

Legal Responses to Mental Health: Is Therapeutic Jurisprudence the Answer? The Experience in New Zealand *

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One in four people in the world will be affected by mental or neurological disorders at some point in their lives. Around 450 million people currently suffer from such conditions, placing mental disorders among the leading causes of ill-health and disability worldwide.

World Health Organization

I Introduction

The orthodox understanding of 'ethics' encompasses a system of moral principles that define good and bad behavior. When applied to mental health, various jurisdictions, including New Zealand, have codified these principles together with the obligations on health service providers to meet these codified principles and standards. Underpinning this relationship is one of mutual trust where the physician has a responsibility, for example, to secure informed consent prior to any treatment. The existence of this therapeutic relationship can be applied when an offender who presents with a mental illness is subject to the criminal justice system.

Criminal justice systems within western jurisdictions are not adequately equipped to process offenders who present with a mental illness. The doctrine of therapeutic jurisprudence has recently provided legitimacy and a framework for specialized courts including drug courts and mental health

* This article builds on research already published in Valmaine Toki "Therapeutic Jurisprudence and Mental Health Courts for Māori" (2010) 33 International Journal of Law and Psychiatry at 440.

courts (King, 2009). The main themes of therapeutic jurisprudence and problem solving courts include a shift of court practice away from the traditional adversarial model, a commitment to achieving offender rehabilitation, a focus on achieving tangible outcomes, and the use of judicial authority to solve problems and change offender behaviour (Crime and Justice Research, 2003).

As therapeutic jurisprudence underpins the rise and success of Specialized Courts including Drug Courts and Mental Health Courts in New Zealand, part one will examine the relevance of this doctrine with New Zealand as the focus. Against this analysis, part two will highlight the extent of mental illness within the criminal justice system in New Zealand. In light of this, part three will review some current initiatives to address mental illness, before providing some conclusions and reflections moving forward.

II What is Therapeutic Jurisprudence?

Therapeutic jurisprudence developed out of the mental health system (Toki, 2010). American Professors Bruce Winick and David Wexler, both mental health law academics, were the pioneers of this movement. During their practice within the American health system, they conceived the idea that the operation of law and its accompanying legal processes can have a direct psychological impact on all the players, including lawyers, judges, and the offender (Winick and Wexler, 2003). This impact could be both therapeutic or anti-therapeutic (McKenna et al., 2007). Thus, a system that is designed to help people recover or improve their mental health often backfires and has the opposite effect (Feuer, 1996).

Therapeutic jurisprudence is a perspective that regards the law as a social force that produces behaviours and consequences (Winick, 2005). Sometimes these consequences fall within the realm of what we call 'therapeutic'. At other times anti-therapeutic consequences are produced (McKenna and Seaton, 2005). Therapeutic jurisprudence raises our attention to this and encourages us to see whether the law can be made or applied in a more therapeutic way, so long as other values, such as justice, can be fully respected (Winick and Wexler, 2003). For Māori, this means that the law should aspire to generate a state of *ora* (well-being) as opposed to an aggravated state of *mate* (ailing, ill). It does not trump other considerations or override important societal values, such as due process or

freedom of speech and press (Schma, 2000). Therefore, therapeutic jurisprudence is the study of therapeutic and non-therapeutic consequences of the law.

Therapeutic jurisprudence is thus described as the “study of the role of law as a therapeutic agent” (Winick and Wexler, 2003). One author offered the following definition as best capturing the essence of therapeutic jurisprudence (Slobogin, 1995):

... the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.

In this sense therapeutic jurisprudence is more of a descriptive and instrumental tool than an analytical theory (Brookbanks, 2003). It focuses on the impact of law on emotional life and psychological well-being (Winick and Wexler, 2003). Therapeutic jurisprudence can be thought of as a lens through which to view regulations and laws, as well as the roles and behaviour of legal actors: the legislators, lawyers, judges, and administrators (Schma, 2000). It is through this lens that an indigenous legal system such as tikanga Māori (Maori custom) can be implemented (Toki, 2010).

