

**THERAPEUTIC JURISPRUDENCE: FIRST STEPS IN THE SUPREME COURT**

**ADDRESS TO AIJA CONFERENCE ON NON-ADVERSARIAL JUSTICE**

**5 MAY 2010**

**JUSTICE MAXWELL, PRESIDENT COURT OF APPEAL, SUPREME COURT OF VICTORIA**

I have spent almost five years in the Victorian Court of Appeal without consciously invoking the concept of therapeutic jurisprudence. But I now realise, having read a number of the published articles by Michael King<sup>1</sup> and Arie Freiberg and having heard David Wexler speak this morning, that at least one or two of the things we have been doing in the Court of Appeal might just qualify under the broad heading of therapeutic jurisprudence. And I thought I should respond to David's encouragement and speak about them tonight.

Perhaps the best example is the establishment, in 2006, of the position of co-ordinator of unrepresented litigants. The initiative to establish this position came from the Court of Appeal but, as it was someone else's idea, I am free to speak glowingly about it!

What underpinned this initiative was the recognition that the experience of coming to court is, almost inevitably, stressful, confusing and difficult for a person without legal representation. Equally, special skills are required of court staff to provide the kind of patient listening and practical assistance which unrepresented litigants so often require.

The co-ordinator is, in effect, a clearing-house. He (the first incumbent was a she) performs two functions – providing an accessible point of reference and a skilled source of guidance for self-represented litigants; and at the same time relieving administrative and judicial staff – and judges – of the burden of explaining rules and procedures and managing expectations about what can and cannot be achieved in the Court.

In the year ended 30 June 2009, our co-ordinator (who services the entire Supreme Court) fielded more than 1400 enquiries, in person and over the phone, from more than 750 self-represented litigants. As far as I know, this position is unique in Australia. My fervent hope is that funding will be found to replicate the office in the much busier jurisdictions, where the need is many times greater.

My second example concerns reflective listening. One of the real benefits for me from the judicial training programs I have attended has been to learn about “reflective listening”. That is, as you know, the technique of summarising and repeating back to the litigant the substance of the argument which has just been put. I have found it of particular assistance with self-represented litigants (but it can also be very helpful with long-winded counsel!).

Summarising the argument confirms, to the litigant, in perhaps the best possible way, that you have been listening carefully and that you have understood his/her concerns. It also provides an opportunity for the judge to acknowledge the litigant's sense of grievance. At the same time, using this technique can save a good deal of hearing time. Once the litigant has confirmed that you have correctly understood the argument, you are better able to dissuade them from making the same argument four or five more times.

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<sup>1</sup> See in particular M S King, “*Therapeutic Jurisprudence, Leadership and the Role of Appeal Courts*,” (2008) 30 Australian Bar Review 207.

My third example concerns an appeal against sentence which a colleague and I heard earlier this year. The offender had been sentenced in the Koori Court. As some of you would know, the Koori Court in Victoria operates as a division of the mainstream courts (Magistrates' Court and County Court). This was a County Court matter. The County Court judge had presided over the "sentencing conversation" which takes place (following the offender's plea of guilty) between the offender and tribal elders and respected persons.

My colleague and I were so struck by the obvious efficacy of the process in this case that we set out in our reasons for decision quite a detailed account of the procedure.<sup>2</sup> As those reasons make clear, we relied heavily on the very thoughtful and enlightened submissions made by the Crown prosecutor on the appeal. I can now see that, by affirming the process in this way, we were (without being aware of it) contributing to the promotion of this form of therapeutic justice.

The most striking feature of the case was what the prosecutor described as the "compelling evidence" of the offender's rehabilitation. In part, this was a result of his active participation in the process – his expression of remorse and shame, his apology to the victim and to the elders, and his acknowledgment of the progress he had made as a result of rehabilitation programs and community support.

Rehabilitation is, of course, only one of the functions of sentencing. Sentencing courts must ensure that sentences are effective to secure the essential objectives of deterrence, denunciation and community protection. But, as I have found it necessary to say in judgments more than once, the community has a vital interest in the rehabilitation of offenders:

*A sentencing judge should be astute to investigate whether a non-custodial disposition is to be preferred, even in a case of a serious offence, if in the long term the community's interest will be best served by that course. This Court should seek to promote public understanding of the fact that – apart from the interest of the individual whom it is sought to rehabilitate, an important interest in itself – there is a vital community interest in maximising the prospects of rehabilitation of an individual who has been convicted of a serious crime.*<sup>3</sup>

Another recent case which raised similar issues concerned an HIV-positive man, recently arrived in Australia, who had pleaded guilty to two counts of reckless conduct endangering persons. He had had unprotected sex without informing the other party of his HIV status. The Court of Appeal had to resentence him, because of a sentencing error conceded by the Crown. In so doing, we took into account the very marked improvement in the offender's appreciation of the seriousness of what he had done and the consequent reduction in the risk to the community. This was the result of very sustained supervision and counselling of the offender by the Health Department and by psychiatrists engaged by the Department. This in turn had been made possible because the sentencing judge had imposed a suspended sentence and a community-based order.

