understanding the process of change in behaviour and the means of

17 Miller and Rollnick, n 4.
21 Maslow, n 20, p 117.
promoting it. Prochaska and DiClemente’s “stages of change” model provides a useful tool for analysing a person’s attitude in relation to change. Motivational interviewing offers techniques for motivating change.

In suggesting the use of such techniques, it is not proposed that judicial officers and lawyers become counsellors. Nor is it suggested that the court will need to engage in a lengthy process in order to help to promote change or to have to apply every technique in every situation. Even in a short hearing, by taking the right approach, a court can help to promote modification of behaviour and a more comprehensive resolution of the matter. What follows is a brief summary of some key approaches that can fit in with the role of a judicial officer. How they are to be applied depends on the unique circumstances of the case.

### Stages of change

It is a myth that people are either ready to change or not. The matter is not so clear cut, as is illustrated by the stages of change model. Judicial officers, like health professionals, can fall into a trap of assuming that a person before them should change, that the judicial officer is the expert, that the person should follow what they say and that all that is required is will power. Such an approach is likely to be met with resistance and less likelihood of promoting change.

The stages of change model was developed on the basis of research on how people address health-related issues such as addiction and move from ill-health to health. The suggestion is that the strategy to be used in motivating change depends on what stage the person is at. Here are the stages of change:

1. **Pre-contemplation** – the person does not consider there is a problem, ignores evidence to the contrary and does not want to change. Any change comes about through external pressure and does not last.
   
   **Strategy:** Raise doubts, raise the person’s awareness of the risks involved in the person’s present situation. Listening to the person, asking open questions, eliciting self-motivational statements (eg what are you concerned about?), seeking a discrepancy between the person’s behaviour and their goals and supporting the person’s right to choose are important tools in this approach. Lecturing or arguing with the person or ignoring their behaviour is unlikely to be helpful.

2. **Contemplation** – the person seriously thinks about change but has not made a commitment to doing anything about it. The person is ambivalent.
   
   **Strategy:** Raise the person’s awareness of the problem by highlighting reasons to change and risks of not doing so and strengthening the person’s self-efficacy in relation to change. Here self-efficacy refers to the person’s confidence in her or his ability to change. Having the person imagine what their changed state might be, providing positive feedback and taking an optimistic approach, referring to the success of others are useful strategies. Advising the person to change, expecting their agreement or being impatient with them is not helpful.

3. **Preparation** – planning to change and making that intention public. The person is re-assessing key aspects of her or his life.
   
   **Strategy:** Assist the person to determine what he or she should do to promote change. Helping the person formulate a clear plan with realistic goals and rewards with identifiable risks, emphasising the person’s choice, being positive and emphasising the success of others are important strategies. Giving simple advice, underestimating the challenge of change and being impatient are counterproductive.

4. **Action** – actively taking steps to modify behaviour, underlying emotions, thinking and attitudes and/or environment to overcome problems. It involves the person’s belief in their ability to change.
Strategy: Assist the person in taking the steps to change.

5. Maintenance – ensuring the change is maintained and relapse does not happen.

Strategy: Assist the person to discover and apply strategies to prevent relapse.

6. Relapse – the person returns to old patterns of behaviour.

Strategy: Assist the person to engage in the stages of contemplation, preparation and action while avoiding demoralisation due to the relapse.

Motivational interviewing

Motivational interviewing is an approach that assists people to acknowledge and do something about problems in their lives. It can be particularly useful where there is ambivalence to change. It has been described as “not a technique, but more a style, a facilitative way of being with people. A style that is centred around avoiding resistance, resolving ambivalence and inducing change.”

The goal of this approach is to facilitate the person taking responsibility for change, including making decisions that will lead to change taking place. Table 1 lists the five principles of motivational interviewing.

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<th>TABLE 1 Principles of motivational interviewing</th>
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<tr>
<td>1. Express empathy</td>
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<td>2. Develop discrepancy</td>
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<td>3. Avoid argumentation</td>
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<td>4. Roll with resistance</td>
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<td>5. Support self-efficacy</td>
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Miller and Rollnick refer with approval to Rogers’ concept of “accurate empathy” which “involves skilful reflective listening that clarifies and amplifies the person’s own experience and meaning, without imposing the counselor’s own material.” Reflective listening is not only an important tool in relation to motivational interviewing; it is a useful tool for any judicial officer to apply in appropriate circumstances. It is a tool used in counselling and in other contexts to help someone deal with a particular problem or issue.

