

## *Specialist Courts – The Impact Upon the Individual*

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Therapeutic jurisprudence is the “study of the role of the law as a therapeutic agent”. It focuses on the law’s impact on emotional life and on the psychological well-being<sup>1</sup> of the individual

What this means for individuals is that the processes of, and outcomes from, the law are considered in terms of how they impact on the whole person.

Within this context, the focus shifts an event that may be the subject of legal intervention to an evaluation of the person who is acting and their modus operandi, including the social, environmental and cultural circumstances in which that person is located. It elevates the notion of the persons 'well being' to a mainstream consideration.

It shifts the focus of 'the problem', manifested by the persons behaviour, from punitive to rehabilitative. In some situations it means that criminal behaviour can be viewed in the context of any underlying physical, psychological, social or economic circumstances dealt with by effective social intervention rather than by harsher sentences.

Specialist courts are the most obvious and recent manifestation of therapeutic jurisprudence in the Australian context. They have an obvious, perhaps superficial, appeal in that they allow decision makers to deal with personal issues through an intersection with service frameworks outside the justice system to develop solutions.

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<sup>1</sup> Wexler – Therapeutic Jurisprudence: An overview

They are attractive as they create a mechanism to deal with otherwise intractable problems and, therefore, offer a possibility that such problems will dissolve or be 'healed'. The fact that these new courts are called "problem solving" courts reflects this.

In summary, as stated by David Wexler:

"...specialised courts ... .. represent a move away from a focus on individuals and their criminal conduct to offenders' problems and their solutions." <sup>2</sup>

Clearly, there is an obvious advantage in that a specialist court creates a sympathetic understanding of the context in which crime is committed or civil needs emerge. This allows the court to take account of the social needs an individual may have and to facilitate compliance with treatment assessed as necessary.

In the criminal domain, this may lead to the development of individual sentencing options, which respect and foster individual growth and development, and may keep a person out of the criminal justice system. We see this example now in the Magistrate Courts Diversion scheme where the person is allowed to address their mental health or disability needs and any offending behaviour whilst legal proceedings are adjourned.

However, in some ways the process may lead to the diminution of a person's control over their illness and treatment. This occurs as their participation and self-determination in choosing their site and level of involvement in access to treating services is reduced. It further affects individual freedoms and choices, imposing a definition of well-being that perhaps has

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<sup>2</sup> Sentencing Review p5

a strict and conventional moral code and which denies the individual the dignity of taking risks (in turn influenced by perceptions of dangerousness and risk of harm).

A further concern is the way in which the solution to problems may tend to become located in the deficiencies of the individual rather than an often more needed recognition of the deficiencies in service networks and systems.

Little acknowledgement is given to the fact that ‘structural impediments [call] for structural remedies’<sup>3</sup> This is an important point in the context of service systems which, over the past decade, have undergone significant change in the context of competition, outsourcing, privatisation and a reduced role for government in service delivery. Query whether these changes have led to the desired improvements in service quality, reductions in service cost and increased choice for consumers in terms of how their individual needs are met.

Finally and crucially a best interests model may often too readily exclude sustained consideration of a person’s wishes and/or rights and whether these are achievable. As Winneke states...Fundamental entitlements such as the right to establish a lack of guilt may be overlooked in systems where, though the diversion path is pursued, the premise is that a person performed the acts alleged, or has some other form of de facto guilt or conviction. Particularly for people who may be disadvantaged in understanding court processes (though clearly able to instruct) there is a great danger of sacrificing rights focused outcomes which may in themselves be more therapeutic than the alternative. The psychological value of

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<sup>3</sup> Protection, Populism and Citizenship. Terry Carney, Law in Context, 1998

finality of proceedings, or choice, must never be overlooked in any consideration of therapeutic\ jurisprudence. <sup>4</sup>

The development of specialist courts challenges much of the traditional model of court practice. Court practice expands potentially towards a dialogue rather than the traditional monologue. The individual becomes involved in an ongoing relationship, one which is focused on identifying and resolving personal issues and individual problems. The relationship essentially ties the person to the court until the court determines otherwise. This can be contrasted to the criminal justice system, in which ends are more clearly defined, in essence the serving of the sentence or its equivalent.