III Criticisms of Therapeutic Jurisprudence

Support for therapeutic jurisprudence varies within academic circles from enthusiasm to mixed reviews. One of the early criticisms of therapeutic jurisprudence was that it was paternalistic. Perhaps this was a confusion in the title itself, which may have suggested a return to a therapeutic state (Stolle, 2000). The State legal system is paternalistic, so if the implementation of a therapeutic jurisprudential approach is successful in reducing Māori offending rates and those relating to domestic violence, then the positive outcome of restoring a state of *ora* would outweigh any criticism of paternalism.

In his article, Judge Arthur Christean (2002) outlined a number of criticisms, such as issues of due process and constitutional infringements, which are also echoed by David Wexler (Winick and Wexler, 2003). These criticisms involve the use of therapeutic jurisprudence within a specialist court setting. They include the belief that therapeutic jurisprudence puts a tremendous strain on resources

and judicial collegiality, because of the 'one court, one judge' concept common to most specialized courts.

In New Zealand, there is a move towards a proliferation of specialized courts; Family Court, Youth Court, Environment Court, Maori Land Court, and Domestic Violence Court. A specialist judge creates consistency of response. This is pivotal to the success of the Family Violence Court, where the judge is proactive in monitoring the progress of the defendant and the success of the court hinges on consistency from the bench. In a recent evaluation of the Waitakere Family Violence Court, Morgan et al. (2007) found that:

Consistency of approach among the judiciary is very important. If we have visiting judges we do whatever we can to make sure they don't go into the Family Violence Court.

Whilst this may seem to exacerbate the strain on judicial resources, the importance of specialist courts and the long term benefits outweigh this concern.

Christean (2002) added that therapeutic jurisprudence works against the goal of a unified court system and in the direction of an individualized/specialized court system. These courts operate on a different judicial philosophy from other courts within the same district. However, proponents of problem solving courts have been quick to defend critics' attempts to pick apart these new initiatives by comparing them to an idealized vision of justice that does not exist in real life (Winick and Wexler, 2003).

There is also the concern that therapeutic jurisprudence undermines the separation of powers by asking the courts to fashion solutions to social problems, rather than leaving the legislature to deal with them. Christean (2002) states that the line between the judicial and executive branch is blurred whenever courts become service providers, intent on achieving specific outcomes. In this regard, the judge becomes part of a treatment team and assumes the responsibility for overseeing programmes sponsored by the team, thus exercising both an executive and a judicial function. Notwithstanding this criticism, it may be that therapeutic jurisprudence is being identified or conflated with drug courts or other problem-solving courts, where the judicial officer is more actively involved than are the judges in mainstream courts.

Berman has acknowledged these concerns of impartiality, including coercion, paternalism, and zealous advocacy (Winick and Wexler, 2003; Berman, 2004). However, Berman (2004) along with Sammon (2008) also advocated for therapeutic jurisprudence and problem solving courts, suggesting that better planning and dissemination of best practice standards can assist to allay these concerns. For instance, when the judge and the lawyers and experts may have shared values that are different from those of the person about whom the decision is being made, this can result in the individual and family feeling that they have not been heard. This is important also for transparency to ensure that the values of the accused are taken into account and this occurs in New Zealand within the youth justice sector as well as in the family court jurisdiction. In a family violence court, the effectiveness of its programmes is discussed regularly between the stakeholders with opportunities to provide feedback. Judges make policy by taking advantage of the discretion that has traditionally been afforded to them over sentencing in order to craft more meaningful sanctions or to direct programme changes (Winick and Wexler, 2003).

There is merit in maintaining clear boundaries with respect to the doctrine of parliamentary sovereignty (Joseph, 2007) and the separation of powers (Joseph, 2007). But in a therapeutic problem solving court, this could undermine the relational element that is necessary between the judge and the offender. By stating clear boundaries and defining roles at the outset, this problem may be overcome and the judge's position of respect maintained. In addition, therapeutic jurisprudence does not trump long-standing notions of due process or the rule of law. However, in order to work strictly within the current Westminster system, a compromise must be made.

It has been claimed that therapeutic jurisprudence compromises the objectivity and impartiality of judges and there is also the concern that the judge substitutes their values and personal opinions regarding what is 'good for' the offender for the rule of law. Christean (2002) argues that the collaborative process requires the judge to act as part of the therapeutic team. In doing so, the judge cannot avoid unethical *ex parte* communications that are traditionally a serious ethical breach of the judge's role. However, such communications form a regular part of the therapeutic process.

