



*3rd International Conference on  
Therapeutic Jurisprudence*

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Distinguished guests, ladies and gentlemen

I apologise for the brevity of my opening but if I were to attempt to name all of the distinguished guests at such an august gathering, I would have little time left for any other remarks.

I am very grateful to the organisers of this conference for giving me the opportunity to address such a distinguished gathering of eminent practitioners in the important field of therapeutic jurisprudence. However, the invitation to speak tonight posed two immediate difficulties for me - first, given that I am speaking after dinner, what is the appropriate balance between the levity apt to a social occasion, and the substance apt to a gathering of distinguished scholars such as this. The second problem, perhaps a little more fundamental than the first, was to gain a clearer understanding of precisely what was comprehended by the expression "therapeutic jurisprudence".

Unfortunately for you, the first problem has been resolved by practical expedience, in that I have been entirely unable to find anything terribly witty or amusing to say on the subject of therapeutic jurisprudence, let alone any jokes dealing with that subject. I was for a moment tempted to recast some of the awful jokes dealing with social workers that were running around some years ago, but have decided against that idea for two reasons - firstly, they were generally in poor taste and, secondly, I'm sure you have heard them all anyway.



So the bad news is that my observations this evening will be a little more akin to some of the working sessions that you have had, and will continue to have during this conference, and a little less like the normal witty after dinner speech. However, the good news is that I will endeavour to be brief.

Returning then to the second problem I identified - that is, of giving some practical content and meaning to the expression "therapeutic jurisprudence", the opportunity of addressing you all this evening has had the distinct benefit of requiring me to do a lot of reading on the topic that I might not otherwise have done. This is no bad thing in a Chief Justice who is still wet behind the ears.

I will not attempt to recast the various attempts at definition of the expression which are to be found in the literature - almost everybody here is better qualified and equipped to undertake that task than I. The process of inquiry did, however, cause me to ponder whether the expression might not have some possible adverse connotations, at least when used in public discourse, or perhaps more accurately, in discussions within the community at large.

Leaving to one side the fact that the phrase is a mouthful in itself, the word "jurisprudence" does not often feature prominently in backyard barbecue conversation, and is seldom heard at even the most erudite dinner parties. I have yet to hear it mentioned on talk-back radio, but I suspect it contains far too many letters for that to ever be a serious prospect. For my own part, I have done two courses in jurisprudence, but remain uneasy at the prospect of having to explain to a non-lawyer, and



even perhaps to many lawyers, the concepts which are embraced by the expression.

But there is, I think, a more substantive problem with the use of the term "therapeutic". Both Oxford and Macquarie Dictionary definitions of that expression focus upon the treatment of disease, disorder or defect. Thus it seems to me that the term connotes a process of treatment, which necessarily seems to connote a patient suffering a degree of disorder - either physical or mental. In more common parlance, since films like "One Flew Over the Cuckoo's Nest", the word "therapy" can be associated with words like "convulsive shock", or sometimes somewhat bizarre treatments to the latter portions of the digestive tract.

And this leads me to ponder its possible vice when used in the context of the criminal justice system. Although I am only a very fresh Chief Justice, I have been an observer of public debate relating to the legal system for long enough to know that there is widespread community distrust of any approach to criminal justice which emphasises rehabilitation which is, I think, generally perceived to be inconsistent with punishment and deterrence. There is, I think, a very simplistic view which is quite widespread, to the effect that the only enduring solution to the problem of crime in our community, and which is often wrongly perceived to be a rapidly growing problem, is increasing the length of terms of imprisonment that are imposed. This is a view which is nourished and strongly encouraged by both the written and printed media, and which flowers and bears fruit on talk-back radio.



In this unfortunate environment, any reference to "therapy", or any other expression which conveys a connotation of treatment, is likely to be characterised as the philosophy of a bleeding heart Liberal, who would open the doors of all the prisons, give each prisoner a quick cuddle and a soft toy on their way out, and allow our society to descend into chaos and lawlessness. I do not mean to suggest that these views are rational or indeed, have any basis whatsoever, or that the Courts should pander to the red-neck element within our community. On the contrary, it is my firm view that the Courts must inform and lead community expectations in the area of criminal justice, rather than merely respond to uninformed supposition. On the other hand, it is, I think, clear that the rule of law depends upon the implicit consent of those governed by law, unless one is prepared to put the army into the streets on a regular basis. It therefore seems to me that the leadership to be provided by the Courts must be within the reasonable parameters of community expectation and tolerance if the Courts are to receive the support and respect of the community.

