
Measuring Legal Actor Contributions in Court: Judges' Roles, Therapeutic Alliance and Therapeutic Change

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The court can be conceptualised as a point of intervention in the lives of offenders as well as their families, social networks and communities. It therefore seems reasonable to investigate what a judge (or other legal actors) can contribute to this interaction and to find ways it can be effectively measured. This article articulates a behaviourally anchored description of a judge's contribution in a courtroom interaction between a judge and a defendant that would have the best chance of facilitating therapeutic change for a court participant. The description is based on a review of the therapeutic jurisprudence literature, procedural justice and legitimacy of justice literature, a brief review of types of therapy that could be effective in a courtroom setting, and research into the common effective denominators in therapy outcomes, most notably the literature on therapeutic alliance and therapeutic change. The article concludes with a brief rating scale designed to quantitatively measure the desired judicial behaviours in open court.

INTRODUCTION

As described in the therapeutic jurisprudence (TJ) literature and more recently discussed in the popular press, in addition to delivering judgments, enforcing legal norms and protecting the community, the court may be conceptualised as a public health intervention entry point in the lives of offenders as well as their families, social networks and communities.¹

Additionally, the act of observing an event necessarily changes it.² Given this, it seems reasonable to investigate what a judge (or other legal actors) can contribute in court to make the best therapeutic use of this opportunity for intervention and to find effective ways it can be measured.

This article reviews the literature regarding the common important determinants of therapy outcome, TJ, procedural justice (PJ) and legitimacy of justice (LJ), alongside a brief discussion of the therapeutic modalities available to the courtroom setting.

Descriptions in the TJ, PJ and LJ literature of an effective and therapeutic juridical intervention tend to be based on ideals and concepts.³ Some have included brief descriptive examples of ways to intervene effectively, linked to the psychological literature on therapy intervention types⁴ and improving sentence adherence;⁵ all are aimed at having a positive impact on the lives of offenders and reducing recidivism.

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¹ BA Babb and JA Kuhn, "A Therapeutic, Holistic, Ecological Approach to Family Law Decision Making" in BJ Winick and DB Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 124, 129; MS King, *Solution-Focused Judging Bench Book* (AIJA Inc, 2009) 73.

² See, eg, M Sassoli de Bianchi, "The Observer Effect" (2013) 18 *Foundations of Science* 213.

³ E Richardson, P Spencer and D Wexler, "International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Court and Enhancing Wellbeing" (2016) 25 JJA 148.

⁴ King, n 1.

⁵ M King, "Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education" (2006) 15 JJA 131. BJ Winick, "The Judge's Role in Encouraging Motivation for Change" in BJ Winick and DB Wexler (eds), *Judging in a Therapeutic Key* (Carolina Academic Press, 2003) 182.

However, as noted by other authors, in regards to the question of “what works” when evaluating court programs, the contribution of legal actors has been a particularly amorphous concept to operationalise.⁶ At times the overlap and convergence of these ideas can be reminiscent of the Indian proverb of the blind men each describing their own part of an elephant, with the “elephant” being what exactly a judge should do to have a therapeutic impact on their defendants.

Taking the pragmatic starting point of “what works to effect therapeutic change in a courtroom?”, this article develops a basic behaviourally-anchored description of what a judge can, and arguably should, contribute to a courtroom interaction to facilitate a therapeutic change for a defendant. This description includes the procedures, behaviours and statements identified from the major therapeutic legal movements as important to client change and adherence to judgments, as well as suggestions for ways to measure the therapeutic alliance as it could exist within a courtroom setting. The article also outlines a basic qualitative measure designed to be used in open court (mainstream or specialist) to capture this contribution. This measure is not exhaustive and is designed as a starting point for dialogue regarding judicial contributions to therapeutic change; it could also be used as a base for future add-on measures designed to capture interactions in specialist courts.

THE ROLE OF JUDGES

Despite judicial roles and actions being culturally and legally determined,⁷ core judicial competencies that relate to the judge’s role in upholding individual rights and freedoms could be viewed as independent of culture or jurisdiction.⁸ These are: adjudication; investigation; and delivering and authorising coercive sanctions.⁹ As observed by Scott,¹⁰ the role of the judge has been slowly evolving to also include motivating and improving the possibility of treatment and personal change for litigants. Supporting this from a legislative perspective, most common law jurisdictions include rehabilitation goals in their sentencing legislation and procedures.

Therapeutic Jurisprudence and a Judge’s Role

The law has a potential to be a healing agent, as does a courtroom. The TJ literature unanimously describes judges as active therapeutic agents and the focus of a TJ judicial intervention as to create positive outcomes for court participants.¹¹ As a judicial approach based only on observation does not improve recidivism outcomes for court participants,¹² the judicial officer is cast as an active facilitator of change. In addition to traditional judicial roles, from a TJ perspective the judge would also support a court participant to engage in their own natural change process, and the court process would become a facilitator of change and potentially also participant empowerment.¹³ From this perspective, judges and lawyers could be viewed as creative problem-solvers, in pursuit of peace to conflictual situations.¹⁴

⁶ R Waterworth, “The Case for Measuring Legal Actor Contributions in Court Proceedings” [2018] *Psychiatry, Psychology and Law* 1.

⁷ J Hodgson, “Conceptions of the Trial in Inquisitorial and Adversarial Procedure” in A Duff et al (eds), *Judgement and Calling to Account* (Hart, 2006) 223–242; D Salas, “The Role of the Judge” in M Delmas-Marty and JR Spencer (eds), *European Criminal Procedures* (CUP, 2002) 488–540.

⁸ Salas, n 7.

⁹ Hodgson, n 7.

¹⁰ C Scott, “Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts” (2004) 25 *Journal of Legal Medicine* 379.

¹¹ Scott, n 10, 384.

¹² A Freiberg, “Australian Drug Courts” (2000) 24 *Crim LJ* 213, 219; King, n 1, 13–14.

¹³ See Waterworth, n 6, 26.

¹⁴ W Schma, “Judging for the New Millennium” (2000) 37 *Court Review* 90, 94–96; DP Stolle, DB Wexler and BJ Winick, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press, 2000).

King¹⁵ has provided an exhaustive definition of the role of a judge in a therapeutic court, which has been refined by later authors.¹⁶ In addition, the judicial role has been described variously as analogous to a coach,¹⁷ project manager, mentor, confessor, cheerleader,¹⁸ motivator, problem-solver, monitor of progress¹⁹ and transformative leader,²⁰ utilising the transformational leadership methods of inspirational motivation, idealised influence, intellectual stimulation and individualised consideration.²¹

Guiding Principles for Judges

Importantly, rehabilitation for an offender in a courtroom is not just the absence of offending; it includes the necessary changes that will enable that person to lead a healthy and fulfilling life.²² Generally, the court is seen as a *facilitator* of change rather than forcing or obliging the individual to change.²³

Judicial intervention, as noted by multiple TJ authors but most notably King, should also include evidence-based strategies to improve outcomes for court participants.²⁴ The basic principles from a psychological perspective that increase motivation and positive behaviour change include self-determination, PJ and health compliance principles.²⁵

TJ emphasises processes that encourage self-determination for court participants so as to avoid increasing resistance and potential resentment of the judicial process.²⁶ TJ also encourages responsible use of the power that judges wield,²⁷ to practice with an ethic of care²⁸ and act as role models for other legal actors, as well as setting the tone for other court staff in their interactions with the defendant.²⁹ Judges are expected to have a positive impact on the people appearing before them and their communities, with the court as a possible facilitator of healing.³⁰

As noted above, most TJ descriptions of judging have been theoretical and goal based, rather than behaviourally anchored. However, King operationalised the TJ literature goals into a description of the ideal solution-focused judge,³¹ and more recently Richardson, Spencer and Wexler³² articulated a model for measuring TJ court processes that included a description of TJ judging in the criteria for court excellence.

