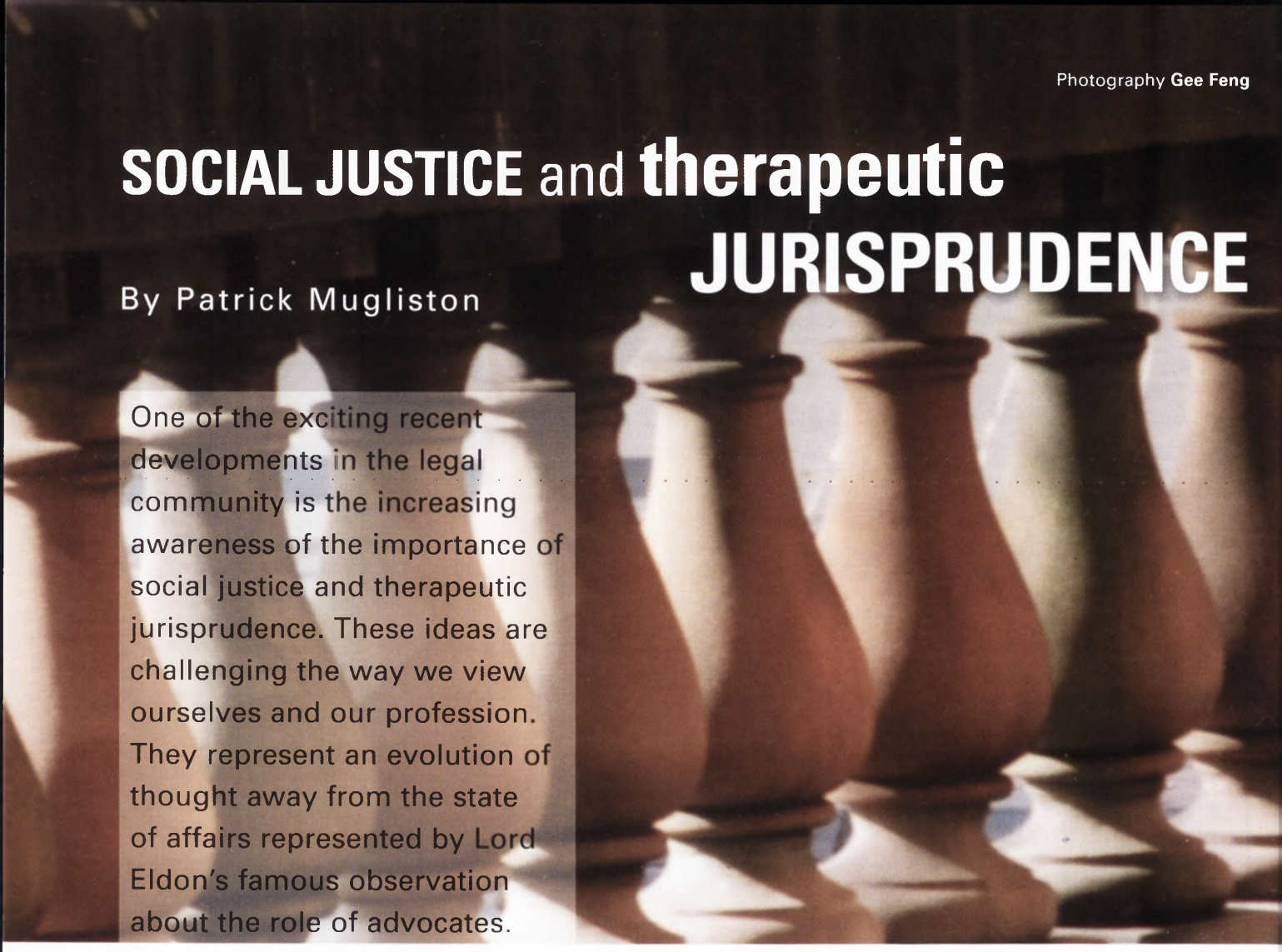

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SOCIAL JUSTICE and therapeutic JURISPRUDENCE

By Patrick Mugliston

One of the exciting recent developments in the legal community is the increasing awareness of the importance of social justice and therapeutic jurisprudence. These ideas are challenging the way we view ourselves and our profession. They represent an evolution of thought away from the state of affairs represented by Lord Eldon's famous observation about the role of advocates.