So, when speaking to the general public, and endeavouring to explain the sentencing process, it seems to me to be preferable to use words like "prevention" rather than words like "rehabilitation", even though, in the context of recidivism, they mean exactly the same thing. I can hear you thinking, well, this is only about nomenclature and after all "what's in a name?". However, in a world in which the public increasingly obtain their information via the medium of 30-second sound bites, nomenclature and symbolism are increasingly important. Politicians understand this. One politician, who shall remain nameless because it is not appropriate for Chief Justices to enter into the field of political discourse, uses the slogan "tough on crime, tough on the causes of crime". Unless I



misunderstand the reading I have done on the topic of therapeutic jurisprudence, this seems to me to be a slogan, which in the latter part at least, emphasises the need to address the underlying problem which may have given rise to the superficial manifestation taking the form of a criminal event - which seems to me to be what therapeutic jurisprudence and problem solving Courts are all about.

I don't mean to say that intellectual discourse at a conference such as this needs to be conducted at the level of glibness which has unfortunately become the characteristic of political debate in this country. My only point is that we ought perhaps be a little cautious about adopting the jargon of sociology and psychology in *public* debate about the criminal justice system, because of the real risk that the public might misconstrue, or the media distort the message into "soft on crime and sympathetic to the causes of crime".

This issue only arises, I think, when the expression is used in the context of the criminal justice system. By making these observations, I do not mean to suggest in any way that the notion of therapeutic jurisprudence is limited to the criminal justice system, although I have noted that quite a lot of literature in the field applies the concept to crime and crime-related areas. Although my post-graduate qualification was in the field of criminology, I have not practised extensively in the criminal jurisdiction, but rather more in the civil and commercial side of the work of the Courts. I would therefore now like to give you some observations from a commercial litigator about the potential breadth of application of the principles of therapeutic jurisprudence in that field.



Before doing so, however, I would like to give you two quotes that seem to me to indicate the utility of therapeutic jurisprudence in the civil area. The first is from Ambrose Bierce, who described a lawsuit as a machine which you go into as a pig, and come out as a sausage. The second is from Voltaire who said, "I was never ruined but twice, once when I lost a lawsuit and once when I won one". The moral of these messages is, I think, clear enough: firstly, litigation tends to bring out the worst in people and make them behave like pigs, and secondly, there are few, if any, winners in litigation.

The first trial at first instance I did as a Judge was a case under the *Corporations Act*. Not a particularly fertile field for the application of therapeutic jurisprudence you might think. However, you would be wrong. The case concerns a very substantial business, valued at many tens of millions of dollars, built up by three members of a family over a period of more than 30 years. Regrettably, they have fallen out. The dispute under the *Corporations Act* is therefore simply the superficial manifestation of a more fundamental underlying problem of family disharmony. It is a disharmony which has persisted for many years, and which may have been better addressed by family counselling than a trip to the lawyers and accountants and ultimately a period in Court. Civil lawyers are inclined to forget that corporations are really a legal fiction, and just a means of organising people. There are always human beings at the heart of every corporation, and even corporations need therapy at times - AWB and James Hardie being two that jump to mind - and the insurance company HIH, whose demise I helped investigate, had a corporate culture which could have usefully occupied a team of therapists.



Another area of the law in which I have practised extensively is the law of defamation. Because of that experience I was asked to Chair a Committee appointed by the Government of this State to report upon the reform of the law of defamation - a reform which was recently enacted. The thrust of our report involved recognition of the basic proposition that the law of defamation was about the restoration of reputation rather than financial compensation. Thus, it seemed to us that a key aspect of the remedy had to be prompt judicial intervention aimed at encouraging prompt retraction and apology instead of a protracted fight over damages. In the many defamation cases in which I have been involved, the issue has always started off being about the emotional hurt and insult suffered by the plaintiff - the affront to integrity if you like, and seldom about the money. Often what the plaintiff really wants is for somebody to say sorry and really mean it. But unless the retraction and apology is immediate, the hurt is suffered for a protracted period, substantial amounts of money are spent on lawyers, and revenge becomes the dominant motive. Often by the time the matter approaches a trial, several years after publication, instead of seeking vindication for their hurt, the dominant motive of the plaintiff is to inflict as much pain on the defendant as possible. This seems to me to be an area of the law which is ripe for the early intervention of therapeutic jurisprudence.