Most significantly, specialist courts appear to have the effect of fusing the court system with the welfare system, in a manner which is subtle and perhaps lacking in transparency.

Redress arrangements may become cloudy with the developing welfare role of the courts. If the court is to become a major player in case management to whom is it responsible and to whom can the individual complain if dissatisfied with service delivery or standards?

Accountabilities may therefore be altered and realigned.

A specialist court requires a type of management role by decision-makers. It expects that they will have the power to address and solve problems with the service system and also accept the role of case manager, within a welfare context. The court would thus be expected to develop thorough knowledge of the possibilities available to individuals within the therapeutic service system. It requires decision makers to seek out appropriate care

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<sup>4</sup> Winick, B.J., "On Autonomy: Legal and psychological perspectives". Villanova law Review Vol. 37 1992

for the individuals before the court. This demands a highly inquisitorial approach which may perhaps challenge or alter the rules of evidence. It ought to consider and give weight to the wishes and instructions of the person who is the subject of the hearing.

It also has the disturbingly costly and anti-therapeutic potential to duplicate the system of monitoring and accountability which, successful or not, is already provided in the health and disability support systems. It has been noted from the perspective of a Magistrate that society must avoid an inappropriate reliance on the criminal justice system to contain what are ultimately social problems (Age 5 August 2002 page 1). We must be wary of reliance on any system of courts, specialist or otherwise, to address problems which are not theirs and for which they may be ill-suited in whatever specialist form.

## **Two case studies**

1. PR was mentally unwell at the time he was charged with relatively minor offences of criminal damage. He had prior offences of assault and property damage for which he had been charged and sentenced and placed on a CBO. The order was no longer current when he went to Court with the later set of charges. Evidence relating to his psychotic state at the time of the offending behaviour was lead at the hearing. The Magistrate made a finding of guilty as charged and made an order pursuant to 93(1)(d) of the Sentencing Act - for him to be treated at a forensic care facility until considered by his treating doctor as able to be released. His inpatient stay at the hospital exceeded 11 months. His progress was deemed by the hospital as slow, his prognosis poor. His frustration with his incarceration meant that he exhibited some anger however, there was no evidence of psychosis. If he had not been charged then he would

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have been maintained in the community perhaps on a community treatment order. He may have had a short involuntary admission in the acute state of his illness.

PR was denied the DSP as Centrelink formed the view that he was a prisoner and not been held for psychiatric rehabilitation. This view was overturned on appeal to the SSAT the treatment he was receiving in the hospital was the same as that offered to those undergoing psychiatric confinement within the meaning of the Social Security Act.

This case highlights issues in relation to the court making an assumption about his treatment. Was it the intention of the Magistrate that he be incarcerated for such a lengthy period or did the court presume that he would quickly be stabilised and then treated in the community?

The decision of the Tribunal allowed them to examine the actual program offered to PR and to others in the hospital who were not deemed to be in gaol but receiving the same program.

This case exemplifies the sorts of anti-therapeutic outcomes which can derive from dispositions with a theoretically specialist therapeutic orientation.

**2.** A young person engaged in a series of incidents of minor property damage, all linked to the same set of delusional beliefs. They led to a series of charges, and repeated court dates some of which she could not meet because she was in hospital. She was ineligible for the existing diversion scheme because in relation to the first charges there had been a finding of guilt, and also because she had (being detained in hospital as in an involuntary patient) failed to attend court. Most significantly, the protracted involvement with the court had devastating impact on her psychological well-being (though ultimately the symptoms which caused the behaviour were brought completely under control and she posed no risk of re-offending).

Such a case illustrates the potentially anti-therapeutic impact of a system which, albeit under the rubric of diversion or specialist courts, lacks sufficiently flexible processes or dispositions, and/or ensures vulnerable people are involved in an ongoing court process.

## **Conclusion**

The emergence of specialist courts encourages a more holistic and client-centred focus aimed at solving the complex problems of individuals who appear before our courts. This is, of course, to be applauded.

However, new policy initiatives of this type may have unintended consequences for legal systems and legal players. They may also, ironically, have anti-therapeutic outcomes for individuals. What is needed, therefore, is a willingness to thoroughly evaluate the initiative rather than to embrace it completely and uncritically, as a type of life raft, in the face of seemingly insolvable problems and the revolving door syndrome of some individuals before courts.