¹⁵ King, n 1.

¹⁶ Richardson, Spencer and Wexler, n 3.

¹⁷ King, n 1.

¹⁸ PF Hora et al, "The Importance of Timing" in BJ Winick and DB Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 178.

¹⁹ CJ Petrucci, "The Judge-Defendant Interaction: Toward a Shared Respect Process" in BJ Winick and DB Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 263.

²⁰ King, n 1.

²¹ B Bass and R Riggio, *Transformational Leadership* (Lawrence Erlbaum Assocs, 2006); W Bennis and B Nanus, *Leaders: Strategies for Taking Charge* (Collins Business Essentials, 2005).

²² King, n 1, 5.

²³ W Miller and S Rollnick, "What Is Motivational Interviewing?" (1995) 23 *Behavioural and Cognitive Psychotherapy* 325.

²⁴ King, n 1, 3.

²⁵ King, n 1, 26.

²⁶ King, n 1, 5.

²⁷ Scott, n 10.

²⁸ RK Warren, "Public Trust and Procedural Justice" (2000) 12 *Court Review* 132, 135; WG Schma, "Judging for the New Millennium" in BJ Winick and DB Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 91.

²⁹ See Waterworth, n 6, 10.

³⁰ See Waterworth, n 6, 9.

³¹ See Waterworth, n 6.

³² Richardson, Spencer and Wexler, n 3.

Judicial Communication – What Does TJ Say a Judge Should Do?

TJ recommendations for judicial behaviour include problem-solving courts and also, more recently, the mainstream courts.³³ Judges in problem-solving courts have a context that allows them to (in theory) implement many more types of therapeutic interactions. Mainstream judges at face value do not. However, the mainstream TJ movement describes ways to implement TJ imperatives in mainstream courtrooms.³⁴ The solution-focused judging skills described by King (below) would be difficult to generalise to mainstream court settings due to practical limitations, and King acknowledged that at times there would be tension between the different considerations involved in judging in a problem-solving court context. For example, the need to promote positive behavioural change and improved wellbeing is counter balanced by the need to hold participants accountable for their actions and to maintain the integrity of the court program. Encouragingly, there are common elements from the description of solution-focused judging and the psychological intervention literature, which are accessible to mainstream judges and desirable to implement in mainstream courtrooms.³⁵ This article examines these in greater depth to better inform the behaviourally anchored description of desirable judge interactions.

STAGES OF INTERACTION

As discussed by King,³⁶ the relationship between a judge and a client can be broken down to introduction, development and conclusion. As King noted, these stages have different purposes, but will use similar skills. These stages will also be present in an abbreviated form when there is a shorter interaction or limited judicial monitoring.³⁷

The introduction phase of a hearing focuses on developing rapport, taking into account the likely challenging emotional state of the client and their potential history of difficulty in forming trusting relationships with authority or helping figures.³⁸ King cited theory from transformational leadership to make the highly relevant point that trust must be earned, even in a courtroom.³⁹

During this phase, basic communication techniques, such as active listening, utilised in a patient and sensitive manner is best;⁴⁰ for example, starting with general questions, and identifying any steps the defendant has taken to address the issue and recognising these.

Solution-Focused Judging

King adapted the leadership theory definition of transformational leadership to recommend the following behaviours in an effective solution-focused judge:⁴¹

- Individualised consideration, which could be demonstrated by showing a strong interest in the participant, utilising effective listening skills (active listening), effective communication skills, practicing an ethic of care towards defendants, asking about positive life events and also about the individual's progress, as well as being empathic when discussing problems or failures. Also,

³³ D Wexler, "Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law" (Arizona Legal Studies Discussion Paper No 15, The University of Arizona, 2014) <<http://www.civiljustice.info/cgi/viewcontent.cgi?article=1005&context=tj>>.

³⁴ Wexler, n 33.

³⁵ See Waterworth, n 6, 184.

³⁶ King, n 1, 158–159; MD Clark, "Change-Focused Drug Courts: Examining the Critical Ingredients of Positive Behavioural Change" (2001) 3 *National Drug Court Institute Review* 35.

³⁷ King, n 1, 158, 737.

³⁸ King, n 1.

³⁹ King, n 1, 158, 738.

⁴⁰ King, n 1.

⁴¹ King, n 1, 37.

utilising strategic discussions to empower participants via collaborative problem-solving rather than imposing external solutions.⁴²

- Idealised influence, which could be demonstrated by encouraging self-determination and self-efficacy, putting goals and strategies in place, having realistic but high expectations of a defendant.
- Inspirational motivation, which could be demonstrated by allowing participants to set their own goals, publicly validating the participant's intrinsic worth and their ability to return to the community, and officially endorsing their goals and offering practical help in meeting these.
- Goal setting (where positive behaviour change is an aim of the process),⁴³ explaining, negotiating, cautioning, warning, positive encouragement and active listening, and including client responses in judgments.⁴⁴

As King notes, different leadership styles are associated with differing levels of follower satisfaction and transformational leadership is most effective.⁴⁵ Unfortunately, mainstream judging tends to operate as "management by exception", which is the least effective management style.⁴⁶

Specific Communication Skills

Effective communication has been eloquently described as commitment to the person and commitment to the message.⁴⁷ It is viewed by TJ authors as vital to effective judging.⁴⁸ Communication includes both verbal and non-verbal elements, which are equally important to effective communication skills. As noted by Porter,⁴⁹ observations of trial judges (in Minnesota) found judges often used non-verbal behaviour that could be considered ineffective and about one-third used these behaviours frequently.

Communication between a judge and a defendant has specific features not found in other settings. Effective non-verbal behaviour for solution-focused judges should include:⁵⁰

- active listening – that is, allowing space for defendants to speak and refraining from interruption while they are speaking, asking clarifying questions to ensure the communication by the defendant is clear and well developed, and including relevant details so as to make sense to the listener;⁵¹
- empathic or relational listening;⁵²
- reciprocity and dynamism;⁵³
- turn-taking;
- connection;
- co-creation of a narrative explanation of events and understanding of proceedings;⁵⁴
- connection between what each person says in turn;

⁴² King, n 1, 138.

⁴³ King, n 1, 138.

⁴⁴ King, n 1, 148.

⁴⁵ King, n 1, 146.

⁴⁶ King, n 1, 146.

⁴⁷ RB Adler and RF Proctor, *Looking Out, Looking In* (Thomson, 12th ed, 2007) 32.

⁴⁸ See Waterworth, n 6, 123.

⁴⁹ LL Porter, *Nonverbal Communication in Courtrooms at the Hennepin County Government Center: A Report on Observations of Fourth Judicial District Judges in March and April 2001* (Hennepin Co, 2001) 4.

⁵⁰ See Waterworth, n 6, 30; K Freeman, *New South Wales Drug Court Evaluation: Health, Wellbeing and Participant Satisfaction* (NSW Bureau of Crime Statistics and Research, 2002).

⁵¹ See Waterworth, n 6, 147; see also CB Rogers and RE Farson, "Active Listening" in RG Newman, MA Danziger and M Cohen (eds), *Communication in Business Today* (Houghton Mifflin, 1987) 589.

⁵² King, n 1, 139; KK Halone and LL Pecchioni, "Relational Listening: A Grounded Theoretical Model" (2001) 14 *Communication Reports* 59.