Many judges may not be trained in therapeutic interventions and in no position to endorse treatment plans; however, the judge merely applies the treatment plan proposed by the team of experts. So,

when the judge becomes the enforcer of the treatment team's decisions, rather than an independent adjudicator of the facts and the law, the appearance of bias cannot be avoided. To the defendant, the judge becomes one of them. On the other hand, this can also be seen to be an effort by the judge to deal more effectively and humanely with the people who come before the court.

It is also argued that the new model substitutes a judge's subjective judgment for the time honoured due process checks. This eliminates a vital check on the abuse of government power. Christean (2000) is concerned that judges cannot effectively act as impartial and detached officers to hear and rule on the competing claims of adversaries when they simultaneously function as advocates and defenders of the programmes and procedures under challenge. Beneficial intent, rather than legal soundness, is seen to be the benchmark of the effectiveness of any treatment regimes that are imposed.

Finally, therapeutic jurisprudence is said to abandon the role of equal justice under the law; that is, programmes are necessarily limited to those offenders who qualify rather than to all defendants who would like to participate. This implies that some defendants will be treated differently from others, depending on whether they are deemed to be worthy candidates for available programme openings. Christean (2000) suggests that difficult or resistant candidates are 'screened out' in favour of presenting a public face to a programme that may be attractive to the media and an endorsement of the programme's success. However, there would be no reason why the jurisdiction could not be widened to include all offenders once the programme becomes successful.

The author acknowledges the validity of these criticisms; therapeutic jurisprudence advocates have in the past addressed them (Arrigo, 2004; King 2003; Winick and Wexler, 2003; King et al., 2009). Nonetheless, one should not lose sight of the aim and should bear in mind that law does not exist in a vacuum and is ever changing. If therapeutic jurisprudence has the desired healing effect, this will result in less offending. The flow on from this will be a lighter caseload and a lessening strain on resources, and arguably, one justification against these criticisms.

According to Wexler (1994) and Winick (1996):

... a therapeutic approach should be taken whenever such an approach is consistent with other values, considerations and understandings of justice, such as the rule of law.

If this is the case, it seems possible from a policy perspective that therapeutic jurisprudence can be mainstreamed. This rationalization is not new. The mainstreaming of restorative justice into the Sentencing Act (2002) in New Zealand requires the Court to take into account offer, agreement, and response to make amends, restorative justice being defined as a process where all stakeholders involved in an injustice have an opportunity to discuss its effect on people and to decide what is to be done to attempt to heal those hurt (Braithwaite, 2000). Also, the Canadian Criminal Code directs a consideration of sanctions, other than imprisonment, that are reasonable in the circumstances, with particular attention to the circumstances of Aboriginal offenders.

Whilst there has been enthusiastic support for therapeutic jurisprudence, a common response is that therapeutic jurisprudence is a re-branding of previous models or a soft approach to crime. In a scathing critique, Hoffman (2002) criticised therapeutic jurisprudence as possessing a “New Age pedigree” and for being both anti-intellectual and wholly ineffective. This critique fails to acknowledge the favourable evidence that drug courts have achieved in regard to keeping offenders in treatment, reducing drug use, reducing recidivism rates, and saving prison costs (Winick and Wexler, 2003).

These criticisms should not discount the possibility that therapeutic jurisprudence may assist in reducing Māori offending rates. The commonalities between the philosophy behind therapeutic jurisprudence and Te Ao Māori will show that therapeutic jurisprudence should not be dismissed as an irrelevant and ineffective model.

IV Advantages and Suitability

From a practical point of view, a significant advantage of therapeutic jurisprudence is that it co-exists with the existing legal system. This would answer the political arguments against a separate system for Māori. Additionally, therapeutic jurisprudence simultaneously allows for the incorporation of tikanga Māori. The inclusion of tikanga can occur, *prima facie*, at all levels of the criminal justice

process.