A surprising amount of the work of the Court which I now head involves applications under the *Inheritance Act* by members of a family who consider that they were not adequately provided for in the Will of a deceased family member, and I am told by the statisticians that as a result of the aging of our population, we can expect this work to increase



significantly. Although the claim is always expressed in terms of inadequate financial provision, once again, the claim is usually the superficial manifestation of a feeling of hurt or anger as a result of an inference drawn from the terms of the Will to the effect that the testator did not regard the claimant as highly as other members of the family. Thus, the case becomes a case not so much about money, but the vindication of past conduct within a family context - another area ripe for therapeutic jurisprudence.

Therapeutic jurisprudence also tells us a little about the way cases like that ought be managed. Mediation is obviously preferable to litigation in almost all cases, but there is a question as to the particular time in the course of the dispute at which mediation should commence, and I use that term because I am firmly of the view that mediation is a process, not an event. Experience suggests that if mediation is deferred until after the parties to an *Inheritance Act* claim have exchanged affidavit evidence - in which they customarily abuse each other and make a variety of scandalous allegations of prior misconduct, the rift in the family is wider rather than narrower at the time of mediation, and mediation less likely to succeed.

And on the subject of mediation, therapeutic jurisprudence has a lot to offer in this area generally. If, as I have suggested by the examples I have already given, a substantial amount of civil litigation is the superficial manifestation of a deeper underlying problem, a mediation which addresses only the superficial manifestation will not provide the parties with the enduring solution which they need to prevent them coming back to Court in the future, in the same way as punishing a criminal without



addressing the underlying cause of the criminal conduct is unlikely to reduce recidivism. But just as in the criminal area it is easier and simpler to address the superficial manifestation and impose a penalty for the offence rather than address the underlying cause, so in the civil area it is easier for mediators to attempt to address the superficial manifestation and arrive at a financial compromise which will improve their settlement statistics, rather than to address the underlying cause which may provide a more lasting solution.

Therapeutic jurisprudence can also inform the spaces which we use in civil litigation. The Administrative Appeals Tribunal, and I am very pleased its President, Justice Garry Downes and his wife Brenda are with us this evening, is now generally configured in a much less adversarial manner - with the Tribunal members sitting on the same level as the parties - sometimes at the same table in an environment which is intended to put parties at their ease and encourage amicable resolution. The same approach could be used for the spaces used for many court processes, such as case management. At the moment, case management in the Supreme Court of Western Australia is generally conducted in courtrooms, with the parties appearing at each end of the Bar table, and addressing the judicial officer who sits on a raised platform in the usual sequence - that is, with one party stating their demands and the other party responding to those. Given that the topic under discussion usually concerns the procedures to be adopted in order to get the case ready for trial, there seems to me to be much to be said for holding the discussion around a conference table, thereby encouraging the parties to approach the issues informally, and less adversarially - perhaps in the hope that they might even adopt a collegiate approach to what is after all a problem



which they all share - namely, the need to get the case to a prompt resolution by either trial or mediation.

There are, of course, many other areas of civil law in which therapeutic jurisprudence has an important role to play, and I do not mean these few examples to be exhaustive in any sense. An obvious area for the utilisation of therapeutic principles is the area of personal injury claims, in which it is well established that as long as the legal claim is unresolved, it will substantially impede the physical recovery of the claimant. This scientifically established fact is often relied upon by employers and insurers to sustain the proposition that claimants are malingerers, whereas in fact it is, I think, clear that an injured person with an unresolved legal claim has a variety of issues which interact with each other, and the resolution of one is likely to assist in the resolution of the other, so that, at the risk of descending into jargon, what is needed is an holistic and therapeutic approach.

However, I fear I am at risk of endangering your wellbeing if I keep on going any longer, as I am the only thing standing between you and your dessert and coffee. I would like to conclude by congratulating the organisers on having brought together such a large and distinguished group of eminent practitioners in this important field. It will be apparent from what I have said that I am firmly of the view that the concepts discussed at this conference have application in virtually every field of the law and are therefore of the utmost importance to lawyers and to the Courts, and, more importantly, the community we all serve.