⁵³ J Brownell, *Building Active Listening Skills* (Prentice-Hall, 1986) 5; also King, n 1, 121.

⁵⁴ G Egan, *The Skilled Helper* (Thomson, 8th ed, 2007) 72; also King, n 1, 121.

- space and support for participants to say what they need to say;⁵⁵
- non-stereotyping;⁵⁶
- mutual influencing;⁵⁷
- non-coercive communication;⁵⁸
- cognitive complexity – that is, an understanding of ideas, events and reasons in a way that integrates multiple elements and a nuanced understanding of the interaction of these;⁵⁹
- multiple lenses for problem formulation;⁶⁰
- appropriate self-monitoring and self-awareness on the part of the judge (but not to the point of distraction);⁶¹
- strategies to create effective dialogue via eliciting, challenging, clarifying and asking open questions⁶² (generally, “what” questions are more effective and less confronting);⁶³
- body language that shows the judge is listening, including open body language and body gestures that indicate listening (such as head tilting, evaluative poses);⁶⁴
- effective non-verbal prompts to encourage contributions from the defendant;
- suggested format – ask open questions about wellbeing, then life events, then issue with non-compliance;
- understanding of the impact of the context on anxiety, and the subsequent impact of this on communication;⁶⁵
- strategies to encourage participants to make sense of the proceedings – for example, focusing on one issue after another systematically;
- effective non-verbal prompts;
- care taken to limit negative statements about the defendant in open court so as to avoid creating “defensiveness” or a shame reaction that gets in the way of constructive change;⁶⁶
- care taken in discussions with other staff to limit legal jargon during discussions in front of the defendant; and⁶⁷
- care to recognise achievements and not inadvertently discount these.

LEGITIMACY OF JUSTICE AND PROCEDURAL JUSTICE

Any pragmatic discussion regarding what works from a judicial perspective in motivating and effecting therapeutic change for defendants must include a brief reflection on the concepts espoused by the LJ and PJ movements in order to be well anchored in the existing literature.

LJ is based on the observation that individuals participating in the justice system make judgments about the legitimacy of that justice system.⁶⁸ These judgments include an evaluation of the organisation(s)

⁵⁵ Egan, n 54, 72; also King, n 1, 122.

⁵⁶ King, n 1, 122.

⁵⁷ King, n 1, 122.

⁵⁸ King, n 1, 122.

⁵⁹ Adler and Proctor, n 47, 32; see also King, n 1, 122.

⁶⁰ Adler and Proctor, n 47, 32; King, n 1, 123.

⁶¹ Adler and Proctor, n 47, 32; see also King, n 1, 123.

⁶² King, n 1, 72.

⁶³ King, n 1, 126.

⁶⁴ King, n 1, 132.

⁶⁵ King, n 1, 126.

⁶⁶ King, n 1, 130.

⁶⁷ King, n 1, 131.

⁶⁸ TR Tyler, “The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities” (1997) 1 *Personality and Social Psychology Review* 323.

involved, an internalised belief regarding the effectiveness with which the authority polices the rules, and whether they should be co-operated with and obeyed.⁶⁹

When an authority is judged to be legitimate, individuals accept the rules implemented by that authority, and defer to them due to a feeling of obligation, rather than expecting a reward or fear of punishment.⁷⁰ As could be expected, when an authority is not viewed as exercising legitimate authority, the reverse is true.⁷¹

Additionally, these judgments of legitimacy can differ between courts, and confidence in court systems differs depending on the type of courts involved.⁷²

PJ describes the procedures involved in a justice-related decision-making situation, and the perceived fairness of these procedures and the treatment received by the decision-maker.⁷³ These can include subjective perceptions of being heard, being treated with dignity and respect, and receiving concerned and attentive treatment by the courts.⁷⁴ The experience of being heard by the court decision-maker has a strong influence on the assessment made by the participant as to whether the procedure is fair. If the defendant decides that the court process is fair, they are more likely to comply with directions or judgments made by the court,⁷⁵ which improves the therapeutic effect of interacting with the court.⁷⁶

PJ communicates a message of respect and value to the individual, whereas “unfair” treatment can be experienced as devaluing that person’s importance in the community.⁷⁷

Perceptions of PJ can strongly influence whether an authority is perceived to be legitimate, and therefore the willingness of individuals to co-operate with that authority. For example, individuals are more likely to want to co-operate with police when they expect fair, respectful and impartial treatment.⁷⁸

SOCIAL DISTANCING

Adding further richness to the contextualisation of the influence exerted on court participants by the judiciary during court interactions is Braithwaite’s theory of “social distancing”.⁷⁹ This theory observes that individuals evaluate authority over time and interactions, including their system of laws, how they enforce these laws and what their authority “stands for”. Social distancing theory notes that individuals develop their own position in relation to the authorities over time, based on the principles of “social distancing”, which describes the degree to which individuals have positive feelings for others and also towards institutions and legal systems.

⁶⁹ M Hough et al, “Procedural Justice, Trust and Institutional Legitimacy” (2010) 4 *Policing: A Journal of Policy and Practice* 203.

⁷⁰ Hough et al, n 69.

⁷¹ Hough et al, n 69.

⁷² SC Benesh and SE Howell, “Confidence in the Courts: A Comparison of Users and Non Users” (2001) 19 *Behavioural Sciences and the Law* 199; H Kritzer and J Voelker, “Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts” (1998) 82 *Judicature* 58.

⁷³ K Burke and S Leben, “Procedural Fairness: A Key Ingredient in Public Satisfaction” (2007) 44 *White Paper of the American Justice Association, Court Review* 4; J Sunshine and TR Tyler, “The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing” (2003) 37 *Law and Society Review* 513.

⁷⁴ EA Lind and TR Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988).

⁷⁵ Lind and Tyler, n 74, 1; also TR Tyler and YJ Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and the Courts* (Russell Sage Foundation, 2002) 248.

⁷⁶ KE Canada and VA Hiday, “Procedural Justice in Mental Health Court: An Investigation of the Relation of Perception of Procedural Justice to Non-Adherence and Termination” (2014) 25 *The Journal of Forensic Psychiatry & Psychology* 321; TR Tyler, “The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings” (1992–1993) 46 *SMU Law Review* 401.

⁷⁷ Lind and Tyler, n 74.

⁷⁸ K Murphy, L Hinds and J Fleming, “Encouraging Public Cooperation and Support for Police” (2008) 18 *Policing and Society* 136; Bennis and Nanus, n 21, 199.

⁷⁹ V Braithwaite, “Criminal Prosecution within Responsive Regulatory Practice” (2010) 9 *Criminology and Public Policy* 515; V Braithwaite, “Dancing with Tax Authorities: Motivational Postures and Non-Compliant Actions” in V Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publishing Ltd, 2003) 15–39.

According to Braithwaite, individuals engage in “positioning motivational posturing” whereby they position themselves in relation to legal authorities.⁸⁰ Those who are committed to accepting the authority (are aligned with that authority) are more likely to do “the right thing” by those authorities, and to feel a “moral obligation” to co-operate.

Others may put a greater distance between themselves and authority due to uncertainty about whether an authority will act appropriately to achieve its goals. Those who socially distance themselves from authority are more likely to show resistance towards the authority’s rules or disengage from interactions with authority or laws.

Resistance to authority can be shown by expressing a right to challenge authority or policies or treatment seen as unreasonable. Dealing directly with the concerns expressed by someone who is resisting can often encourage that person to move to a “posture of commitment”.

