

# **THERAPEUTIC JURISPRUDENCE AND THE DISTRICT COURT**

**JUDGE IAN DEARDEN  
DISTRICT COURT OF QUEENSLAND**

## **Background**

I am a District Court Judge in Queensland appointed in February 2005. The District Court in Queensland has an extensive criminal, civil and appellate jurisdiction. I sit (primarily) in a regional court, Beenleigh, situated halfway between Brisbane and the Gold Coast. This court currently has the second highest level of criminal filings in Queensland, (outside of Brisbane), and consequently the vast bulk of my judicial work is crime. Like all District Court judges in Queensland, I also circuit 12-13 weeks a year, 2-3 weeks in Brisbane, and the balance at courts throughout non-metropolitan Queensland. On average, I conduct between 12 and 20 criminal trials a year, around 600-700 sentences, as well as 100-120 breaches of community based orders and/or suspended sentences and a small number of criminal appeals. There is some small component of civil work, although jurisdictional changes in the pipeline may alter this balance.

I conduct virtually all sentences *ex tempore* ie I receive all sentence exhibits (criminal and traffic histories, schedules of facts, photographs, victim impact statements, psychologicals, psychiatric and/or other pre-sentence reports, references etc), hear oral submissions from prosecution and defence, and deliver my sentence immediately. By agreement, I

regularly receive before the sentence date, copies of documents to be tendered on the sentence from both the prosecution and the defence, to enable the sentencing process to proceed more efficiently. On very rare occasions, I may stand the matter down and draft some notes before delivering oral reasons, but my almost invariable practice, even on the most serious matters, is to proceed directly to sentence and to provide the defendant with comprehensive sentencing remarks at that time.

### **The impact of therapeutic jurisprudence on my judicial practice**

In June 2009 I attended the International Academy of Law and Mental Health (IALMH) Congress in New York. It is not overdramatic to say that my exposure to therapeutic jurisprudence (a significant strand in that conference) was truly an epiphany. Prior to this first “close encounter” with therapeutic jurisprudence (TJ) and my growing awareness of the benefits of applying the “TJ lens” to the criminal sentencing process, I had intuitively approached the exercise of sentencing criminal defendants utilising a range of techniques and strategies which, in hindsight, I consider reflect TJ principles. In no particular order, therefore, I set out various aspects of my sentencing practice that may be of interest to TJ practitioners, whether they be judicial officers, legal practitioners, or others. Many of these practices pre-date my exposure to TJ, but all of them (I believe) have been validated by, and improved by the TJ lens.

- My fundamental mantra as a judge, from day one, has been that everyone in my court is entitled to, and should be treated with courtesy, dignity and respect. That extends to and includes the most difficult counsel, the most tiresome and quarrelsome witness,

the more trying members of the public gallery, the court staff and officials, and of course, the defendant who has committed, or has allegedly committed, anything from the most minor to the most heinous of offences.

In turn, all participants in the court process are expected to treat me with the courtesy, dignity and respect to which the position of judicial officer in my court is entitled.

- All defendants should, at all times, be addressed with courtesy and in the first (rather than the third person) eg I will usually say prior to arraignment “stand up please Mr Smith”. This contrasts, I should say, with the process followed by at least some judicial officers I can recall as a practitioner, who would simply say “stand up, accused”, an approach which I consider to be demeaning and dehumanising.
- Although both prosecution (and frequently defence) lawyers regularly refer to the person charged as “the accused”, I prefer to use a term which I consider to be less pejorative, namely, “the defendant” (a practice which I note is endorsed by the District and Supreme Court Benchbook in Queensland).
- I invariably address my sentencing remarks to the defendant in the first person, ie, “stand up please Mr Smith, Mr Smith you have pleaded guilty here today to 1 count of dangerous driving ...”. I

never shift into the third person. I am talking to, not about, the defendant, and he or she is entitled to hear, and understand, what I am saying. Consequently, my remarks are always directed in a conversation, often more “one way” than I would prefer, although occasionally interspersed with responsive verbal and/or non-verbal responses from the defendant. Where I feel compelled to use legalese, I seek to ensure at all times that I translate it into conversational English. I must, of course, expose my reasoning to a degree sufficient for the Court of Appeal to understand not only what my sentence is, but why I have imposed it. However, my primary audience is the defendant, as he or she is the most directly affected by my sentence, and after him or her, there are a range of secondary “interested persons” (prosecutor, defence lawyers, victims, family, friends and the media) all of whom should have no difficulty in understanding both the what and the why of the sentence.

- I constantly apply what I understand to be Parent Effectiveness Training (PET) principles at all times when dealing with defendants. At a fundamental level, I believe that it is imperative to separate the defendant from his or her behaviour. This immediately liberates me as a sentencing judge, because I can, when necessary denunciate and excoriate the defendant’s behaviour eg :“Your violence was gratuitous, despicable and appalling” while at the same time acknowledging and respecting the defendant as a human being, entitled to the same dignity, courtesy and respect as every other human being.

- Where relevant, and particularly when family members are in court, I speak to defendants about the extraordinary power of the unconditional love of family. I point out that family are capable of despising and despairing of the conduct of a member of the family, but at the same time, expressing their unconditional love for a family member. It is, I stress where appropriate, a truly powerful force in our society. In fact, I often talk at length of love in my court, and not infrequently see and hear some very hard men, in particular, crying throughout a sentence, which I see as a positive sign.
- I regularly tell defendants that, given we all live in a democracy, we therefore have choices. I explain to defendants that if their choices in the future are good choices, they can take all the credit, conversely if their choices are bad choices (particularly choices which lead them into further criminal offending, breaches of court orders or a return to drug and alcohol abuse) then defendants are entitled to make those choices, but they must then accept responsibility for the inevitable negative outcomes of bad choices. Where appropriate, I explain the concept of autonomy and free will, hopefully in language that will be understood. Within limits, I have no hesitation in resorting to the vernacular if I think it will assist in communicating my message.