26 Miller and Rollnick, n 4, p 7.
PUTTING THERAPEUTIC PRINCIPLES INTO PRACTICE: THE EXAMPLE OF SENTENCING

Although problem-solving courts such as drug courts provide an ideal opportunity to apply therapeutic principles in court processes, sentencing also provides an opportunity for judicial officers presiding in a general criminal list to apply these principles.

Giving voice, validation and respect in sentencing

In terms of voice, validation and respect, there are several interested parties in relation to sentencing. The community’s interests are represented by the prosecutor whose job it is to ensure that the sentencing process is carried out properly and that a sentence is imposed that is appropriate in the circumstances. A prosecutor may refer the court to the impact of a particular kind of offence on the community and the judicial officer will often refer to that fact in sentencing. However, to promote a therapeutic effect for the community, it is important that there be community awareness of the principles, processes and outcomes of sentencing.

Conventional courts rely on the media and community legal education to promote community awareness. However, some therapeutic jurisprudence-based problem-solving courts are going several steps further. For example, community courts that operate in the United States and the United Kingdom seek to promote community awareness of and support for the court by soliciting information from the local community which they serve as to local problems, involving the community and its agencies in the work of the court in addressing these problems, and by making the work of the court visible by having offenders work in the community as a part of their sentence. In other words, community courts promote community voice, validation and respect and other therapeutic values such as self-determination and participation.

Although the victim of a crime is not a party to criminal proceedings, courts and the community recognise the impact that crime has on victims and the interest that victims have in ensuring that trial and sentencing processes are carried out appropriately. Victims are commonly given a voice through the means of victim impact statements, through participation in mediation processes and to some degree in the giving of evidence at trial. The court gives validation to victims by reference to the impact of the offending on victims in the course of sentencing remarks. The court expresses empathy for the victim’s situation.

There are also matters personal to the offender to be taken into account. Typically, voice in this context is defence counsel presenting a plea in mitigation or an in-person accused being given the opportunity of explaining to the court what happened. Sometimes the court itself must further promote this process for an in-person accused who says little or nothing about the case, either by asking questions of the accused or by seeking a pre-sentence report. Again, the court gives validation to an accused by referring to matters presented by the defence and, in particular, mitigating factors in the course of sentencing remarks. The court can also promote the process of rehabilitation by encouraging the participant to engage in rehabilitation programs.

In some cases, particularly those involving offenders with little or no contact with the justice system, offenders can be overwhelmed by guilt and remorse adversely impacting on their ability to lead a constructive and law-abiding life in the community. No doubt such people will need counselling and other professional assistance to address these issues but a court could also encourage the offender by saying that the person’s debt to the community for the wrongdoing is satisfied by the performance of the sentence of the court and that it is time to move on with life.27 In appropriate cases, the court would, of course, facilitate that process through the imposition of a community-based order or its equivalent.

These are procedures that courts already apply. Therapeutic jurisprudence can highlight the therapeutic impact of processes already being used and suggest further developments in court processes in order to further therapeutic values consistent with other justice system values to be promoted.

Using the rehabilitative power of the court

In the United States, Wexler suggested that a judge could enter into a dialogue with an offender to encourage the offender to identify the causes of the offending and to formulate a rehabilitation plan that could then be included as a condition of a probation order.\(^{28}\) This kind of approach can be used in three situations arising under Australian sentencing law, depending on the jurisdiction: the power of the court to adjourn sentencing, sentencing an offender to some form of a community supervision order and the imposition of a pre-sentence order.

Magistrates’ Courts commonly adjourn cases while offenders participate in diversion programs such as the Court Referral and Evaluation for Drug Intervention and Treatment (Victoria), Magistrates Early Referral into Treatment (New South Wales and shortly, Queensland), Pre-sentence Opportunity Program and Supervised Treatment Intervention Regime (Western Australia), Court Assessment and Referral Drug Scheme (South Australia) and Court Alcohol and Drug Assessment Service (Australian Capital Territory). Magistrates’ Courts and higher courts exercising criminal jurisdiction use community supervision orders in one form or another. Western Australian courts have the power to impose pre-sentence orders in cases where a person is liable to be sentenced to an immediate terms of imprisonment: s 33A of the *Sentencing Act 1995* (WA). Such orders may impose program, supervision and curfew conditions. Instead of simply adjourning a matter and ordering a person to participate in diversion or a pre-sentence order or imposing a community supervision order, the court could spend a few minutes entering into a dialogue of the nature suggested by Wexler.