Disengagement from the legal system is a desire to step outside of the legal system, where there is a disagreement about the authority’s goals and also their ways of achieving these. Disengagement can be shown as avoidance behaviour, where the individual avoids all interaction with a legal authority or compliance with its authority. An extreme form of disengagement could see the individual seeking out alternative forms of justice.⁸¹

An individual’s posture with regards to authority can and will change over time and with repeated interactions.⁸² Treating people well can reduce social distancing; treating people badly can increase social distancing. Clearly, if a court expects people to participate in the process and to comply with directions, as well as to affect therapeutic change, then court procedures need to be sensitive to theories of social distancing and the principles of PJ.

THE INTERACTION BETWEEN THESE AND THERAPEUTIC JURISPRUDENCE

As might be expected, there is a strong overlap between whether a judicial procedure or policing procedure is perceived as fair and whether the authority exercising that procedure is perceived as legitimate, and subsequently whether an individual “socially distances” themselves or cooperates and accepts that institution’s authority.

PJ is particularly important for marginalised or stigmatised members of society, including those with mental illness, or low socioeconomic status.⁸³ As could be expected, the elements of PJ – including being treated with respect, being heard and the perception that those in charge are concerned with the defendant’s wellbeing – can improve perceptions of the legitimacy of the authority of the justice system (LJ) and improve compliance with the justice system and the outcomes of a court process,⁸⁴ as well as lead to that person’s alignment with society’s rules and authority.

Importantly, from a therapeutic perspective, there are indications that if a court participant (eg in the mental health court) has positive experiences of PJ over a period of time, they will experience positive engagement and change,⁸⁵ as well as an increase in a sense of hope and empowerment – elements that are highly important for therapeutic change.⁸⁶

⁸⁰ Braithwaite (2003), n 79.

⁸¹ Braithwaite (2010), n 79; R Weitzer and RK Brunson, “Strategic Responses to the Police Among Inner-City Youth” (2009) 50 *Sociological Quarterly* 235.

⁸² See n 81.

⁸³ Lind and Tyler, n 74.

⁸⁴ Lind and Tyler, n 74; also S Kopelovich et al, “Procedural Justice in Mental Health Courts: Judicial Practices, Participant Perceptions and Outcomes Related to Mental Health Recovery” (2013) 36 *International Journal of Law and Psychiatry* 113; NG Poythress et al, “Perceived Coercion and Procedural Justice in the Broward Mental Health Court” (2002) 25 *International Journal of Law and Psychiatry* 517.

⁸⁵ G McIvor, “Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts” (2009) 9 *Criminology and Criminal Justice* 29; DB Wexler, “Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence” (2008) 44 *Court Review* 78.

⁸⁶ Kopelovich et al, n 84.

REVIEW OF THE COMMON DENOMINATORS OF THERAPY OUTCOMES

There are several ways of looking at “what works” for therapeutic change and how to measure it. Unfortunately, most court review research has tended to define “success” as decrease or cessation in recidivism.⁸⁷

This focus is understandable from a legal perspective, but somewhat two-dimensional when seen from a therapeutic or pragmatic health economics perspective.⁸⁸ After addressing the question from the perspective of the TJ, PJ and LJ literature, it is worth looking at “what works” therapeutically from the perspective of the helping professions. The following discussion examines the variety of clients passing through the courts, their needs and the types of therapeutic interventions available that could be adapted to a court setting. It then looks at the common denominators of therapeutic outcomes that are considered effective in encouraging therapeutic change.

COURT PARTICIPANTS

It is difficult to get precise statistics on the mental health and socioeconomic concerns of individuals passing through the courts; however, there are commonalities to the types of mental health problems that people going through court systems struggle with. These range in type, symptomatology and severity, and can include the effects of trauma (PTSD), chronic trauma (complex trauma, personality disorders such as antisocial personality disorder), drug addiction, depression, anxiety, self-harm and suicidal ideation. When looking at adolescents progressing through the juvenile justice system, they show a similar range of mental health problems, and in addition, developmental problems such as autistic spectrum disorder, and attachment disorders such as reactive attachment disorder. Experience would suggest that due to a combination of mental health factors, developmental issues and the effect of anxiety due to the context, participants may experience difficulties in communication in the court setting.⁸⁹ This is likely to mean that courts will need to adjust their manner of communicating with clients if they want the client to completely take in and respond to the communication that occurs in court.

It is useful to match the type of psychological intervention to the presenting issues. So, what works with these presenting problems from a therapeutic perspective?

TYPES OF THERAPY

Psychotherapy is defined as the deliberate application of clinical methods and “interpersonal stances” from psychological principles to help a person change their behaviour, thoughts and emotions.⁹⁰

There have been four major developmental waves for psychotherapy, as the ideas and principles of psychotherapy have evolved over time:

⁸⁷ JC Anestis and JL Carbonell, “Stopping the Revolving Door: Effectiveness of Mental Health Court in Reducing Recidivism by Mentally Ill Offenders” (2014) 65 *Psychiatric Services* 1105; PJ Burns, VA Hiday and B Ray, “Effectiveness 2 Years Postexit of a Recently Established Mental Health Court” (2013) 57 *American Behavioral Scientist* 189; PA Dirks-Linhorst and DM Linhorst, “Recidivism Outcomes for Suburban Mental Health Court Defendants” (2012) 37 *American Journal of Criminal Justice* 76; VA Hiday and B Ray, “Arrests Two Years after Exiting a Well-Established Mental Health Court” (2010) 61 *Psychiatric Services* 463; VA Hiday, HW Wales and B Ray, “Effectiveness of a Short-Term Mental Health Court: Criminal Recidivism One Year Postexit” (2013) 36 *Law and Human Behavior* 401; S Maruna, “Elements of Successful Desistance Signaling” (2012) 11 *Criminology and Public Policy* 73; ME Moore and VA Hiday, “Mental Health Court Outcomes: A Comparison of Re-arrest and Re-arrest Severity Between Mental Health Court and Traditional Court Participants” (2006) 68 *Law and Human Behavior* 659; S Ross, “Evaluation of the Court Integrated Services Program: Final Report” (Melbourne Consulting and Custom Programs, University of Melbourne, 2009); CM Sarteschi, MG Vaughn and K Kim, “Assessing the Effectiveness of Mental Health Courts: A Quantitative Review” (2011) 39 *Journal of Criminal Justice* 12; DB Wilson, O Mitchell and DL Mackenzie, “A Systematic Review of Drug Court Effects on Recidivism” (2006) 2 *Journal of Experimental Criminology* 459.

⁸⁸ D Wexler, “Robes and Rehabilitation: How Courts Can Help Offenders ‘Make Good’” (2001) 38 *Court Review* 18; D Wexler, “Therapeutic Jurisprudence and Readiness for Rehabilitation” (2006) 8 *Florida Coastal Law Review* 278.

⁸⁹ SO Lilienfeld and H Arkowitz, “Are All Psychotherapies Created Equal?” (2012) 23 *Scientific American Mind* 68.

⁹⁰ JO Prochaska and JC Norcross, *Systems of Psychotherapy: A Transrational Analysis* (Brooks/Cole Publishing Co, 1999).