Collectivity and relationality are central tenets to Māori. Therapeutic jurisprudence is asserted as being a relational based construct (Brookbanks, 2001). Te Ao Māori (Maori world view), like therapeutic jurisprudence, shares the idea of communitarianism or collectiveness, and the notion of whanaungatanga or relatedness. This move away from a rule based approach towards a principle or relational or values approach is consistent with tikanga Māori. Thus, from a conceptual point of view, therapeutic jurisprudence represents a movement away from a heavily rule based approach to one that is more collective, relational, principle, and value based.

Therapeutic jurisprudence allows and acknowledges different conceptual frameworks. The Māori conceptual framework is at odds with the existing monocultural justice system in New Zealand. It is acknowledged that the Child Young Persons and their Families Act 1989 (CYPF) provides for concepts of support and involvement of iwi (tribes) and hapū (sub tribes) groups. Section 16 of the Criminal Justice Act 1985 (now repealed) also allowed an offender's supporter to present information at sentencing relating to their ethnic or cultural background to help avoid future offending.

However, in a review of section 16 of the Criminal Justice Act 1985, now repealed and replaced by section 27 of the Sentencing Act 2002, the paucity of its use was noted (Chetwin et al., 2000). There was no mandatory requirement that the offender's cultural background be considered as a mitigating factor in sentencing. The application of this section was at the discretion of the judge and the cultural information regarding an offender was but one factor to consider. However, when the section was employed and the cultural background of the offender was taken into consideration, it was not uncommon for the sentence to be suspended (Chetwin et al., 2000; Sentencing Act, 2002, ss 8(i) and 27).

Notwithstanding these provisions, issues central to Māori, such as reciprocity, have no equal in the State justice system. The judge is the ultimate decision-maker under the CYPF Act 1989 and the Sentencing Act 2002. So it is evident that there are differences in approach and differences in how justice should be administered between the Māori and State systems.

Therapeutic jurisprudence, like tikanga Māori, is a forward looking process. In comparison, the criminal justice system looks back, punishing the offender for past actions and focusing on the penalty. Tikanga Māori, like therapeutic jurisprudence, is not penalty orientated. It looks for the 'right' or *tika* way of doing things, ultimately resulting in a healing or restoration of balance and *ora* for the participants.

Two important issues can be drawn from this. The first is that the commonalities between therapeutic jurisprudence and tikanga Māori allow both systems to work in tandem. This also provides a window for the introduction of tikanga programmes that focus on indigenous law as a basis to understand why the crime or *hara* should not be committed. Acknowledging the effect of colonialism and the law on the role of women is instrumental in understanding the true 'hara' or 'crime' that underlies domestic violence. This primarily turns on the breakdown of the whānau (family) (Mikaere, 1994).

The second issue is that the theory of therapeutic jurisprudence allows the administration of justice in the existing legal system to promote the well-being of communities, thereby empowering Māori to look after one another (Mikaere, 1994). The challenge will be the realization, implementation, and practicality of therapeutic jurisprudence in a suitable court forum.

Addressing the criticisms for therapeutic jurisprudence from a tikanga Maori perspective, the facilitator of a dispute is usually a *rangatira* (respected leader), *tohunga* (expert), *kaumatua* (elder usually male) or *kuia* (elder usually female). The set of principles attached to resolving disputes is supported by other principles that traditionally provided the guidelines for actions amongst individuals and groups throughout Māori society. Principles provide flexibility as to the appropriate choice of action. For this reason, Māori society is often described as "principle or value based" as opposed to "rule based". There is less emphasis on rules, but more emphasis on principles. Thus, within a tikanga Māori perspective, the principle of a healing outcome would outweigh rules, such as those based on the notion of unethical ex parte communications.

In *Du Claire v M Palmer and Crown Law Office* [2012], Asher J viewed ex parte communications as a necessity to achieve justice. However, ex parte communications with a judge can result in

disciplinary actions (Harvey, 2013). On motions to dismiss, Silvia Cartwright J, sitting in the Cambodian Supreme Court, noted that ex-parte communications “create the appearance of asymmetrical access enjoyed by the prosecutor to the trial judge and for that reason alone should cease” (Cartwright, 2012).

