

## THERAPEUTIC JURISPRUDENCE IN FAMILY LAW

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Therapeutic jurisprudence is one of a number of schools of thought in law that advocates a broader, more comprehensive approach to law (Daicoff, 2000). While the supporters of the various vectors of comprehensive<sup>1</sup> law emphasise different points of interest, they appear to share a number of common convictions, or will at the least be prepared to accept them. Firstly, law has a social effect, and lawyers should be aware of this. Secondly, lawyers should have a broader perspective than merely the rights of people, and should also, inter alia, consider the effect law has on the physical and psychological well-being of individuals (Wexler, 2001). Thirdly, moving beyond the normal rights focus requires creative approaches to lawyering (Cooper, 1998). Fourthly, lawyers cannot practice comprehensive law without collaborating with practitioners from other disciplines (Cooper, 1998; Winick, 1997). Finally, even when a more comprehensive approach is used, the process must be fair and just<sup>2</sup> (Wexler, 2001).

Supporters of the therapeutic jurisprudence movement advocate the use of the social sciences to systematically examine the impact legislation, legal procedure and the behaviour of legal actors have on the mental and physical health of the people (Winick, 1997).

In this paper I will examine the therapeutic effect of the family law process under five headings. As the purpose of this paper is to provide information about therapeutic jurisprudence and to generate a discussion, the examination will be general and at a conceptual level, and will not involve a detailed analysis of either the Western Australian or Australian family law or practice.

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<sup>1</sup> This is neither a formal, nor a well defined, or a cohesive movement. I use the term comprehensive as an umbrella term, but some others prefer other descriptive labels. Cooper (1998), for example, uses the label "creative problem solving approaches to law".

### **Approach to dispute resolution**

Despite measures that encourage dialogue and bring about shared decision-making, the overall nature of the process in the family courts is still adversarial.

The therapeutic strengths of the traditional adversarial process are the standard, relatively predictable, and fairly transparent pattern that it follows, and the emphasis on certainty and finality (Ackerman & Kane, 1990; Anderten, Staulcup, & Grisso, 1980; Haney, 1980; Melton, Petrila, Poythress, & Slobogin, 1997; Pollack, 1971). This satisfies people's need to feel in control of themselves and their circumstances.

However, the combative nature of the process encourages the taking of positions and defensiveness, even in those stages of the process that are not adversarial. It invites parties to dwell on the negative aspects of their partner's behaviour. This feeds into the natural tendency that people have of attributing good behaviour of others to external factors, and bad behaviour to internal factors (Harvey, 1987), and of maximising the negative behaviour and minimising the positive behaviour of other people (Baucom, Sayers, & Duhe, 1989). Consequently the system is likely to encourage parties' negative perception of each other, rather than a realistic assessment of each other.

Having their negative characteristics and behaviour exposed, and even exaggerated, is particularly detrimental to people with a poor self-concept as they will experience feelings of shame that generate high levels of anger and hostility (Lewis, 1971). This explains some of the hostility seen in the family court. However, more concern should probably be held about those people who turn their anger inwards, as they may be at risk of harming themselves, and in this process their children.

The model of dispute resolution used in the adversarial system involves parties taking up positions and engaging in an ongoing debate, leaving it to a third person to decide how the dispute will be solved. This is similar to the way in which many people in dysfunctional relationships deal with disputes. Social learning theory suggests that it will be more therapeutic to engage the parties in a process that models functional dispute resolution skills; help them develop these skills; and move to a stage where they solve

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<sup>2</sup> In order for people to perceive a process as fair they must feel that they had an opportunity to tell their story, and that the decision-maker was knowledgeable and respectful of their dignity.

their own problems and take ownership of them. This is particularly important where the parties have minor children, as research suggests that fathers' post-divorce contact with their children is associated with the level of hostility between ex-spouses (Erera, Minton, Pasley, & Mandel, 1999; Gibson, 1992; Wall, 1992).

This combative atmosphere also discourages people from accepting responsibility in situations where it would be therapeutic to do that. For example, where domestic violence is alleged, it would be therapeutic for both the victims and perpetrators if the latter acknowledged it, and accepted responsibility for their behaviour. This is unlikely to happen in traditional litigation, or if such an admission is made, it will usually be minimized, or an attempt will be made to excuse the behaviour by blaming the other party.

The nature of the adversarial system may also discourage parties from seeking, or accepting, offers of remedial services or counseling because they fear that it may be construed as an admission of guilt, and used against them. This may account for much of the resistance and denial sometimes observed in family law cases, and is clearly not therapeutic.