- The psychodynamic theories originated with the work of Freud (1895–1939) with the assumption that the past strongly influences a person's current behaviour, and therefore that the past needs to be made conscious in order to change behaviour and emotional reactions. Common techniques used in psychodynamic therapies include neutrality, interpretation, and use of the awareness of transference and counter transference.⁹¹ These do not readily adapt to a courtroom setting and could cause participants harm.
- Cognitive-behavioural therapies – cognitive therapies target change in thought patterns, and behavioural therapies focus on behavioural patterns.⁹² The approach is problem oriented, directive and intellectually based. Within these modalities, the therapeutic relationship can also be important (eg used for modelling new behaviours). This approach has been adapted by King⁹³ for a solution-focused judge; however, it would be more difficult to implement in a mainstream courtroom.
- Existential and humanistic theories – these are the backdrop to the development of the major principles behind the counselling process, and the vision of the therapeutic relationship as a means for therapeutic intervention, as well as providing material for therapy.⁹⁴ Therapeutic intervention utilising the relationship include authenticity, listening skills and the use of empathy. The guiding basis of this therapy is an understanding that individuals are motivated to lead healthy, fulfilling lives, and to find meaning in experiences and life. Rogers⁹⁵ defined six necessary and sufficient conditions for therapy to impact on personality change, including: the therapeutic relationship; unconditional positive regard; and accurate empathy from the therapist. The goal of therapy is the creation of personal meaning and personal growth. This therapeutic approach could be adapted to a mainstream court environment.
- Emerging theories – these include constructivist, feminist, multicultural and transpersonal theories. Constructivist theories view knowledge and experience as constructed, rather than objective.⁹⁶ Generally, from these perspectives, personal problems are viewed as emerging from the tension between a person and their context. Constructivist theories have led to solution-focused therapy and narrative therapy.⁹⁷

Of these, two appear to be particularly adaptable for both a mainstream and a problem-solving courtroom setting.⁹⁸ These are:

- Solution-focused therapy is usually a brief intervention; it assumes that the individual is an expert on their own life, can define their goals for therapy, and are able to generate solutions to their problems and to reach their goals.⁹⁹ The brevity and focused questioning of this therapy makes it potentially useful in a courtroom setting.
- Narrative therapy focuses on how clients can “reauthor” their life narratives to create new meaning and new experiences of reality.¹⁰⁰ Emphasis is placed on creating and reinforcing stories about self,

⁹¹ S Freud, “On the Beginning of Treatment: Further Recommendations on the Technique of Psychoanalysis” in J Strachey (ed), *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Vol 12, 1911–1913 (trans, The Hogarth Press and the Institute of Psycho-analysis, 1958).

⁹² AT Beck, *Cognitive Therapy and the Emotional Disorders* (Meridian, 1976); KS Dobson and L Block, “Historical and Philosophical Bases of the Cognitive-behavioral Therapies” in KS Dobson (ed), *Handbook of Cognitive Behavioral Therapies* (Guilford Press, 1988) 3–38; A Ellis, “The History of Cognition in Psychotherapy” in A Freeman et al (ed), *Comprehensive Handbook of Cognitive Therapy* (Plenum Press, 1989) 5–19.

⁹³ King, n 1.

⁹⁴ AH Maslow, “A Theory of Human Motivation” (1943) 50 *Psychological Review* 370; CR Rogers, *Client-Centered Therapy* (Houghton Mifflin, 1951).

⁹⁵ Rogers, n 94.

⁹⁶ JD Raskin, “Constructivism in Psychology: Personal Construct Psychology, Radical Constructivism, and Social Constructionism” (2002) 5 *American Communication Journal* 1.

⁹⁷ S de Shazer et al, *More Than Miracles: The State of the Art of Solution-Focused Brief Therapy* (Routledge, 2007).

⁹⁸ King, n 1.

⁹⁹ de Shazer et al, n 97.

¹⁰⁰ MK White and D Epston, *Literate Means to Therapeutic Ends* (Dulwich Centre Publications, 1989).

others and relationships that are useful for the client to have a healthy self-esteem, sense of self-efficacy and positive interactions with others. A court experience is a powerful facilitator to develop and witness new life narratives.

An additional therapy that specifically targets antisocial behaviour also deserves inclusion in this review – this is multisystemic therapy.¹⁰¹

As noted, there are many different types of therapy¹⁰² and some treatments can be harmful in certain circumstances.¹⁰³ Is there a simpler way to conceptualise a therapeutic intervention in a courtroom setting in a way that avoids the risk of iatrogenic harm?

THERAPEUTIC ALLIANCE

Research on outcomes has tended to focus on the most frequently used types of therapies¹⁰⁴ – that is, cognitive behaviour therapy, psychodynamic therapy, person-centred therapy and interpersonal therapy. However, over time research into “what works” in therapy has become inextricably linked with research into the therapeutic alliance (relationship). Early psychotherapy authors observed that therapy types appeared to have equal impact (the dodo bird effect).¹⁰⁵

As has been demonstrated to a significant degree in the psychological and psychotherapeutic research literature, the type of treatment does matter.¹⁰⁶ However, despite the presenting problem of the client and the type of intervention adopted, the strength of the therapeutic alliance is a major process variable with central impact on therapeutic outcomes.¹⁰⁷

Although the therapeutic relationship has been defined differently depending on theoretical orientation and discipline,¹⁰⁸ a basic definition is the collaborative relationship between a therapist and patient with the central aspects being the link between the therapist and their patient and their agreement both on goals and tasks for therapy.¹⁰⁹

¹⁰¹ TS Van der Stouwe et al, “The Effectiveness of Multisystemic Therapy (MST): A Meta-Analysis” (2014) 34 *Clinical Psychology Review* 468.

¹⁰² JC Norcross, *Psychotherapy Relationships That Work: Therapist Contributions and Responsiveness to Patients* (OUP, 2002).

¹⁰³ SO Lilienfeld, “Psychological Treatments That Cause Harm” (2007) 2 *Perspectives on Psychological Science* 53.

¹⁰⁴ Lilienfeld and Arkowitz, n 89.

¹⁰⁵ L Luborsky and B Singer, “Comparative Studies of Psychotherapies: Is It True That ‘Everyone Has Won and All Must Have Prizes?’” (1975) 32 *Archives of General Psychiatry* 995; S Rosenzweig, “Some Implicit Common Factors in Diverse Methods of Psychotherapy” (1936) 6 *American Journal of Orthopsychiatry* 412.

¹⁰⁶ DF Tolin, “Is Cognitive-Behavioral Therapy More Effective Than Other Therapies? A Meta-Analytic Review” (2010) 30 *Clinical Psychology Review* 710.

¹⁰⁷ AC Del Re et al, “Therapist Effects in the Therapeutic Alliance-Outcome Relationship: A Restricted-Maximum Likelihood Meta-Analysis” (2012) 32 *Clinical Psychology Review* 642; R Elvins and J Green, “The Conceptualization and Measurement of Therapeutic Alliance: An Empirical Review” (2008) 28 *Clinical Psychology Review* 1167; R Elliott, WB Stiles and DA Shapiro, “Are Some Psychotherapies More Equivalent Than Others?” in TR Giles (ed), *Handbook of Effective Psychotherapy* (Plenum Press, 1993) 455–479; C Flückiger et al, “The Alliance in Adult Psychotherapy: A Meta-Analytic Synthesis” (2018) 55 *Psychotherapy* 316; ML Friedlander et al, “Alliance in Couple and Family Therapy” (2011) 48 *Psychotherapy* 25; C Gelso and J Carter, “Components of the Psychotherapy Relationship: Their Interaction and Unfolding During Treatment” (1994) 41 *Journal of Counselling Psychology* 296; AO Horvath and L Luborsky, “The Role of the Therapeutic Alliance in Psychotherapy” (1993) 61 *Journal of Consulting Clinical Psychology* 561; L Luborsky, “Helping Alliances in Psychotherapy: The Groundwork for a Study of Their Relationship to Its Outcome” in JL Cleghorn (ed), *Successful Psychotherapy* (Brunner/Mazel, 1976) 92–116; BD McLeod, “Relation of the Alliance with Outcomes in Youth Psychotherapy: A Meta-Analysis” (2011) 31 *Clinical Psychology Review* 603; RS Shirk, MS Karver and R Brown, “The Alliance in Child and Adolescent Psychotherapy” (2011) 48 *Psychotherapy* 17; MJ Welmers-van de Poll et al, “Alliance and Treatment Outcome in Family-involved Treatment for Youth Problems: A Three-Level Meta-Analysis” (2018) 21 *Clinical Child and Family Psychology Review* 146; BE Wampold et al, “A Meta-Analysis of Outcome Studies Comparing Bona Fide Psychotherapies: Empirically ‘All Must Have Prizes’” (1997) 122 *Psychological Bulletin* 203.

