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THERAPEUTIC JURISPRUDENCE – AN AUSTRALIAN PERSPECTIVE

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INTRODUCTION

At a recent conference in Crete on Ethics and Professional Responsibilities, I had the privilege of meeting David B. Wexler and hearing his presentation on Therapeutic Jurisprudence. I also had the advantage of reading his article entitled *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer.*

Over a cup of good Greek coffee, Mr. Wexler asked me about developments in this area in Australia and suggested I might contribute to a forthcoming publication. The short answer is that there has been little development in academic circles compared to the work being done by Mr. Wexler and others in the United States and little development within the Australian legal profession. However, there is real development, particularly in the State of Victoria, at the instigation of our Justice Department headed by the Attorney General, the Honorable Rob Hulls.

DEVELOPMENTS IN VICTORIA

The Victorian Justice Department has initiated a number of programs to address the problems of the vulnerable and disadvantaged people in the community and their relationship with the justice system. Such initiatives include the Aboriginal Justice Agreement, the Women's Safety Strategy, the State Disability Plan and the Cultural Diversity Project. It has improved responses to the needs of victims of crime to assist in their recovery, particularly in the areas of family violence and sexual assault. A victims' support agency has been established, and has provisions for compensation for pain and suffering.

Most significantly, there have been developments in what is more clearly Therapeutic Jurisprudence, namely, the establishment of problem-solving courts. There is now a division of the Magistrates Court to deal

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with family violence. The age limit in the Children's Court has been increased to 18 years. A drug court has been established, which has special powers to impose treatment orders. Koori courts have been established to deal with special issues which arise in dealing with aboriginal offenders and provide as much understanding and support with these special problems. Although there has been some criticism of the concept of establishing special courts for sections of the community, it seems that the judiciary and the profession have embraced these initiatives and are cooperating with the work being done by the Magistrates Court. Victoria's Chief Magistrate, Ian Gray, presented an interesting paper describing the practice of the Koori court and its early achievements at the Ethics Conference in Crete. In addition, needed funding has been given to the Victoria Legal Aid and community legal centers.

All these developments are the work of the government and Magistrates Court, but the profession, while cooperating with these initiatives, has not seriously looked at other aspects of Therapeutic Jurisprudence of the kind described by Mr. Wexler in his paper.

SOME PROBLEMS FOR PROFESSIONAL INVOLVEMENT IN THERAPEUTIC JURISPRUDENCE IN AUSTRALIA

In the three most populated States in Australia, that is, New South Wales, Victoria and Queensland, the profession is divided into barristers and solicitors along the British model. Other states have also seen the development of separate referral bars. The solicitor, usually working in firms, is in a sense the general practitioner and advisor to the client. Solicitors have a right of audience in the courts as advocates, but generally do not practice as such. If they do, it is often in country and suburban areas and in the larger cities only in the Magistrates Court. There are some exceptions, but generally the skills, knowledge and experience required of a professional advocate reside in members of the Bar. They practice as individuals and usually act only when briefed by solicitors and when the solicitors' clients become involved in litigation in which higher skills and experience in advocacy is needed.

It follows from these arrangements that the solicitor has the main contact with the client and not the barrister. The barrister is often briefed shortly before the case goes to court, and even if the barrister is briefed earlier, his or her activities are limited to advising on evidence and preparing a case for trial. There has been a long-standing debate about the advantages and disadvantages of this system, compared to the systems in which lawyers are amalgams although they may in fact specialize in trial

advocacy. When working with the National Institute for Trial Advocacy in the United States in training of advocates, I learned that one of the problems was that trial lawyers do not get sufficient court experience. One well-known trial lawyer, who was described as a busy one, appeared in about ten trials during the year. A moderately successful barrister in Australia would appear in trials throughout the year, and a successful one would have very few days out of court. This is because the solicitors do much of the preparation and pre-trial activity. A good analogy may be that of the medical general practitioner who looks after the patient, engages a specialist surgeon when an operation is needed and then continues looking after the patient's rehabilitation.

The Australian, like the British system, has imposed, at least on barristers, some ethical obligations that are based on the way a barrister operates as an independent practitioner and an officer of the court. Amongst those ethical obligations is the so-called 'cab rank rule.' The rule requires a barrister to accept a brief from a solicitor in the area the barrister practices. It is a breach of the barrister's duty to choose or refuse cases, except in most exceptional circumstances. The character of the client or the nature of the cause is not a basis for a refusal of a brief. This stems from the traditional duty of a barrister to not make judgments, but to be available to represent clients in court. This duty has been expressed in various ways. Lord Elden[2] said:

> The advocate lends his exertions to all, himself to none. The result of the cause is to him a matter of indifference. It is for the courts to decide. It is for him to argue. He is merely an officer assisting in the administration of justice and acting under the impression that truth is best discovered by powerful statements on both sides of the question.

