Lawyer, Social Worker, Psychologist and More: The Role of the Defence Lawyer in Therapeutic Jurisprudence

Deen Potter

Participation in problem solving court programs presents a particular challenge for accused who often have to face and resolve long-standing health and behavioural problems. For lawyers representing such clients there are unique professional and ethical challenges. These lawyers are called upon to support their clients through the process and take a care-based approach that re-defines the concept of the client's "best interest". For a defence lawyer steeped in the traditional adversarial system where securing an acquittal or a reduced sentence is paramount this approach is unfamiliar. Lawyers applying therapeutic jurisprudence are called upon to use communication and motivational skills that are not usually applied in adversarial proceedings to promote their client's rehabilitation. This article explores these issues in the context of a therapeutic jurisprudence based program in the court in the regional Western Australian town of Geraldton.

In one of its many applications therapeutic jurisprudence promotes the use of the court as an instrument of rehabilitation. The court becomes the 'problem-solver'. The manner in which the judicial officer conducts court proceedings, the physical structure of the court as well as the content and substance of what is said and done under the auspices of the judiciary and justice system can all contribute to the rehabilitation of the offender. Lawyers are an important link in applying therapeutic jurisprudence principles. Therapeutic jurisprudence principles can be applied where an offender has accepted responsibility for their actions and criminal behaviour. Even before that point has been reached a skilled and detailed enquiry and interview process based on those principles can place the lawyer in the position of bringing to the attention of their client the potential reasons for their contact with the criminal justice system, the effect of their actions on their victims and the wider community. The lawyer is in a prime position to advise their client as to potential paths towards long-term rehabilitation. In this case the lawyer's insight becomes the beginnings of the client's insight.

The Best Outcome for the Client

If it is accepted that the role of a defence lawyer is to advocate for the best possible outcome for their client the question that begs is what is the 'best possible outcome'? On what basis is this measured, particularly within the confines of a traditional criminal justice system which is adapting to an evolving therapeutic jurisprudence? Further, if the court is the 'problem-solver' in therapeutic jurisprudence, who is left to identify the problem? And
once those problems are identified where does that leave the lawyer advocate who measures success in bear terms of acquittal?

A lawyer who measures success based on acquittals gained as a result of hard-edged cross-examination, on breaking down victim witnesses or through technical anomalies will not feel comfortable in accepting that results obtained in the course of applying therapeutic jurisprudence principles can be defined as the ‘best possible outcome’. This traditional defence lawyer can only see that a conviction-free client is a happy client and that in turn represents a successful outcome (Wexler, 2002).

For some clients this ‘success’ will hold true only in the short term. For many lawyers, particularly those operating as public advocates, they will be dealing with clients who have seriously dysfunctional lives marked by substance abuse, violence – as perpetrators, victims or both – economic marginalisation and social isolation and physical and mental health deficiencies (Steering Committee for Review of Government Service Provision, 2003). For these lawyers an acquittal is usually only a short-term reprieve gained for the client, the police and the criminal justice system. For the lawyer applying therapeutic jurisprudence the goal is not to win or intimidate but do what is therapeutically best for the client (Skove, 2002).

The Therapeutic Approach of the Advocate

Lawyers, through traditional training, are taught to place information in legal boxes, to find the path of least resistance in answer to the perceived problem. Irrelevancies are an annoyance to be cast aside, admissions uttered are akin to dancing with the devil. In contrast, therapeutic jurisprudence asks the lawyer advocate to delve deep into the psyche of the client and draw out the fundamental basis upon which that client constructs their world. This must be done so that the lawyer advocate can ensure that the client can properly access the full range of the therapeutic benefits of this form of jurisprudence. An approach to instruction taking that is more comfortable in the rooms of a psychologist or social worker is needed. A lawyer applying therapeutic jurisprudence must become trained in listening to matters that might at first glance appear irrelevant but upon closer inspection will reveal the true nature of the client and often the root cause of offending behaviour.