¹⁰⁸ MR Fitzpatrick, S Iwakabe and A Stalikas, “Perspective Divergence in the Working Alliance” (2005) 15 *Psychotherapy Research* 69.

¹⁰⁹ ES Bordin, “The Generalizability of the Psychoanalytic Concept of the Working Alliance” (1979) 16 *Psychotherapy* 252; AO Horvath et al, “The Alliance” in JC Norcross (ed), *Relationships That Work* (OUP, 2011) 9; MS Karver et al, “Meta-Analysis

The relationship also demonstrates structured parameters to the interaction, which is formed early on in the interaction between the parties and appears to be stable over time.¹¹⁰ Bordin's formulation of the therapeutic alliance delineates three essential elements: agreement on the goals of therapy; agreement on the tasks involved in therapy; and the development of a bond (mutual positive regard and trust) between the therapist and the client.

HOW IMPORTANT IS THE THERAPEUTIC ALLIANCE?

The therapeutic alliance has been described variously as “a potent curative factor in all forms of treatment”,¹¹¹ “crucial for successful therapy outcome”,¹¹² or “a critical component of effective therapy”.¹¹³ Del Re et al noted that, from research spanning 30 years, the therapeutic alliance has been demonstrated to be a consistent predictor of therapy outcome.¹¹⁴ All studies reviewed found a correlation between the therapeutic alliance and positive therapy outcome. In Del Re et al's meta-analysis, the average alliance-outcome correlation was .4; however, other studies have shown a more modest correlation.¹¹⁵

Additionally, there is evidence to suggest that some research may have underestimated the strength of the correlation between therapeutic alliance and client outcome¹¹⁶ – although there is great variability between clients' outcomes, there is very little variability within a therapist's own clients of the correlation between alliance and outcome.¹¹⁷ This means that therapist contribution to the therapeutic alliance is crucial.¹¹⁸ Also, some therapists seem to have a significantly better ability to form a healthy therapeutic relationship with their clients, and this differing ability is significantly related to their client's outcomes.¹¹⁹

Crucial for a successful court intervention, the alliance is an essential ingredient in the client accepting therapeutic intervention and following a plan towards personal growth.¹²⁰

of Therapeutic Relationship Variables in Youth and Family Therapy: The Evidence for Different Relationship Variables in the Child and Adolescent Treatment Outcome Literature” (2006) 26 *Clinical Psychology Review* 50; Shirk, Karver and Brown, n 107; KJ Miller and JS Mizes (eds), *Comparative Treatments of Eating Disorders* (Free Association Books, 2000).

¹¹⁰ AO Horvath, “The Therapeutic Relationship: Research and Theory” (2005) 15 *Psychotherapy Research* 3; Horvath and Luborsky, n 107; B Mallinckrodt, “Session Impact, Working Alliance, and Treatment Outcome in Brief Counseling” (1993) 40 *Journal of Counseling Psychology* 25; DJ Martin, JP Garske and KM Davis, “Relation of the Therapeutic Alliance with Outcome and Other Variables: A Meta Analytic Review” (2000) 68 *Journal of Consulting and Clinical Psychology* 438.

¹¹¹ E Marziali and L Alexander, “The Power of the Therapeutic Relationship” (1991) 61 *American Journal of Orthopsychiatry* 383.

¹¹² CE Hill and MM Corbett, “A Perspective on the History of Process and Outcome Research in Counseling Psychology” (1993) 40 *Journal of Counseling Psychology* 3; AO Horvath and BD Symonds, “Relation Between Working Alliance and Outcome in Psychotherapy: A Metaanalysis” (1991) 38 *Journal of Counseling Psychology* 139.

¹¹³ Horvath et al, n 109; Miller and Mizes, n 109; Shirk, Karver and Brown, n 107.

¹¹⁴ Del Re et al, n 107; see also Flückiger et al, n 107.

¹¹⁵ Flückiger et al, n 107; Horvath et al, n 109.

¹¹⁶ Del Re et al, n 107.

¹¹⁷ S Baldwin, B Wampold and Z Imel, “Untangling the Alliance-Outcome Correlation: Exploring the Relative Importance of Therapist and Patient Variability in the Alliance” (2007) 75 *Journal of Consulting and Clinical Psychology* 842.

¹¹⁸ Baldwin, Wampold and Imel, n 117.

¹¹⁹ See Hora et al, n 18; U Dinger et al, “Therapist Effects on Outcome and Alliance in Inpatient Psychotherapy” (2008) 64 *Journal of Clinical Psychology* 344; D Zuroff et al, “Between-Therapist and Within-Therapist Differences in the Quality of the Therapeutic Relationship: Effects on Maladjustment and Self-Critical Perfectionism” (2010) 66 *Journal of Clinical Psychology* 681.

¹²⁰ Bordin, n 109.

Research has demonstrated the impact of therapeutic alliance across different problems and different treatment modalities – for example, depression,¹²¹ anxiety,¹²² PTSD,¹²³ eating disorders¹²⁴ and personality disorders.¹²⁵

Research has found that therapist qualities are more important to outcome than client variables.¹²⁶ Patient contribution factors to patient and therapist alliance are distinct and can be reliably measured.¹²⁷ Although earlier studies indicated that the client variable of attachment style influenced client report of therapeutic alliance,¹²⁸ more recent studies have shown that what a therapist contributes to the interaction has a larger impact on the alliance – that is, outcome correlation.¹²⁹ The pattern of the therapeutic alliance over time is also very important to the therapeutic outcome.¹³⁰

In particular, therapist responsiveness to the client is a key ingredient in good therapeutic alliance.¹³¹ Responsiveness means the attentiveness with which the therapist responds to new information that emerges during their interaction.¹³²

Responsiveness is not influenced by client variables, such as personality disorder or type of diagnosis, meaning that focusing on the quality of the interaction between the therapist and client is more likely to show a beneficial outcome, despite the wide variety (or absence) of diagnoses and types of diagnoses seen in defendants progressing through the courts.

MEASURING THERAPEUTIC ALLIANCE

Given the importance of therapeutic alliance to therapy outcome, it is not particularly surprising that there are multiple types of rating scales to measure it. Of these, research shows that observer ratings of therapeutic alliance are the most accurate predictors of therapeutic outcome;¹³³ and second to that, client ratings.¹³⁴

¹²¹ J Krupnick et al, "The Role of the Therapeutic Alliance in Psychotherapy and Pharmacotherapy Outcome: Findings in the National Institute of Mental Health Treatment of Depression Collaborative Research Programme" (1996) 64 *Journal of Consulting Clinical Psychology* 532; P Raue, M Goldfried and M Barkham, "The Therapeutic Alliance in Psychodynamic-Interpersonal and Cognitive-Behavioral Therapy" (1997) 65 *Journal of Consulting Clinical Psychology* 582.