Lord Eldon, the former Chief Justice of England, was a brilliant jurist who encapsulated the sentiments of his time. Like many of his contemporaries, he resisted proposals to abolish slavery, end imprisonment for mere civil debt and emancipate Roman Catholics. It is said that he was so resistant to change that he wept when he learned that the death penalty would no longer be available for petty larceny.[1] This is what Lord Eldon 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.'[2]

Today, lawyers – and indeed judges – often make statements suggesting that they see their role in a very different light. It is not uncommon for judges to see themselves as participating in the process of social change and social justice. In such a context, they are clearly not indifferent to the outcome. For example, the former Chief Justice of India, the Hon Mr Justice PN Bhagwati, said on the topic of access to justice, when chair of the United Nations Human Rights Committee:

> 'In the beginning, when I started social action litigation in India as a judge in the Supreme Court of India, there was criticism from some quarters that entertaining social action litigation and making orders and giving direction for taking affirmative action to make human rights meaningful and effective was going beyond the traditional judicial function...
>
> 'This criticism was repelled by me as unfounded because the law cannot remain static; it has to adapt itself to the needs of the people and to satisfy their hopes and aspirations.'[3]

Many of us involved in the justice system see ourselves as being deeply concerned with the outcome, whether from the perspective of our client's interest, or in the wider sense referred to by Chief Justice Bhagwati.

Today, few people are likely to consider it a sign of judicial weakness if a judge reveals a personal view or emotion in relation to a case. Examples abound, such as when his Honour Justice Kirby said in *The Queen v Taufahema*[4] that he had arrived at his conclusion[5] 'without enthusiasm'. Indeed, his Honour made a point of saying:

> 'The impartial application of basic legal principles is the more important in criminal appeals because the circumstances in which such principles are invoked sometimes make it painful to apply the principles with judicial dispassion and complete even-handedness.'[6]

Such a statement would undoubtedly have had therapeutic consequences for the victim's family, in spite of the judge's

actual ruling, because it acknowledged the pain caused by a decision to acquit.

Concepts of 'rights to justice' are not new. They stretch back as far as the Magna Carta and even further. The Magna Carta tells us that 'no freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land. To no one will we sell, to no one will we deny or delay right to justice.'[7] Such sentiments do not imply mere indifference to the result.

Would you wish to be represented by somebody who is indifferent as to whether you succeed or fail? Is a system of justice that regards 'indifference in advocates' as a positive attribute a worthwhile one?

Chief Justice Bhagwati also said:

> 'The law is not an antique to be taken down, dusted, admired and put back on the shelf. It is a dynamic instrument fashioned by society for the purpose of eliminating friction and conflict and unless it secures social justice to the people, it will fail in its purpose and some day people will cast it off. It is therefore the duty of the judges to mould and develop the law in the right direction by creatively interpreting it so that it fulfils its social purpose and economic mission. The judges must realise that the law administered by them must become a powerful instrument for ensuring social justice to all and by social justice, I mean justice which is not limited to a fortunate few but which encompasses large sections of have-nots and handicapped, law which brings about equitable distribution of the social material and political resources of the community.'[8]

How should we gauge whether a justice system delivers such an objective? Therapeutic jurisprudence may be a useful yardstick.

Therapeutic jurisprudence is based on the concept of assessing not only the legal consequences of a justice system but also the social, psychological and personal consequences. Theorists in this area regard the justice system as a social force that produces therapeutic or anti-therapeutic consequences. In a presentation on therapeutic jurisprudence, Professor Wexler[9] said:

> 'Therapeutic jurisprudence wants us to be aware of [these consequences] and wants us to see whether the law can be made or applied in a more therapeutic way so long as other values, such as justice and due process, can be fully respected.'[10]

The concept of therapeutic jurisprudence embraces not only the consequences to individuals of their contact with a justice system, but also collectively to subclasses of people or, even, indeed, to our planet. For instance, Aboriginal people may be justified in questioning whether the legal system imposed on them has dealt with them and their environment in a therapeutic way.