- For defendants with drug and alcohol addiction, I remind them of the Alcoholics Anonymous mantra that a person remains an alcoholic (or where relevant, a drug addict) for their entire life. The fundamental step an alcoholic or addict must do is to look in the mirror each day and choose, each day, whether or not to drink alcohol or take illicit drugs that day.
- At the suggestion of Judge Robertson of the Queensland District Court, prior to the commencement of my sentencing remarks on a dangerous driving causing death charge, I address short remarks to the family of the deceased. I make it clear to them that I have read (and/or listened) to their victim impact statements, and that, as much as any human being can, I understand the depth of their sorrow. I then remind them, however, that in sentencing the defendant, I am bound by sentencing legislation and precedent, and the one thing that I am unable to do is to restore the life of their loved one. I always then pause (usually to regain my own composure apart from anything else) before commencing the sentencing of the defendant. I'm not ashamed to admit that at times I have been unable to avoid my own tears, particularly when I have a court room filled with quiet sobbing!
- At the conclusion of sentencing defendants for dangerous driving causing death offences, I always "step aside" from my formal sentencing remarks to ask them, as one human being to another, (and not as judge to defendant) to do whatever they can, either formally or informally, to tell their story to others in order to

educate those they meet on the consequences of dangerously driving motor vehicles. I stress that although I will never know, if even one other life is saved as a result, then the universe will be grateful.

- I constantly stress in sentencing remarks the importance of an apology, even post-sentence. I never make it never part of any formal order. I remind defendants (whether an apology has been provided pre-sentence or not) that an apology is the first step for healing, not only for the victim, but also for the offender. The giving and receiving of an apology is, I consider, an essential part of being a feeling and caring human being, and I frequently reference the current Prime Minister's apologies to both the stolen generation, and the child migrants and forgotten Australians, as powerful examples of apologies which have sought to heal a whole population.
- I speak frequently of both the joys and stresses of being a parent, of being there for the good times and the bad times, and of the unbreakable bonds between a parent and a child. I remind defendants that although they may have the unconditional love of their child, they will have to work to avoid offending in order to regain their child's respect. I often make similar comments about the relationship between a defendant and their parents who are frequently sitting in the rear of my court, sometimes having spent the entire day waiting for the sentence to come on.

- Many of the defendants who appear in my court have difficult, challenging and at times, utterly tragic upbringings. Where appropriate, I say to such defendants that it is my belief that none of us get a choice about the cards we are dealt growing up. Some people clearly get dealt a great hand of cards and some get dealt an awful hand. I explain though that from the point in time that I sentence them, they have choices. The past cannot be changed, but the future can be, and the defendant, like everybody else, has an opportunity (which may well be limited for some time) to make choices about how they intend to live their life in the future.
- Where appropriate in assault charges, I regularly share my experience as a solicitor acting for a Maori man of impeccable background, who killed another Maori man while both were drunk, as a result of receiving incorrect information that the deceased had physically chastised one of my client's children. I explain how my client had both kicked and punched the victim, but that just one of the punches, which did not even leave a bruise, caused a subarachnoid haemorrhage, and killed the victim within minutes. This is a "real life" and very personal account on my behalf as to how "one punch can kill". I usually go on to make observations as to how human beings can on the one hand survive the most catastrophic injuries, yet can be killed by a single misplaced blow. We are all fragile creatures, and violence, even without intention of serious injury, can easily kill or cause catastrophic personal injuries.

- I regularly tell defendants that they are leaving the court room with my best wishes. Given the opportunities for change that a sentence presents to a defendant, I explain that if it works for them, then it is not only good for them personally and for their families and loved ones, but it is also good for the community as a whole.
- Whenever I deal with a spitting offence, I commence by asking the defendant, to think for just five seconds about the roles being reversed. Typically the offence is spitting on a police officer. I ask the defendant to consider if after arrest, they were spat on in the face by a police officer, how they would feel. I express my belief that they would not only be very angry, but they would be entitled to be, given the despicable and demeaning nature of the act of spitting on another human being. I usually receive a knowing nod from the defendant!

### **Where to from here?**

I readily acknowledge that my judicial practice utilising the lens of therapeutic jurisprudence, is still at the early stages of a lifelong journey. The District Court is, by its nature, a very formal environment. It is difficult, both in terms of court architecture, tradition, practice, and the approach of prosecutors and defence lawyers, to engage defendants in a dialogue. Although I am always willing to undertake a conversation with defendants, I do not seek to embarrass, demean or belittle them in that process (a practice regularly followed by some judicial officers when I was a practitioner). However, I remain open to, and will seek to

incorporate, as much dialogue as is sensitive and appropriate, in my sentence practice.

It is clear that solicitors need to understand the extraordinary benefits that therapeutic jurisprudence can bring to the practice of criminal law. In that respect, I recommend on every possible occasion, to judicial officers and to lawyers, the superb publication by the AIJA of Michael King's "Solution-focused Judging Benchbook" which I sincerely wish had been around when I was a practitioner. I have no doubt that my practice as a criminal lawyer would have been far more effective had I had the opportunity of reading the contents of this benchbook. Much of what Michael has written confirms and supports my own intuitive understandings of the various relevant issues, but the great benefit of therapeutic jurisprudence is the intellectual underpinning it brings to these intuitive understandings and beliefs.

I am delighted to say that I have become and will continue to be a tireless advocate for the benefits of therapeutic jurisprudence in the mainstream courts in Australia. I am keen to listen to the experience and practice of others, and to share what little I have learnt with as many as possible who will listen!