¹²² MC Cloitre et al, "Therapeutic Alliance, Negative Mood Regulation, and Treatment Outcome in Child Abuse-Related Posttraumatic Stress Disorder" (2004) 72 *Journal of Consulting and Clinical Psychology* 411.

¹²³ Cloitre et al, n 122.

¹²⁴ MJ Constantino et al, "The Association Between Patient Characteristics and the Therapeutic Alliance in Cognitive-Behavioural and Interpersonal Therapy for Bulimia Nervosa" (2005) 73 *Journal of Consulting and Clinical Psychology* 203.

¹²⁵ A Andreoli et al, "Crisis Intervention in Depressed Patients With and Without DSM-III – R Personality Disorders" (1993) 181 *The Journal of Nervous and Mental Disease* 732; DN Klein et al, "Therapeutic Alliance in Depression Treatment: Controlling for Prior Change and Patient Characteristics" (2003) 71 *Journal of Consulting Clinical Psychology* 997; JL Strauss et al, "Early Alliance, Alliance Rupture, and Symptom Change in a Nonrandomized Trial of Cognitive Therapy for Avoidant and Obsessive-Compulsive Personality Disorders" (2006) 74 *Journal of Consulting and Clinical Psychology* 337.

¹²⁶ Baldwin, Wampold and Imel, n 117; Del Re et al, n 107; Dinger et al, n 119; Zuroff et al, n 119.

¹²⁷ Krupnick et al, n 121.

¹²⁸ Mallinckrodt, n 110; B Mallinckrodt, HM Coble and DL Gantt, "Working Alliance, Attachment Memories, and Social Competencies of Women in Brief Therapy" (1995) 42 *Journal of Counseling Psychology* 79; B Strauss and B Schwark, "Die Bindungstheorie und ihre Relevanz für die Psychotherapie [Attachment theory and its practical relevance for psychotherapy]" (2007) 52 *Psychotherapeut* 405.

¹²⁹ Baldwin, Wampold and Imel, n 117; Dinger et al, n 119; DK Marcus et al, "The Therapeutic Alliance in Adolescent Substance Abuse Treatment: A One-With-Many Analysis" (2011) 58 *Journal of Counseling Psychology* 449; Zuroff et al, n 119.

¹³⁰ DM Kivlighan and P Shaughnessy, "Patterns of Working Alliance Development: A Typology of Client's Working Alliance Ratings" (2000) 47 *Journal of Counseling Psychology* 362.

¹³¹ WB Stiles, "Responsiveness as an Obstacle for Psychotherapy Outcome Research: It's Worse than You Think" (2009) 16 *Clinical Psychology: Science and Practice* 86; WB Stiles, L Honos-Webb and M Surko, "Responsiveness in Psychotherapy" (1998) 5 *Clinical Psychology: Science and Practice* 439.

¹³² Stiles, n 131.

¹³³ Marziali and Alexander, n 111; L Fenton et al, "Perspective Is Everything: The Predictive Validity of Six Working Alliance Instruments" (2001) 10 *Journal of Psychotherapy and Practical Research* 262.

¹³⁴ A Bachelor and A Horvath, "The Therapeutic Relationship" in MA Hubble, BL Duncan and SD Miller (eds), *The Heart and Soul of Change: What Works in Therapy* (American Psychological Association, 1999) 133.

Observer rating scales – such as the Vanderbilt Therapeutic Alliance Scale (VTAS),¹³⁵ the Working Alliance Inventory-Observer Form (WAI-O)¹³⁶ and the California Psychotherapy Alliance Scales (CALPAS) – are highly correlated to each other, and have high construct validity.¹³⁷ As per Fenton et al,¹³⁸ the Penn Helping Alliance Rating Scale, the CALPAS, the VTAS and Working Alliance Inventory (Observer, Therapist and Client versions), had significantly correlated observer ratings, while ratings completed by therapists or clients were not¹³⁹ – meaning that there were only minimal differences between the types of rating scales used.

IMPLICATIONS FOR THERAPEUTIC JURISPRUDENCE

Horvath and Luborsky found that the early phase of therapy is crucial,¹⁴⁰ and that therapeutic alliance tends to be formed very early in the interaction and is stable over time.¹⁴¹ It should be possible to utilise the interaction between a judge and a defendant as a short-lived therapeutic interaction, and to focus on the interaction from a therapeutic alliance formation perspective.

This discussion needs to be contextualised, so as to emphasise the importance of incorporating up-to-date psychological intervention techniques available, via court referral, based on the evolving evidence base. As new therapies and programs become available it is important to make use of them as appropriate. However, the features of what constitutes an effective therapeutic relationship or alliance are stable across therapeutic situations, and these features can be readily adapted to a TJ context to foster therapeutic change for defendants. It is also possible to teach these behaviours to therapists¹⁴² (and by inference) also to the judiciary.

For a legal actor in a court setting, this means the judge taking active steps: to delineate, invite and form a positive working relationship with the defendant with clear roles, boundaries and evidence of respect and trust in the interaction; to invite the defendant to participate and agree in defining the goals of the hearing; and to invite the contribution to, and agreement with, the tasks of the hearing from the defendant.

Additionally, as Del Re et al observed, it is crucial to ensure that institutions and workplaces are conducive to therapists and other intervenants exercising their skills in alliance development.¹⁴³ Care needs to be taken to develop judicial contexts that are conducive to therapeutic legal actor contributions and not judicial burn out – for example, by managing the size of court lists.

A BEHAVIOURALLY ANCHORED DESCRIPTION OF LEGAL ACTOR CONTRIBUTIONS

After a review of common determinants of therapy (particularly the impact of therapeutic alliance and the interpersonal factors that facilitate this), as well as a review of the PJ and TJ literature and research into court outcomes, it is possible to compile a behavioural description of what a judge could do in a mainstream court to have the best chance of facilitating change. This is as follows.

¹³⁵ DE Hartley and HH Strupp, “The Therapeutic Alliance: Its Relationship to Outcome in Brief Psychotherapy” in J Masling (ed), *Empirical Studies in Analytic Theories* (Erlbaum, 1983) 1–38.

¹³⁶ R Di Giuseppe, JJ Linscott, and R Jilton, “Developing the Therapeutic Alliance in Children-adolescent Psychotherapy” (1996) 5(2) *Applied and Preventive Psychology* 85–100; TJ Tracey and AM Kokotovic, “Factor Structure of the Working Alliance Inventory” (1989) 1 *Psychological Assessment* 207.

¹³⁷ V Tichenor and CE Hill, “A Comparison of Six Measures of Working Alliance” (1989) 26 *Psychotherapy: Theory, Research, Practice, Training* 195.

¹³⁸ Fenton et al, n 133.

¹³⁹ Fenton et al, n 133.

¹⁴⁰ Horvath and Luborsky, n 107.

¹⁴¹ Horvath, n 110; Horvath and Luborsky, n 107; Mallinckrodt, n 110; Martin, Garske and Davis, n 110.

¹⁴² Marziali and Alexander, n 111; JC Muran and JP Barber, *The Therapeutic Alliance: An Evidence-Based Guide to Practice* (Guilford, 2010).

¹⁴³ Del Re et al, n 107; A Donabedian, “Evaluating the Quality of Medical Care” (2005) 83 *The Milbank Quarterly* 691.

Introductions

During the introductions it is important to maintain good eye contact, use warm to neutral emotional tone, calmly and firmly set boundaries and roles in the courtroom, explain the goals of the hearing, and help the participant to feel confident to participate in the hearing. The judge should take the time to explain the court processes and how to address the judge. If at all possible, the judge and the court participant should create a collaborative definition of goals, and take turns in speaking.