Paul Nichols said that the interface between Aboriginal people and the white Australians' justice system has been anti-therapeutic.[11] He suggested that it may be possible to see in the Aboriginal people, as a consequence of this anti-therapeutic interface, a cluster of symptoms that could be regarded as a form of mass post-traumatic distress syndrome.[12]

Constructing whole societies and cultures as 'patients' subject to neurosis is not novel. Sigmund Freud said, 'If we consider mankind as a whole and substitute for it a single individual we discover it too has developed illusions which are inaccessible to logical criticism and which contradict reality.'[13]

More recently, Richard Heinberg observed in *Catastrophe, Collective Trauma, & the Origin of Civilisation*[14] that when hunter-gatherers have encountered so-called 'civilised' people, they often remark on how the latter appeared generally to be 'disconnected, alienated, aggressive, easily frustrated, addictive, and obsessive'. These are the very traits often associated with post-traumatic stress syndrome. So while it is possible to see the impairment of a culture as a result of its contact with a 'civilising' dominant culture, Heinberg also argues that it is possible to see, in those dominant cultures, certain traits of psychic distress. He explains that, in order to deal with the concept of mass neurosis, we can and are compelled to draw analogies with individual manifestations of psychic distress. In the same way, it is possible to see how such distress may be healed.

Heinberg argues that western civilisation is itself suffering from post-traumatic stress:

> 'Could it be because the population is already numbed to some extent by some ancient trauma, the destructive energy of which has been passed along from generation through abusive child rearing?'[15]

Is there a similar correlation between the role of the litigant in the process of social justice and the idea that mankind itself suffers a form of post-traumatic stress disorder? As advocates, we play a pivotal role in aiding the legal system to fairly and reasonably deliver justice to all. In doing so, nothing is lost if the advocate is interested in the results.

We may be able to draw inspiration from Kant's view that a person is right to do something if they would be happy to have it done to them, and if they would be happy to live in a world where such an action is commonplace.[16] When this logic is applied to a system of justice, it is easy to see why we as lawyers should not be indifferent to the outcomes where they impact on human rights and a healthy planet. Applying Kant's philosophy, this is our responsibility and legacy to others.

Such relatively innovative ways of analysing the role of the advocate are essential for the legal system to progress in the way it deals with issues of social justice. In her book, *For Your Own Good* [17] Alice Miller argues that attitudes towards child-rearing may have led to Nazism being possible. German parents were taught to bring up their children to suppress feelings, she argues, and to reward stoicism and self-control. Childhood excitement was considered a vice, and 'inhibition of life' was extolled as a virtue. Against the background of such a childhood, it may be possible to understand why Eichmann SS (head of the Department for Jewish Affairs in the Gestapo from 1941 to 1945 and chief of operations in the deportation of three million Jews to extermination camps) was able to listen to highly emotional testimony at his trial >>

with no feeling whatsoever, yet blushed when it was pointed out to him that he had forgotten to stand when his verdict was read.

In such a context, Chief Justice Bhagwati's remarks are somewhat consoling. Locally, in Perth, Chief Justice Wayne Martin, at the start of law week, called for a fresh approach to tackling the high imprisonment rate of Aboriginal people in WA. He stated that there was no easy or short-term solution and conceded that 'Perhaps whatever we have done in the past does not appear to have worked.'[18] His Honour was addressing the problem in terms of looking at the *results* of our legal system in dealing with the Aboriginal people. He spoke of the recommendations of the WA Law Reform Commission, particularly those aimed at enhancing the relevance of the law for Aboriginal people. Such comments and insights are far removed from the indifference to the plight of Aboriginal people that Lord Eldon would have felt.