### **The opportunity to testify**

Research reveals that people find it therapeutic to talk about their experiences, cognitions, emotions and behavior in the right setting (Pennebaker, 1989; 1990; 1993). This is no surprise; most traditional and non-traditional forms of therapy give people an opportunity to tell their stories (Allan & Allan, 2000). It follows that most litigants will find the giving of testimony therapeutic, if they are allowed to recount their experiences in a supportive, affirming, respectful environment and if a person of authority, who respects their dignity, listens to them.

Giving testimony also gives people a voice, an opportunity to be heard. This is very empowering and appears to be one of the key criteria people take into account when they judge the procedural fairness of the justice system. This perception is very important as research suggests that non-resident fathers' satisfaction with the system may impact on the quantity and quality of their

involvement with their children post-divorce (Kruk, 1991; Stone & McKenry, 1998).

On the negative side, giving testimony allows parties to deny responsibility, blame and disparage each other. This may also encourage further feelings of shame and anger on the part of the other party.

Giving testimony, and especially dealing with cross-examination by an intelligent, able and experienced cross-examiner, requires relatively good verbal skills. It may be a very difficult task for less verbal people, or those with just below normal intellectual abilities, who may find it a disempowering and shaming experience. These feelings could translate into hostility as discussed above.

### **Admission of evidence and privilege**

Not all evidence is introduced by way of oral testimony; affidavits are often used to provide evidence to the court. While presenting one's story in written form could also be therapeutic, it is unlikely that a carefully drafted document by a professional person will have the same impact as oral testimony. If the deponent is subjected to cross-examination with a minimum of opportunity to tell their story in a narrative form, any potential therapeutic benefit will probably be lost.

The opportunity to give verbal testimony may be restricted for a number of other reasons as well. On the one hand, the rules of evidence may exclude logically relevant testimony because the risk of prejudice, should it be admitted, exceeds the possible probative value thereof. It is therefore difficult to give people an opportunity to tell their full story in the traditional system if parts thereof are not relevant or overly prejudicial. Most lay people who do not understand the rules of evidence will become angry if they cannot tell their story.

On the other hand, virtually all people who are competent witnesses can be compelled to give testimony. Professional people, such as therapists, cannot refuse to testify and claim privilege for confidential communications from clients. Lawyers may consequently discourage clients and their children from consulting a therapist, because it may interfere

with their preparation of the case, and because there is always the possibility that the therapist may be called as a witness.

### **Role of social scientists**

Decision making in the family law area requires social science knowledge and skills that some legal decision-makers may not have. In early English law, expert knowledge of this kind was introduced by specialist juries<sup>3</sup> (Jones, 1994; Ormrod, 1972; Pollock & Maitland, 1968; Thayer, 1889/1969) and later court experts<sup>4</sup>, who participated in the decision making and were not witnesses and were not cross-examined (Jones, 1994). As the role of the witness evolved in English law, both the special juries and court experts were gradually phased out, and replaced by expert witnesses whose testimony is subject to the rules of evidence, and who can be cross-examined (1994; Jones, 1986). Scientists were therefore effectively excluded from the decision-making process<sup>5</sup>. This has major consequences for social scientists in the family court setting.

Firstly, those social scientists called as witnesses by one of the parties, are virtually by default seen as biased (see for example Law Reform Commission of Western Australia (LRCWA), 1999). The reason is that it is pointless in an adversarial system (Allan & Louw, 2001), and could be unethical (Weinstein, 1997), for lawyers to call social scientists that do not support their cases, as expert witnesses. This is unfortunate, as many social scientists live up to the lofty standards set to them by the system (Allan & Louw, 2001; Bazelon, 1982; Melton, 1994) and are objective, unbiased and impartial consultants of the court. Some fail, but in most cases it is unlikely that social scientists choose to be biased and partial. The process is subtler, and is probably a function of factors such as their forensic ignorance and the influence of the adversarial system itself. Witnesses, especially if they know they will be attacked, tend to take up positions that they can defend while testifying. However, replying to cross-examination, often

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<sup>3</sup> Traces of them could be found until recently in the City of London special jury (Ormrod, 1972). The special juries together with court experts were the ancestors of the modern expert witness (Holdsworth, 1956).

<sup>4</sup> The first reference to court experts can be found in 1345 and by 1554 they were well established in the courts (Jones, 1994). These experts were similar to the expert assessors still used in the English and Welsh Admiralty and Patent Courts and in South African Courts.

<sup>5</sup> By doing this, the influence of experts was greatly restricted. It has been argued that this was part of an attempt by law to protect itself from science, and to retain its dominance (Hunter, 1981; 1994; Jones, 1986).

promotes a shift towards the adoption of more dogmatic and extreme positions (Bowden, 1983).