Admissions become a valuable insight and evidence that the client has made the first tentative steps towards rehabilitation, acceptance of wrongdoing and recognition of the impact it has on others (Petrucci, 2002). Particularly in the early stages of entry into this form of rehabilitation the lawyer advocate is the primary means of communicating the client’s deepest held fears and problems. Indeed, the lawyer may be placed in a position of releasing, to the court, a client’s highly personal information at a pace that allows the client to come to terms with the gravity of the disclosure, for example, of childhood abuse or an admission of chronic long-term substance abuse.
The lawyer acting therapeutically is not only an advocate for the client in the ‘problem-solving’ court; the lawyer must advocate the therapeutic process itself to the client. This is difficult because, for clients unfamiliar with that process, it will seem unusual, if not unethical, for their legal advocate to be urging participation in a process where sentencing is delayed whilst intimate consultation and coordination between all stakeholders, including police, is undertaken. At times the lawyer is caught in the middle and this often gives rise to conflicting ethical considerations.

Further, such a lawyer must be a shoulder to cry on during the hard times, for often he or she is the only real confidante of the client, must be a coach and provide encouragement and must advocate the benefits of wholesale lifestyle change. The role of lawyer as ‘change agent’ requires specialized skills. Traditional legal training, generally, does not provide that training (Wexler, 2005).

This role is often the most difficult as many clients fear the reality of true lifestyle change. This lifestyle change means letting go of social networks and ingrained and comforting behaviour in favour of a brave new world. There is a phase in the application of Therapeutic Jurisprudence where the isolation of true lifestyle change is even lonelier than the client’s familiar isolation from the mainstream. At least he had his sub-culture to fall back on if things got tough.

It is during this phase, in particular, that the lawyer taking a therapeutic approach must be particularly attuned to the supports that are available for the client, particularly positive family supports, but also other targeted services that will meet the very specific needs of the particular client. The lawyer must be willing and able to access these vital resources if they are going to see their client through this difficult phase. The lawyer must utilise language that encourages and reinforces gains but also indicates areas where improvement is needed. To allow a client to rest too easy during this phase risks significant relapse. The lawyer can assist the client with the assistance of motivational interviewing techniques (Birgden, 2002a). Unfortunately, this approach can be time-consuming and does not sit well with the profit motive of private practice.

Challenges for the Lawyer Taking a Therapeutic Approach

Dealing with Indigenous clients, whether it be in metropolitan or regional and remote Western Australia, presents an additional and complex challenge. This is because the historical record of police and prosecutorial intervention in the lives of Indigenous peoples outstrips that of your average citizen. Courts imprison indigenous Western Australians at a rate that continues to attract international comment and concern (Blagg, 2005, at 5-6). Courts have removed Indigenous children from their parents. To indigenous West Australians the courts have represented the sharp end of oppression (Blagg, 2005). The criminal justice process and outcome is perceived as being either
predetermined or irrelevant (Bereseford and Omaji, 1996, at 108-110). Therefore, the legal practitioner who wishes to suggest to their indigenous client that the court can be a place of assistance and recovery must be prepared to expend significant levels of energy, particularly in the early phases of therapeutic intervention, to have the client accept that there are benefits and that this approach will involve the court stepping away from its traditional approach to the enforcement of the law. For the lawyer who advocates that their client is suitable to engage in a program founded in therapeutic jurisprudence it is often the case that they must first convince their client that it has real potential to deliver medium to long term benefits to them.

For the lawyer applying these principles the client who presents, for example, with cumulative driving-under-the-influence charges, in fact presents with a multifaceted problem and not simply one that can be dealt with by avoiding jail or receiving fines and loss of the licence. Clearly abuse of alcohol is a problem but that problem may be brought on by lack of employment opportunities, which in turn may be due to lack of educational qualifications or indeed lack of a driving licence itself due to previous driving-under-the influence convictions. He is isolated, in all likelihood, both economically and socially. His social networks will invariably involve others who abuse alcohol.