*In my opinion, defence counsel was right to submit to the judge that this matter was more appropriately regarded as a public health issue than as a criminal law issue, though it was not said then nor in this*

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<sup>2</sup> *The Queen v Morgan* [2010] VSCA 15.

<sup>3</sup> *DPP v Tokava* [2006] VSCA 156, [21].

*court that the breaches of the criminal law should be ignored. Rather, the point of the submission was that the objective of protecting the public had already been shown to be best served by the close supervision which the health authorities were maintaining.*<sup>4</sup>

Recently I found myself, unexpectedly, having a “sentencing conversation” of my own. This was an application for leave to appeal against sentence. The applicant had been sentenced to 18 months’ imprisonment, with a non-parole period of nine months, after pleading guilty to a charge of recklessly causing serious injury. Following a verbal exchange in a nightclub, he had punched the victim to the face several times, knocking him to the ground and causing injuries which his own counsel described as “very, very nasty” and “horrendous”.

Not only was the applicant himself in court – which is itself unusual – but he had a large number of friends, male and female, in court to support him. In dismissing the application for leave to appeal, I took the opportunity to address a few words to his supporters:

*“I hope those who have loyally supported the applicant in court this morning will help the courts to spread this message - that those who commit violence when drunk are likely to end up in gaol. One of the purposes of sentencing is to send a message to the community that that is what will happen. I hope you will talk to your friends and say, ‘Look, it’s actually really serious. Matt Zenner is in gaol, and the appeal court wouldn’t entertain an application to reduce the sentence’.*

*Every day in the County Court, and too frequently in this Court, judges keep saying, ‘Sentencing for this kind of offending is particularly important in sending a message, because it is so prevalent.’ Frankly, the courts are at a loss to know how to get the message out to the community that this kind of violence is, and has always been, viewed seriously and that people who offend in this way do go to gaol.<sup>5</sup> You heard the previous application for leave to appeal, where the young man is in gaol for five years with a minimum of three years for the same offence, recklessly causing serious injury. This is really serious stuff. I hope you can spread the message.”<sup>6</sup>*

My final example concerns the regional work of the Court of Appeal. The founding President of the Court of Appeal, Justice Winneke, made a firm commitment that the Court of Appeal would sit in regional centres at least twice a year. I have maintained that commitment and, if resources permitted, I would want to expand it. I think it is very important for the Court to convey, in this very practical way, that we are a court for all Victorians.

Last May, the Court sat in Mildura, a city on the border between Victoria and New South Wales, to hear an appeal against sentence by a person whose dangerous driving had caused the deaths of six teenagers from that district and had resulted in very serious injuries to four others.

<sup>4</sup> *Kuoth v The Queen* [2010] VSCA 103, [9].

<sup>5</sup> See *The Queen v Hay* [2007] VSCA 147 [36].

<sup>6</sup> *The Queen v Zenner*, 29 October 2009, unreported, Maxwell P, [13]–[14].

It was, I think, very important that the Court was seen to be doing its work in the very community where this tragedy had occurred. The hearing was extensively covered in the local paper and a number of the victims' families were present in court. So were friends and relatives of the applicant, who came from the same area. When the result of the appeal was handed down some months later, in Melbourne, we arranged for the publication of the decision to be transmitted by video link to Mildura.<sup>7</sup> (Another bench of the Court did the same recently, when handing down a decision on a sentence appeal which concerned a serious sexual offence committed in Geelong. The Court had sat in Geelong to hear the appeal and the decision was transmitted by video link.)

Let me conclude by saying something about the use of language in judgments. Like my distinguished former counterpart, Keith Mason, I see no place in appellate judgments for criticism of first instance decision-makers. If the conclusion is reached that error has been made, it is both necessary and sufficient to say so, and to explain why.

I regard simplicity and clarity of expression as the governing principles of judgment writing. I hope that I am making some progress, however slow, towards those goals. I learned a lot from attending judgment writing school, organised by the highly energetic Judicial College of Victoria. We were not, however, taught to prepare the judgment as a "respectful letter to the loser", as David Wexler suggested this morning. Instead, Professor Jim Raymond imbued us with what is known as the "LOPP/FLOPP" approach to judgment writing. When translated, that means you should state the Losing Party's Position and then identify the Flaw in the Losing Party's Position!

Finally, although I enjoyed studying Latin at school, I am mounting my own quiet campaign for its removal from legal discourse. I started with a comment in a footnote.<sup>8</sup> So far I have not detected a groundswell of support!

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<sup>7</sup> *The Queen v Towle* [2009] VSCA 280.

<sup>8</sup> *Janina Puttick v Fletcher Challenge Forests Pty Ltd* [2007] VSCA 264, fn 94.