The need for a healthy planet and human rights is surely better served by judges and advocates who care and are perhaps even passionate about justice, freedoms and responsibilities. By extolling 'indifference to the result' as a virtue in the legal profession, we may be contributing to a psychic numbing that will have serious consequences for us all. ■

Notes: **1** The Right Hon Earl of Birkenhead (1926) *Fourteen English Judges*, Cassell & Co Ltd, p237. **2** *Ex parte Lloyd*, 5 November 1822, reported as a note in *Ex parte Elsee* (1830) Mont 69, 70n at p72. **3** Hon Mr Justice PN Bhagwati, *Democratisation of Remedies and Access to Justice*, First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002. **4** [2007] HCA 11 (21 March 2007) at [180]. **5** That a man accused of complicity in a policeman's murder should effectively be acquitted because the prosecution wanted to alter the charges against him after his trial had taken place. **6** Above Note 4 at [182]. **7** The Magna Carta 1215, para 39. **8** See above, note 3. **9** David Wexler is a Lyons Professor of Law and Professor of Psychology at the University of Arizona. He is also a Professor of Law and Director of the International Network on Therapeutic Jurisprudence at the University of Puerto Rico. The Network maintains a website, which includes a comprehensive therapeutic jurisprudence bibliography, at http://www.law.arizona.edu/upr.intj. **10** D Wexler (2000) 'Therapeutic Jurisprudence: An Overview' 17 *Thomas M Cooley Law Review* 125-34, available at http://www.law.arizona.edu/upr.intj. **11** P Mugliston and P Nichols, *Does the legal system deal with Aboriginal people and Gays/Lesbians in a therapeutic or anti-therapeutic way, and what lessons may we learn from history?*, Transforming Legal Processes in Court and Beyond: Third International Conference on Therapeutic Jurisprudence, 7 June 2006. **12** *Ibid.* **13** S Freud (1937) 'Constructions in Analysis' in J Strachey (trans, ed) *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, vol 23 (1937-1939), pp255-70, at p269. **14** http://www.newdawnmagazine.com.au/Articles/Origin%20of%20CivilisationP1.html. **15** http://www.newdawnmagazine.com.au/Articles/Origin%20of%20CivilisationP1.html. **16** 'Act only on the maxim whereby thou canst at the same time will that it should become a universal law': I Kant [1785] *(JW Ellington, ed, trans (1993)) Grounding for the Metaphysics of Morals*, 3rd ed, Hackett, p30. **17** A Miller (H Hannun and H Hannun, trans (1983)) *For Your Own Good*, Farrar, Straus, Giroux. **18** The *West Australian*, 8 May 2007, p10.

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Deductions fo

This article updates tables of deductions published in the February 2001 issue of *Plaintiff* (pages 31-35). Mortality, unemployment and strike rates have all dropped, giving generally lower deductions.

Allowing for death, unemployment, sickness, disability and strikes, the lowest calculated deduction for any age, sex or occupation is 3% – for young females in skilled occupations. The highest is 11% – for older male labourers. These estimates suggest that the 15% deduction traditionally used by Australian courts is too high.

The NSW Court of Appeal, in *Zhang v Golden Eagle International Trading Pty Ltd & Ors* [2006] NSWCA 25, accepted the trial judge's decision to adopt the standard discount of 15% for vicissitudes, rather the 7.5% we had estimated based on the age, sex and occupation of the injured. Basten JA said at 59:

> 'The figures relied upon by the appellant give little indication as to the basis on which they were calculated, but they are clearly calculated by reference to occupational groups, and not by reference to the individual circumstances of the appellant.'

Table 1 is intended to give reasonable estimates for persons of average health and heredity, given their sex, age and occupation. The table is based on:

- future mortality rates, as projected by the Australian Bureau of Statistics in *Population Projections Australia 2004-2101* (published 29 November 2005);
- Australian unemployment rates in the 10 years to August 2006;
- Australian disability claim frequencies and durations, from *1997 Report of the Disability Committee*, Institute of Actuaries of Australia;
- Australian industrial dispute rates from 1996 to 2005; and
- Australian total and permanent disablement rates from *Report on the Industry Funds Investigation 1994-95*, Institute of Actuaries of Australia.

Table 2 is intended for use where multipliers explicitly allow for the chances of death. Such multipliers are often used in Victoria, South Australia and the Northern Territory. Both tables assume retirement at 65, and a discount rate of 5%. Different discount rates make little difference to the estimates.

Evidence of a plaintiff's particular circumstances could justify large adjustments up or down from these tables. For example, a plaintiff who had been in stable employment, exercised frequently, did not smoke or drink, had an average body mass index and long-lived parents might properly have a lower-than-normal deduction for vicissitudes. ■