Any attempt by the offender to rehabilitate will initially be encouraged by his peers but, if he is showing signs of advancement, he will be scorned by those same peers as he begins to dislocate himself from them. He will need strength, intestinal fortitude, to push beyond his peers and the lifestyle that he has found comforting, if not comfortable. Unless the root causes are dealt with this client will continue to abuse alcohol because, the reality is, there is little connection between he and the modern economy and contemporary social structure.

The lawyer applying therapeutic jurisprudence principles must recognize all of this not only at the theoretical level but also at the practical level. He or she must identify at a very early stage that these root causes exist and must bring them to the attention of the problem-solving court if limited resources are to be targeted appropriately. It does no good to send the offender to substance abuse courses alone, for this offender has been there and done that. Then there is the question of how to manage the client during the period of any licence suspension. Lack of mobility in a highly mobile society can lead to depression, frustration and restricts opportunity for engagement with the wider world.

The Geraldton Experience of a Therapeutic Approach to the Law

The Geraldton Alternative Sentencing Regime (King and Ford, this volume) is one example of a problem-solving court program in which therapeutic jurisprudence principles are applied to deal with the issues raised above. Neil Morgan and Joanne Motteram (2004, at 126-127) note that:
The Geraldton Alternative Sentencing Regime... is the only specialist court that seems to have a relatively high proportion of Aboriginal clients... The reasons for the higher proportion of Aboriginal participants are probably due to demographic factors and the fact that the programme appears to draw on Aboriginal support services, including the Aboriginal Legal Service and Aboriginal Community Corrections staff.

As the name suggests this programme commenced in Geraldton, Western Australia. Geraldton is a regional centre 500 kilometres north of the State capital of Perth. There are approximately 20 000 residents, about 25% are indigenous. Driven by the determination and initiative of the regional magistrate, the co-ordination and commitment of the local service providers and legal profession the program soon expanded to outlying areas where the regional magistrate sits in circuit courts. Further, the therapeutic principles of the program were extended beyond the criminal justice system and applied to the care and protection jurisdiction of the Children's Court. In that jurisdiction the Department for Community Development has the role of 'prosecutor' in removing children from parents struggling to provide adequate care for their children. The name of this program is the Family Care Program. Therapeutic Jurisprudence has also been formally extended into the civil jurisdiction of Restraining Orders through the Roads to Healing Program. These court-driven initiatives require lawyers to think and act in a manner that will be radically unfamiliar to them.

On the limited evidence available it is clear that these programmes have assisted many participants to restore their lives, their health and spiritual wellbeing (Cant, Downie and Henry, 2004, at 39). More importantly the clients who have successfully completed the Geraldton program have become role models for their previous networks of 'dysfunctional' peers. Further, as many of these successful participants are also mothers and fathers, it is arguable that they also represent a break in intergenerational offending patterns so common to disadvantaged and marginalized groups. For example, for the first time children see their mother studying as she takes up an adult education course. They see their parent reacting without violence and aggression to stressful situations. They see more of the household income directed towards their educational and health needs and not squandered in an undisciplined and random manner on non-essentials or illegal activities. They see their parents engaging in meaningful relationships with depth and with a wider range of people. All in all the children of these participants begin to see what living in the mainstream can be like and as a result they themselves are brought closer to the full range of opportunities available. The wide-ranging nature and extent of these positive outcomes must be understood and appreciated by the lawyer in such courts ensuring advocacy with passion.
Conclusion

Whilst one cannot detract from the vital and central importance of the judicial officers, police prosecutors, or the community corrections officers, the role of the lawyer committed to therapeutic jurisprudence is critical to the development of a 'new measure' of success as a client progresses through the criminal justice system. As the community continues to call for the courts to 'do something' about society's ills then will the traditional lawyer will have to give way to a well rounded, holistic approach to defence advocacy, an approach that begins to look at long term benefits for the client rather than short term gains.

Note

1. Mark (2004) is particularly instructive in advocating the need to look beyond 'headline indicators' to measure the success of policy initiatives and the effectiveness of programs. Similarly, Cant Downie and Henry (2004, at 39) note that "[M]easuring the success of ...the GASR by simply ascertaining whether people have committed further offences or not is very limited". See also Wexler (2005).