Dr. Johnson,[3] in expressing the same concept, stated that:

> [A] lawyer (advocate) has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge .... A lawyer is to do for his client all that his client might fairly do for himself, if he could .... If lawyers were to undertake no causes until they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim.

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2. This statement is quoted in Ex parte Elsee (1830) MONT 69, at 70N, 72 *available at* http://www.geocities.com/artofadvocacy/about_advocacy_folder/what_is_advocacy_pagetwo.htm (last visited Feb. 22, 2004).

3. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 342 (David Campbell Publishers 1992).

It follows from the peculiar role of a barrister, and the ethical principles which bind barristers, that it would be wrong for a barrister to attempt to become a social reformer by refusing briefs from solicitors because the clients are not willing to participate in rehabilitation programs.

Another factor, which is a relevant and a significant difference in Australia, is that we do not have plea bargaining, as it is known in the United States. There is a limited form of discussion between the defense and prosecution about the nature and number of charges but that is resolved on the basis of the sufficiency of evidence and rarely for other reasons. Such discussions do not involve the Judge. Also, any agreed positions about sentencing considerations put before a judge do not bind the judge. Further, judges infrequently refuse to act on what is jointly submitted by the parties, unless the evidence supports the result which the parties seek.

CONSEQUENCES OF THESE DIFFERENCES

Action by government and the judiciary to develop and support Therapeutic Jurisprudence initiatives is underway and should be encouraged, subject to the legitimate concern that the fundamental concepts, rights and protections of litigants are not infringed. The profession should be encouraged to cooperate with such developments, provided that the ethical obligations of professional lawyers in their representation of the clients' interests are not compromised.

The nature of barristers practice and ethics makes it difficult to see how Therapeutic Jurisprudence, in the sense that it is described in Mr. Wexler's article, can be significantly developed. It would be quite unethical for a barrister to refuse to accept a brief, in a criminal matter, at trial or upon sentence, if it were conditional on the client's agreement to participate in prevention or rehabilitation programs. A private solicitors' firm may well be entitled to take this approach, but in my view a solicitor who has a right of audience in the courts and acts in a sense, in the same way as the American trial lawyer, could also be bound by a similar ethical obligation. There are firms in Australia who, for example, do mainly plaintiffs' work and would not appear for a defendant say in a tobacco industry case. They are entitled to do that but a barrister is not.

Having said that, there are some ways in which barristers can and should cooperate fully with the practices of the special needs courts or other Therapeutic Jurisprudence initiatives. It is also possible to attempt to introduce a culture of a more cooperative approach by the bar with trial management and a culture of avoiding behavior that unnecessarily upsets victims and witnesses. This must be within the limits of the right of a

barrister to conduct a case in the best interest of the client provided it is within the bounds of ethics, etiquette and his or her position as an officer of the court.

I have read the article by Bruce Winick which deals with his views about the role of what he calls 'counsel' in Therapeutic Jurisprudence. If by counsel he intends to include barristers in a system like the one which exists in Australia, then I repeat the ethical limitations which bind barristers. Nevertheless, some of the actions by counsel, to which Mr. Winick refers, can properly have a therapeutic approach. I refer to helping the clients with their pre-trial attempts at negotiation and mediation, as well as helping the client with an easier path through the trial process by better informing the client about the process so as to make it more understandable and acceptable. All this can be done by barristers, and many good barristers already do it.

CONCLUSION

I think the Australian law schools could devote more time to the question of how the Australian profession, given the way it practices, can, consistently with its duties, become involved in the development of Therapeutic Jurisprudence. This could be done in university courses, particularly Criminal Law, Family Law and Trial Practice and Advocacy, as well as Clinical Programs. The same can be said for both barristers and solicitors. Bar Readers' courses, Advocacy Training workshops and Continuing Legal Education programs could be used to develop an understanding of the basic aims and approaches of Therapeutic Jurisprudence. Despite the ethical restrictions, lawyers, solicitors and barristers can be encouraged to understand and apply the principles of Therapeutic Jurisprudence to their work. These developments, designed to introduce a culture of Therapeutic Jurisprudence, should be cautious and considered without dampening the enthusiasm for the idea by David Wexler and his colleagues, who are doing important, interesting and constructive work.