Discussion About the Problem

The judge should ask neutral and open questions about the context as to why they are in court, and include the court participants' own words in defining "the problem". If possible, the judge should notice and discuss the strengths that are present in the current situation, despite the reasons for being in court. The judge should also notice and discuss the point of view and experiences of other participants to the problem.

Sentencing

The judge should give a summary for sentencing or judgment that includes a collaborative definition of the problem and incorporates the parties involved in the summary remarks. The judge should describe the responsibility for action as internal to the court participant, and describe the situation and summary to include the participant as having choices over their actions, and also highlight context and possible supports available. The summary should include an acknowledgment of the possible experiences of other people who are also involved in the problem situation – for example, the victim of a crime.

Judicial Communication Skills

The judge should use open questions, with active listening skills and attentive and encouraging body language, and use non-verbal prompts to encourage the court participant to express themselves well. The judge should adapt their language and speed of speaking to the language abilities and comprehension of the court participant, and ask questions to check that the court participant has understood them. The judge should facilitate other legal actors present in the court to do the same, so as to ensure that the court participant understands what is being communicated and the processes behind this. The judge should consider and promote the use of open or closed questions, active or passive listening, invitations to the defendant to participate, turn-taking in discussion and effective body language. Turn-taking and collaborative dialogue should occur during the interaction.

Judicial Alliance

The judge should employ a neutral to warm emotional tone and an open but authoritative body language, and actively ally themselves with the court participant against "the problem" (ie how to stop offending while using drugs, or how to stop behaving in a violent manner towards family members, or how to separate from a partner in the least damaging way for the children and both partners).

This composite picture leads to the development of a behaviourally defined description of desirable judicial interactions from a therapeutic perspective, described in detail in Figure A, which could be used as a brief rating scale for use by an independent observer to capture elements of this description and measure this in a courtroom setting. This measure is not designed to be comprehensive, but rather a starting foundation point for future conversations about judicial contributions to therapeutic change, and a foundation for potential future developments of measures for specific court settings.

FIGURE A. Legal Actor Contributions Court Checklist

Legal Actor Contributions Court Checklist

Introductions

☐ The judicial officer establishes context: explains how the court works and the multiple functions of justice

The judicial officer addresses to the defendant

- ☐ personally
- ☐ eye contact
- ☐ in a 'non-intimidating' manner
- ☐ by name
- ☐ explains to defendant how to address the judge

Judicial Emotional tone

1 2 3 4 5 6 7

warm -----positive but firm-----neutral -----cold ----- hostile

Judicial Body language (circle one):

open / closed

dominant / encouraging

- ☐ The judicial officer explains the goals of hearing: for defendant, for court and for society
- ☐ The judicial officer explains rules for participating in the court (adaptive communication)

Discussion about problem

- ☐ Enquiry about the background by the judicial officer
- ☐ Enquiry about the defendant by the judicial officer
- ☐ Enquiry about the context to the defendant and the problem by the judicial officer
- ☐ Inclusion of defendant's words into statements and questions (creation of a shared description of 'the problem')

Summary or Sentencing Remarks

- ☐ Collaborative definition of the problem used by the judicial officer
- ☐ Incorporation of defendant and context into sentencing by the judicial officer

Location of the problem (please circle one)

The judicial officer describes the defendant as the problem

OR The judicial officer describes the problem as external to the defendant

Location of responsibility to act (agency and accountability) (please circle one)

The judicial officer describes the defendant as responsible for their actions

OR The judicial officer describes the defendant as not responsible for their actions

- ☐ Explanation of reasons for sentencing by the judicial officer
- ☐ The judicial officer includes emotions and wishes of defendant in sentencing remarks
- ☐ The judicial officer includes acknowledgement of the victim's experience in sentencing remarks
- ☐ Guiding conversations for change: the judicial officer makes defendant aware of future choices and their possibilities for change

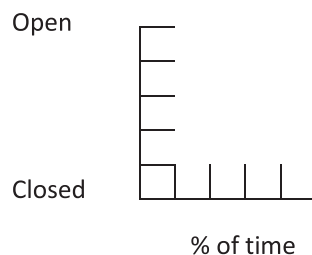
Resources: Discussion of resources available to help support change for the defendant in the future

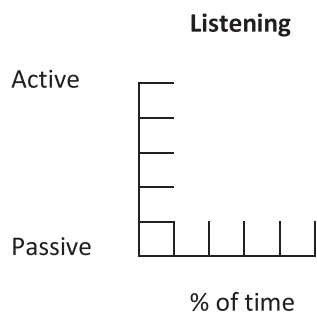
<----->

No mention of resources and support / Mentions resources and support / Multidisciplinary practice

Judicial Communication Skills

Questions





Active listening shown by the judicial officer

- ☐ Paraphrasing
- ☐ Asks clarifying questions
- ☐ Validation / minimal encouragers

Participation encouraged by the judicial officer

- ☐ Invited defendant to participate
- ☐ Turn taking
- ☐ Adaptation of communication style to meet the defendant's abilities (cognitive ability, language, communication disorders)
- ☐ Cultural referencing appropriate to client
- ☐ Choices offered

Judicial positioning / trust / rapport

Emotional tone of the judicial officer overall:

1 2 3 4 5 6 7

warm -----positive but firm-----neutral -----cold ----- hostile

Body language of the judicial officer overall (please circle one):

1 2 3 4 5 6 7

open -----closed

1 2 3 4 5 6 7

encouraging -----dominant

Judicial officer positioning overall:

- 1 2 3 4 5 6 7
- Allied -----neutral-----adversarial
- ☐ Agreement on goals of the hearing
- ☐ Agreement on tasks to be completed during the hearing

Judicial Body language

- ☐ Attentive and open (looking at the defendant, arms uncrossed, leaning in, head tilting, slow nodding, furrowed brow, interest noises eg. 'hmmm hmmm')
- ☐ Dominant (disapproving expression, body positioned to take up a lot of space, interrupting, grooming behaviours, chin stroking, aggressive gestures, rolling eyes)
- ☐ Bored or tired (mostly looking away from the defendant, drumming fingers, tapping toes, tapping other objects, yawning, or sagging posture)
- ☐ Closed (arms crossed, head tilted down and away)
- ☐ Evidence of reciprocity in body language between the judicial officer and the defendant during the interaction
- (mirroring in body posture, emotional tone, facial expressions)

CONCLUSION

The role of the judiciary varies depending on the cultural, legal and social context. However, the core role of judging in enforcing legal norms, delivering punishment with a view to facilitating rehabilitation and protecting the community appears relatively stable across jurisdictional boundaries.

Focusing on rehabilitation, the TJ literature recommends specific goals and guiding principles for judicial interactions to achieve therapeutic aims. The PJ literature also inform specific procedures for judicial interaction.

Alongside these recommendations, the literature on common determinants of therapeutic outcome (and therapeutic change) identifies therapeutic alliance as a powerful common facilitator of therapeutic change across therapeutic interactions. The literature indicates that this alliance is best measured by an objective observer.

This article has developed a behaviourally anchored description of a judicial interaction, which stands the best chance of facilitating therapeutic change, along with a checklist designed to capture these aspects in a courtroom setting.

This measure could prove to be an effective tool to capture the courtroom contributions of legal actors, and their impacts on defendants from a therapeutic perspective, and would be extremely useful for future court research projects. As noted by many researchers in the natural world, the act of observing changes what is observed. In this case, it is hoped that measuring the important contribution that judges make to their defendants' movement towards rehabilitation will be the start of an enriching dialogue.