Secondly, most lawyers and social scientists would agree that the best assessment comes to naught if the findings and the implications thereof are not well communicated. Oral testimony that is subject to cross-examination does not appear to be an effective way of communicating mental health, health and social information about people to court. One reason is that an effective and proper cross-examiner may deflect attention away from central findings, by successfully attacking the credentials of the witness or irrelevant findings (Melton, 1994). The misfortune is that research demonstrates that whenever an expert's professional reputation was called into question, research participants lowered their ratings of the credibility of the witness, irrespective of whether the charge of incompetence was corroborated by other evidence (Kassin, Williams, & Saunders, 1990). It comes as no surprise that a survey of Australian psychologists doing assessments for the courts revealed that 61% of them believed that their testimony was "almost always" or "always" distorted in court (Allan, Martin, & Allan, 2000). No wonder many social scientists feel frustrated with the process, and would prefer a system where they contribute to the solution of the problem by being involved in it in a problem solving capacity, rather than as witnesses (Allan & Louw, 2001; Keilin & Bloom, 1986).

### **Legal decision making is a linear process that emphasises certainty**

One of the strengths of traditional legal decision-making is that it uses clear, linear and standard processes that emphasise certainty and finality at each stage. The certainty this brings is potentially therapeutic. Nevertheless, the process has anti-therapeutic elements.

Firstly, it does not allow an opportunity for a formal and appropriate expression of emotions that is often necessary to be dealt with before the disputants can move into a problem solving mode (Acland, 1990; Boule, 2001).

Secondly, decisions are made on the basis of available information if a party can demonstrate that a threshold of certainty has been exceeded. Inherent in this is the risk of sequentiality, that is the phenomenon that the first decision in a sequence of decisions

is often determinative of later decisions, because they are self-strengthening (Davis & Barua, 1995). This is especially the case where the evidence is not convincingly in favour of either side, as is often the case when interim orders are made.

Thirdly, the linear system makes it difficult to utilise a decision-making process that emphasises the tentative nature of decisions, and is more responsive to new information and feedback. Consequently the use of some strategies that will encourage parties to take ownership of the process is restricted. An example of such a method would be behavioural contracting that engages parties in goal setting, identifying rewards for compliance, and penalties for non-compliance.

### **Conclusion**

This analysis indicated that the current system has therapeutic elements and, subject to the availability of resources, this therapeutic potential can be enhanced. However, no legal system will ever be totally therapeutic because of the individual differences amongst people and the fact that individual needs vary across time and situations. Furthermore, in any dispute there is always competing interests, and it is rare to find a situation where the needs of the disputants are similar. In certain situations the best interest of a child, and consequently the child's therapeutic needs may be given priority. However, in other cases the challenge is to identify the needs of individuals, and to have a system that is flexible enough to accommodate these needs as far as is optimally possible. This does not mean that all people will be optimally satisfied with the system, because in the case of some people there may be a discrepancy between what they want and what would be therapeutic for them. It is inevitable that there may be occasions when there will be tension between the rights of individuals and the therapeutic needs of another. How this should be resolved is not clear, but it appears that the rights to a fair trial will always be paramount (Wexler, 2001).

This analysis further indicates that social scientists should not be witnesses in the decision-making process, but should be involved in making decisions. This is not a suggestion that social scientists should take over the decision-making in this area. The ability of legally trained people to focus on facts, and their ability to monitor for legally relevant facts, critically examine them, and to "attach more than one inference to a fact" (Weinstein, 1997, p. 166) is important and ensures a perception of fairness.

Nevertheless, it appears as if social scientists could make a greater contribution if the information they provided was introduced more efficiently, and if they could assist judicial officers to identify and deal with the therapeutic needs of parties.

### References

- Ackerman, M. J., & Kane, A. W. (1990). *How to examine psychological experts in divorce and other civil actions*. Eau Claire: Professional Education Systems.
- Acland, A. F. (1990). *A sudden outbreak of common sense: Managing conflict through mediation*. London: Hutchinson Business Books.
- Allan, A., & Allan, M. M. (2000). The South African Truth and Reconciliation Commission as a therapeutic tool. *Behavioral Sciences & the Law*, 18(4), 459 - 477.
- Allan, A., & Louw, D. A. (2001). Lawyers' perception of psychologists who do forensic work. *South African Journal of Psychology*, 31(2), 12-20.
- Allan, A., Martin, M.-A., & Allan, M. M. (2000). Assessment for the courts: A survey of Australian psychologists. *Psychiatry, Psychology and Law*, 7(2), 150-158.
- Anderten, P., Staulcup, V., & Grisso, T. (1980). On being ethical in legal places. *Professional Psychology*, 11(5), 764-773.
- Baucom, D. H., Sayers, S. L., & Duhe, A. (1989). Attributional style and attributional patterns among married couples. *Journal of Personality and Social Psychology*, 56, 596-607.
- Bazelon, D. L. (1982). Veils, values, and social responsibility. *American Psychologist*, 37(2), 115-121.
- Boulle, L. (2001). *Mediation: Skills and techniques*. Chatswood (NSW): Butterworths.
- Bowden, P. (1983). Madness or badness. *British Journal of Hospital Medicine*, 10, 388-394.
- Cooper, J. M. (1998). Towards a new architecture: Creative problem solving and the evolution of law. *California Western Law Review*, 34, 297-323.
- Daicoff, S. (2000). The role of therapeutic jurisprudence in the comprehensive law movement. In D. P. Stolle, D. B. Wexler & B. J. Winick (Eds.), *Practicing therapeutic jurisprudence* (pp. 465-492). Durham: Carolina Academic Press.
- Davis, P. C., & Barua, G. (1995). Custodial choices for children at risk: Bias, sequentiality, and the law. *University of Chicago Law School Roundtable*, 2, 139.