Certainly, if defence counsel has done her or his job, all of the relevant matters in mitigation, including causal factors in relation to the offending, will have been brought to the attention of the court. But after hearing from counsel, the judicial officer may ask the accused whether he or she wishes to add anything. The contents of the response may then provide the basis for exploring causal factors and a strategy the person wishes to use to address these factors. If the answer was simply “no”, then the judicial officer would need to ask open questions such as “Why did you break the law”, “You have told me you have a problem with amphetamines, what do you intend to do about it”, and/or “If I adjourn this case, what would you propose to do in the adjournment period?” Here the judging strategy would be to listen, to demonstrate that the judicial officer has listened, to express empathy, to motivate the person to consider a rehabilitation strategy, to support that process and not to impose the judicial officer’s interpretation on the defendant’s situation.

This exercise is similar to one undertaken by all those entering a program under the supervision of the Perth Drug Court: the setting of goals and strategies. It allows the participants a say in determining where they would like to be at the end of the program and how they intend to get there. By allowing participants to make a choice in relation to rehabilitation, the court promotes compliance and minimises the negative side-effects of coercive orders of the court. As Winick observes:

> Individuals coerced to participate in a treatment program – for example, by court order; as a condition of diversion, probation or parole; by correctional authorities; or by authorities in psychiatric settings – often just go through the motions, satisfying the formal requirements of the program without deriving any real benefits. In contrast, the voluntary choice of a course of treatment involves a degree of internalised commitment to the goal often not present when the course of treatment is imposed involuntarily.\(^{29}\)

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If the person proposes a sound rehabilitation strategy, the court can provide positive feedback and then formulate that strategy in terms of the conditions of bail or community-based sanction. For example, if the person proposed attending grief counselling and drug treatment, then that could be specified in the terms of bail or community order.

Sometimes a person may be reticent to speak due to cultural or language factors, being intimidated by the court process or being taken unawares by the questions asked. Processes used in Aboriginal courts such as the inclusion of Aboriginal elders and less formal court processes assist in addressing such concerns for Aboriginal people. In other situations, standing the matter down or adjourning the case will give the accused a chance to consider the questions asked and to seek legal advice. While the expeditious disposal of criminal cases and the demands of the list of the judicial officer are factors that must necessarily be taken into account in considering whether to take this approach, the potential of promoting the rehabilitation of the offender is also an essential consideration. It is important to note that the offender’s motivation to reform is likely to be at its highest while subject to the immediate jurisdiction of the court and prior to sentence.

Fixing review hearings while a person participates in a diversion program, supervised bail or a pre-sentence order allows the court to monitor and encourage compliance. The court can order a report from a community corrections officer as to compliance with the order. The strategy set by the participant at the start of the order can then be used as the basis for positive feedback when there has been compliance and further encouragement where there has been less than satisfactory compliance but where the court considers a further opportunity ought to be afforded the participant to follow the terms of the order.

At review hearings the court can ask the participant about matters such as work, family situation, health and progress through the program set by the court in collaboration with the participant. The aim is to use open questions that encourage the participant to speak rather than closed questions that can shut conversation down. By taking this approach, the court expresses its concern for and interest in the participant and promotes the participant’s trust in the process. By taking such an approach, the court expresses empathy for the participant.

Dealing with problem cases
Criminal courts generally are used to applying increasingly severe sanctions for continual offending. However, in the health field it is recognised that a person may relapse – and often relapse several times – on the path to recovery and good health. Thus, in reviewing a person subject to a pre-sentence order or adjourned sentencing on conditions including participation in a rehabilitation program, it is important to be mindful of the steps of change. While further serious offending will require a court to take significant action such as a remand in custody or proceeding to sentencing with the imposition of an immediate term of imprisonment, less serious non-compliance such as the further but not sustained use of illicit substances without new offending requires a different approach.

The court could take an approach based on the principles of motivational interviewing in addressing a situation of non-compliance that does not include serious offending. When the issue is raised, the judicial officer could ask the person, “What happened?” The court would not try to impose its own interpretation of the person’s situation but would instead listen attentively to the person and express empathy regarding personal factors raised in relation to non-compliance. Arguing with the person about the validity of the reasons offered or taking a heavy-handed approach in terms of condemning the person or a threat of imprisonment is likely to be counterproductive by promoting resistance to change.

In the course of the dialogue it is important to note whether the person takes responsibility for their actions or whether blame is attributed to outside factors. While there may be legitimate reasons for non-compliance such as a medical emergency for matters within the control of the participant, the participant needs to be called to account. An offender’s failure to take responsibility for her or his actions may impede the healing process. Such an response may require a judicial officer to ask further questions such as requesting a more detailed explanation or asking “what did you do” to facilitate the taking of responsibility by the person. This approach applies equally to the participant’s attitude to the offending that brought the participant before the court in the first place.
Next, the court could remind the person about the goals and strategies the person set for
themselves at the start, that is, the court could develop discrepancy. Then the court could ask
the person what he or she intended to do about it and could support self-efficacy by providing positive
feedback in relation to sound proposals suggested.