The collectivity tenet is central to tikanga Māori, together with the principle of everyone being on the same level. This effectively assists to dispel the criticism of therapeutic jurisprudence that the defendant perceives the judge becoming the same as them. Further, it dispels the objectivity and impartiality criticism.

Therapeutic jurisprudence, like tikanga Māori, is a relational ethic. In a submission on the Victims’ Rights Bill to the Justice and Electoral Select Committee, the New Zealand Human Rights Commission considered that a therapeutic jurisprudence model was appropriate and could be addressed through progressive amendments to the justice system (Galtry, 2001).

It is noted that section 9 of the Victims’ Rights Act 2002 makes provision for meetings to resolve issues relating to the offence. Viewed in isolation, this is similar to the provisions of a family group conference in the CYPF Act 1989 and consistent with tikanga Māori. Further provisions of the Victims’ Rights Act 2002 include the provision for Victim Impact Statements, to be placed before the court on sentencing, which potentially offers an opportunity to seek balance for the victim and offender — the aim of tikanga Māori.

The programmes currently in place for Māori offenders may be stemming the tide but are not solving the problem. Over the generations, the physical and spiritual move of Māori away from their *turangawaewae* (ancestral place to stand) has alienated many urban Māori from their culture. The result of this is manifested, in part, by some Māori who perceive a *marae* (traditional meeting area/house) setting for the Te Āwhina Whānau programme, as strange as a courtroom setting. Consequently, the whole process is seen as having an anti-therapeutic effect. This is but one reason to support the need for an alternative system to address the disproportionate rates of Māori offending.

The Law Commission (1999) has noted that:

Māori should retain the right to organize as Māori, and to administer and manage their own affairs ... The establishment of specific Māori services to provide access to justice would be a further indicator of progress in this outcome category.

Notwithstanding these recommendations by the Law Commission, the statistics, which indicate that Māori are over-represented in criminal proceedings, are difficult to ignore (Ministry of Justice, 1999; Department of Corrections, 2007).

Therapeutic jurisprudence has encouraged people to think creatively about how to bring promising developments into the legal system. The use of tools from social sciences to promote psychological and physical well-being opens the door to tikanga Māori. In doing so, therapeutic jurisprudence may be able to offer a vehicle that will ultimately decrease Māori offending rates. It is pertinent to note that David Wexler stated (Winick and Wexler, 2003):

In many respects, the roots of this *new judicial approach can be traced back to indigenous and tribal justice systems* [emphasis added], including noteworthy examples in what today constitutes the United States, Canada, Australia, and *New Zealand* [emphasis added] ... and a serious effort is now underway to learn from those systems and to introduce some of their perspectives and techniques into western judicial structures.

V Māori and Mental Health

Three out of every five Māori (indigenous people of New Zealand) will suffer from a mental disorder during their lifetime (59.9 per cent) (Baxter et al., 2006). For this reason Māori are disproportionately represented within forensic mental health facilities and there is evidence to suggest that the current mental health framework is not delivering for Māori with mental health disorders (Tapsell, 2007). According to Dr. R. Tapsell:

If some of the disparities currently apparent within our mental health system are to be

reversed we must look for *alternative models* [emphasis added] that provide the highest quality of psychiatric care and rehabilitation, *yet reflect the Māori world view...* [emphasis added].

In order to facilitate improvements in Māori health, and especially in mental health, a number of principles have been identified. It is clear that the New Zealand criminal justice system plays a significant role in the management of Māori offenders with a relatively high prevalence of mental illness. The onus is upon the criminal justice system and the health system to explore options that allow for the early recognition and intervention for the mentally ill before they enter the criminal justice system. This has placed a burden on the criminal justice system requiring an innovative response (McKenna and Seaton, 2005).

Māori are disproportionately represented in the criminal justice system. Māori are also disproportionately represented in the forensic mental health facilities. Separately, these are concerning facts, but together these issues provide disastrous results. Despite the incorporation of decision-making for Māori within health policies, these facts clearly indicate that another approach is required. Dr Rees Tapsell stated in 2007:

... the scientific evidence supporting the effectiveness of a specific model for forensic rehabilitation which reflects *the Māori World View does not yet exist* [emphasis added].