- Erera, P., Minton, C., Pasley, K., & Mandel, S. (1999). Fathering after divorce in Israel and the US. *Journal of Divorce and Remarriage*, 31, 55-82.
- Gibson, J. (1992). *Non-custodial fathers and access patterns* (10). Canberra: Family Court of Australia.
- Haney, C. (1980). Psychology and legal change: On the limits of factual jurisprudence. *Law and Human Behavior*, 4(3), 147-199.
- Harvey, J. H. (1987). Attributions in close relationships: Research and theoretical developments. *Journal of Social and Clinical Psychology*, 5, 420-434.
- Holdsworth, W. A. (1956). *A history of English law*. (Vol. 1). London: Methuen.
- Hunter, M. (1981). *Science and society in restoration England*. London: Cambridge University Press.
- Jones, C. A. G. (1994). *Expert witnesses*. Oxford: Clarendon Press.
- Jones, C. G. (1986). Men of science v men of law: Some comments on recent cases. *Medicine, Science and the Law*, 26(1), 13-16.
- Kassin, S. M., Williams, L. N., & Saunders, C. L. (1990). Dirty tricks of cross-examination. *Law and Human Behavior*, 14, 373-384.
- Kruk, E. (1991). Discontinuity between pre- and post-divorce father-child relationships: New evidence regarding paternal disengagement. *Journal of Divorce & Remarriage*, 16, 195-227.
- Lewis, H. B. (1971). *Shame and guilt in neurosis*. New York: International Universities Press.
- Melton, G. B. (1994). Expert opinions: "Not for cosmic understanding". In B. Sales & G. VandeBos (Eds.), *Psychology in litigation and legislation* (pp. 55-99). Washington: DC: American Psychological Association.
- Melton, G. B., Petrila, J., Poythress, N. G., & Slobogin, C. (1997). *Psychological evaluations for the courts*. (2nd ed.). New York: Guilford Press.
- Ormrod, R. F. G. (1972). Evidence and proof: Scientific and legal. *Medicine, Science and the Law*, 12, 9-20.
- Pennebaker, J. W. (1989). Confession, inhibition, and disease. In L. Berkowitz (Ed.), *Advance in experimental social psychology* (Vol. 22, pp. 211-244). New York: Academic Press.
- Pennebaker, J. W. (1990). *Opening up: The healing power of expressing emotions*. New York: The Guilford Press.

- Pennebaker, J. W. (1993). Putting stress into words: Health, linguistics, and therapeutic implications. *Behaviour, Research and Therapy*, 31(6), 539-548.
- Pollack, S. (1971). Principles of forensic psychiatry for psychiatric-legal opinion making. In C. H. Wecht (Ed.), *Legal medicine annual* (pp. 261-297). New York: Appelton-Century Crafts.
- Pollock, F., & Maitland, F. W. (1968). *The history of English law*. (Vol. 1). Cambridge: University Press.
- Stone, G., & McKenry, P. (1998). Nonresidential father involvement: A test of a mid-range theory. *The Journal of Genetic Psychology*, 159(3), 313-336.
- Thayer, J. B. (1889/1969). *A preliminary treatise on evidence at common law*. New Jersey: Rothman Reprints.
- Wall, J. (1992). Maintaining the connection: Parenting as a noncustodial father. *Child and Adolescent Social Work Journal*, 9, 441-456.
- Weinstein, J. (1997). And never the twain shall meet: The best interests of children and the adversary system. *Miami Law Review*, 52, 79-176.
- Wexler, D. B. (1997). Therapeutic jurisprudence in a comparative law context. *Behavioural Sciences and the Law*, 15, 233-246.
- Wexler, D. B. (2001, August). *The healing potential of the law: How therapeutic jurisprudence can help change law, law practice and the courts*. Paper presented at the Colloquium of the University of Western Australia Law School, Perth, Australia.
- Winick, B. J. (1997). The jurisprudence of therapeutic jurisprudence. *Psychology, Public Policy, and Law*, 3(1), 184-206.