If the person is unable to suggest a coherent strategy, then asking the person whether a short
adjournment to enable her or him to think about it would be helpful, or the court could ask a series of
questions to facilitate the person thinking about what needs to be done to address the problem. The
nature of the questioning would depend upon the specific reasons the person offered as to why there
was non-compliance.

Upon successful completion of the pre-sentence order or adjourned sentencing period, the court
can take the opportunity to review the participant’s progress in open court and support and praise the
participant for the progress made. The court can thereby reinforce the rehabilitation process. The court
would also be able to take into account successful completion of the program in mitigation of
sentence.

CONCLUSION
Interpersonal interactions have an effect on people's behaviour and their ongoing wellbeing. The effect
can be short or long term, depending on the nature of the interaction. By virtue of their status and the
function they perform, judicial officers have an effect on those who come before them in court.
Whether judicial officers are of the view that the judicial function includes motivating behavioural
change in accord with justice system goals or not, they have the opportunity of maximising any
positive effect and minimising any negative effect of court processes by means of the way they interact
with people coming before them. Techniques of therapeutic jurisprudence can be used to enhance this
process.

Therapeutic jurisprudence acknowledges what is therapeutic in contemporary legal systems but
suggests that a therapeutic analysis using findings from procedural justice and the behavioural sciences
can help any legal system and its officials better promote therapeutic outcomes consistent with justice
system goals.

How therapeutic principles are applied in judging will depend on the personality and individual
approach of the judicial officer, the nature of the case and the time available. Just as there are
differences between judicial officers as to how they interact with other people in court depending on
personality, so in the application of a therapeutic approach there will be differences, although there
will be the same fundamental principles underlying their approach. This is already apparent in the
differing styles of drug court and other problem-solving court judicial officers. A judicial officer in
sentencing will have a greater scope for motivating behavioural change than one presiding in a trial or
in an appeal. A judicial officer in a drug court will have greater scope for motivating change than a
magistrate sitting in a remand and sentencing list with 100 cases before the court.

However, whatever the nature of the hearing and whether a criminal, civil or family law case, the
judicial officer can facilitate voice, validation and respect and thereby promote a better experience of
court process for those who play a part in proceedings before the court.

The therapeutic style of judging seeks to take a more comprehensive approach that embraces the
whole person. It embraces modes of interaction that take into account not only the rational but the
emotional and in some cases the spiritual. Therapeutic judging is part of a general trend in the justice
system towards a more collaborative, psychologically comprehensive and humane approach to
addressing legal problems.30

335; Daicoff S, “The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement” in Stolle DP, Wexler DB
and Winick BJ (eds), Practicing Therapeutic Jurisprudence (Carolina Academic Press, Durham, 2002) p 465; King, n 18;
6; King, n 7; Daicoff S, “Law as a Healing Profession: The ‘Comprehensive Law Movement’” (2006) 6 Pepperdine Dispute
Resolution Law Journal 1.
The skills of a judicial officer should not only encompass the ability to analyse and make findings on law and fact but also interpersonal skills such as the ability to listen and communicate effectively with an ethic of care and the ability to motivate others to consider positive change. While the ability to ascertain the facts and law and apply the law to the facts to reach a judgment may be regarded as intellectual skills, interpersonal skills tap into what is now called “emotional intelligence”. There are five domains of emotional intelligence: knowing one’s emotions, managing emotions, motivating oneself, recognising emotions in others and handling relationships (the skills involved in interpersonal effectiveness).^31

Court processes have been typified by a subordination of the emotional dimension of human nature – which has been seen to be variable and inherently unreliable – and a reliance on analytical processes. This is not to say that emotion has been entirely lacking in the courts – courts recognise, for example, that the exercise of compassion is appropriate in sentencing in certain cases and also express concern in relation to the personal impact of crime on victims, perpetrators, their families and the community – only that its full dimension and potential for good has not been acknowledged in legal processes. With the emergence of a more comprehensive and humane approach to the law exemplified in the introduction of therapeutic jurisprudence, restorative justice and the like, legal processes are being developed based on a more complete understanding of human nature.

Judicial education, therefore, should not only be in relation to analytical skills and developments in the substantive law and procedure but also skills based on a more comprehensive understanding of human nature and human interaction, including those based on emotional intelligence such as interpersonal skills, self-knowledge and in the findings of the behavioural sciences that can be usefully adapted to court processes.

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