Further, Peter Jansen (2004) has commented:

In many ways, the essential aspects of such a model may have universal appeal ... as has been said many times before; *if we can get it right for Māori we will get it right for everyone* [emphasis added].

As specialized courts, such as mental health and drug courts, have shown success in ameliorating like circumstances, it is timely to consider whether the application of therapeutic jurisprudence within a specialized court can assist.

VI *Drug Courts in New Zealand*

A recent New Zealand study indicated that 80 per cent of crime is driven by alcohol and other forms of drugs (Waters, 2011). Alcohol and other forms of drugs feature in 33 per cent of all fatal road crashes and in 21 per cent of serious injury crashes with a social cost of \$875 million, including costs for minor injuries (Waters, 2011). The victims' costs are estimated at \$400 million each year, and for alcohol and other forms of drugs, the overall cost to society is \$6.88 billion (Waters, 2011). In referring to recent statistics, a former Labour spokesman for the courts, Rick Barker noted (Waters, 2011):

The cost per year per prisoner is \$91,000 (Department of Corrections, 2014); \$44 million per year could be saved by reducing recidivism from its current rate of 68 per cent (74 per cent for Māori) to 20 per cent; and only 6.1 per cent of the Department of Corrections budget goes to 'reintegration', almost none of which is for low-level offenders.

Taken in context there are clear reasons for their introduction, according to Hon. Peggy Fulton Hora, Judge of the Superior Court of California (Ret.), we have 'Drug Courts' because (Fulton Hora, 2011):

Alcohol, other drugs and crime is [sic] too broad for any single agency to tackle alone, incarceration doesn't prevent crime for those with substance use disorders; and Drug courts bring judges, prosecutors, defense attorneys, court personnel, probation and treatment providers together to solve the problem.

In New Zealand there are two drug courts that operate within the youth justice system. One is based in Christchurch and focuses on enhancing the treatment of offenders who have a serious drug dependency that has contributed to their repeated offending (Richardson et al., 2013). The other is based in Auckland for 'at risk' youth with mental health and/or drug and alcohol issues, called the Intensive Monitoring Group Richardson et al., 2013).

Appearances before these two courts are accepted following recommendations from Family Group Conferences (FGC). To be eligible the youth must be a repeat offender and exhibit a moderate to serious drug dependency. These courts, like other specialised courts, hold the offender accountable, whilst addressing the concerns and interests of the victims. The victim has opportunities to attend

the initial FGC and together with the other stakeholders, including police, court staff, and health agencies, will assist in the development of a treatment plan for the offender. After the successful completion of the treatment plan, balance or healing should be realized for the offender, victim, and community.

A pilot Alcohol and Other Drug Treatment Court has been established in Waitakere. Again it is still early days, but it is suggested that, following international trends, some degree of success will be expected. A recent documentary on Māori Television of the pilot Alcohol and Other Drug Treatment Court suggests that the pilot is achieving success and if the offender successfully completes their treatment the probability of re-offending is low (Maori Television, 2014).

Other specialized courts including the re-entry courts are modeled from the same principle that underpins drug courts. That is, they are designed to assist ex-prisoners to participate in a judicially supervised parole programme to promote their successful integration into the community (Saunders, 2003). There are specialized courts established in the United States that help to reduce recidivism and improve public safety through judicial oversight. The Hon. Richard Gebelein has stated (Maruna and LeBel, 2003):

...drug courts have succeeded because, unlike previous failed rehabilitative efforts, the drug court movement has been able to provide a narrative of what is causing the criminal behaviour of the drug court clients and what they need to get better.

VII Conclusions

Maori continue to be over represented at all stages of the criminal justice system. This is compounded by their disproportionate representation within forensic mental health facilities. The application of therapeutic jurisprudence within a specialized court, such as a Drug Court or Mental Health Court, has shown success in various jurisdictions. The synergy between therapeutic jurisprudence and tikanga Maori (Maori culture) is promising.

In view of this appalling situation, the recent establishment and initial success of Drug Courts in New

Zealand is welcomed. This success provides legitimacy for the adoption of the doctrine of therapeutic jurisprudence into specialized court practice and a conscious move away from traditional adversarial models.

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Acknowledgements: none

Competing Interests: none

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Date of Publication: June 20, 2017