REALISING THE POTENTIAL OF JUDGING

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I INTRODUCTION

Over the last twenty years, there has been increasing awareness of the importance of judicial officers understanding how cultural, developmental, health, social, economic and other aspects of people coming before a court, affect how legal problems arise and how they are resolved. Diverse developments such as the introduction of specific Bench Books — Aboriginal Bench Books, equal opportunity Bench Books, child witness Bench Books — and publications on the application of therapeutic jurisprudence to judging such as *Judging in a Therapeutic Key*,[1] *Judging for the 21st Century*[2] and *Solution-Focused Judging Bench Book*,[3] reflect this increasing awareness and the need for resources to equip judicial officers to address these factors in judging. Another significant aspect of this development has been the introduction of problem-solving courts, court diversion programs and Indigenous sentencing courts, which use processes thought to be more suitable in addressing the underlying issues of those coming before the court with legal problems.

This article argues that these developments recognise various elements of the interpersonal dimension of judging, an aspect that goes beyond its purely technical, rule-based aspects to embrace the behavioural, psychological, social, emotional and cultural elements. It suggests that the systematic and integrative exploration of this dimension of judging has been lacking until comparatively recently. It argues that the interpersonal dimension exists in all judging contexts.

Depending on the context, judging has the potential to promote particular justice system goals: the resolution of legal disputes, the addressing of underlying issues so as to prevent the recurrence of legal problems, and party and public confidence in and respect for the court system. The attainment of each of these goals is dependent on the proper judicial exercise of interpersonal skills suitable to the judicial context.

This article contends that judicial officers should not only have knowledge of the interpersonal dimension of judging, but also of the techniques required to negotiate the different situations that may arise — whether it is a witness with

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1 Bruce J Winick and David B Wexler (eds), *Judging in a Therapeutic Key* (Carolina Academic Press, 2003).

2 Susan Goldberg, *Judging for the 21st Century: A Problem-Solving Approach* (National Judicial Institute, 2005).

3 Michael S King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009).

special needs, a victim who breaks down in the witness box, an angry litigant, a defendant who is deflated, having relapsed into drug use after a long period of abstinence, or a person in the public gallery who is upset about what is happening in the courtroom. Depending on the situation, judging in these contexts may require particular listening and communication skills, the expression of empathy, the use of techniques of persuasion or motivational interviewing, the use of techniques to settle child witnesses and collaborative problem-solving techniques.

A particular application of the interpersonal dimension of judging is solution-focused judging.[4] Solution-focused judging eschews the concept of a court solving a party's underlying problems — a notion that has been implicit in the concept of 'problem-solving courts'.[5] Firstly, it is the individual's own responsibility to solve their problems — albeit with the aid of appropriate support and treatment agencies.[6] Secondly, the concept of a court solving someone's problems implies a paternalistic approach, one that may inhibit the individual's motivation to engage in positive behavioural change and address underlying issues.[7]

Solution-focused judging applies therapeutic jurisprudence, an approach to the law that, amongst other things, sees law and legal processes as having the potential to promote healing.[8] Here healing is directed at addressing underlying issues related to offending — such as substance abuse, mental health issues, lifestyle issues and family violence. In this form of judging, rather than coercing participants into treatment and programs thought by the judicial officers and other specialists to be best for them, the judicial officer (and case team, where applicable) collaborates with participants to empower them to engage in the rehabilitation process suitable for their individual needs and support them through the process while they are on the court program.

Although there may be an increased interpersonal focus in solution-focused judging, the function remains that of judging and the boundaries of judging must be respected if the integrity of the interpersonal dimension of judging is to be maintained. This is of course the case in other court contexts where particular interpersonal aspects of judging are promoted through the use of suitable communication and other therapeutic skills.

This paper does not assert that judicial officers have ignored the interpersonal dimension of judging. There have been and are judicial officers with a keen sense of the importance of interacting sensitively to people in court and who are adept

4 Ibid.

5 Ibid 1–12.

6 Bruce Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1055.

7 Ibid.

8 See, eg, Winick and Wexler, above n 1; David B Wexler and Bruce J Winick (eds), *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991); David Wexler and Bruce Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996); David B Wexler, *International Network on Therapeutic Jurisprudence* (27 July 2010) International Network on Therapeutic Jurisprudence <http://www.law.arizona.edu/depts/upr-intj>; Australasian Institute of Judicial Administration, *Australasian Therapeutic Jurisprudence Clearinghouse* (2011) <http://www.aija.org.au>.

at applying interpersonal and other therapeutic skills in judging. Further, studies of the views of judicial officers as to qualities requisite for judging list some key interpersonal skills.[9] What has been lacking has been a holistic approach: the consistent and systematic application of this knowledge and these skills and recognition of them as essential components of judging in any context. The developments highlighted above and discussed further below illustrate how progress has been made towards rectifying this deficiency. Yet there remain cases where judicial officers are rude to litigants,[10] or blatantly assume the position of one party during a trial, oblivious to or not caring about the effect on the party concerned.[11] A systematic approach to incorporating interpersonal skills as an essential component in judging may reduce the incidence of such situations and further the attainment of justice system goals. It may also foster research to promote the development of this area of judging and promote judicial education in these areas.

II THE INTERPERSONAL DIMENSION OF JUDGING

This section of the article contends that until recently, judging has not systematically explored and applied an important aspect of its function — its interpersonal aspect — and the skills needed if it is to be properly conducted. The focus has been on the technical and legal aspects of judging and the role of interpersonal skills in promoting judging and justice system goals has not been given sufficient emphasis. As a result, there has been a largely unrealised potential of judging. However, the emergence of new forms of judging in the last twenty years has cast much-needed light on the interpersonal dimension of judging.

A *The Nature of the Judicial Function*

Judicial officers, when referring to the nature and purpose of their work, commonly refer to the judicial oath. According to a former judge of the High Court of Australia, John Toohey, the judicial oath can be traced to a statute passed during the reign of Edward III.[12] The judicial oath taken by judges and magistrates in Australia commonly includes a commitment to 'do right to all manner of people according to the law, without fear or favour, affection or ill-

9 Kathy Mack and Sharyn Roach Anleu, 'The National Survey of Australian Judges: An Overview of Findings' (2008) 18 *Journal of Judicial Administration* 5, 16; Kathy Mack and Sharyn Roach Anleu, 'Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices' (2011) 37(1) *Monash University Law Review* 187.

10 See, eg, *Barmettler v Greer & Timms* [2007] QCA 170.

11 See, eg, *Wragg v Bond* [2009] WASC 383.

12 John Toohey, '"Without Fear or Favour, Affection or Ill-Will": The Role of Courts in the Community' (1999) 28(1) *University of Western Australia Law Review* 1, 2.

will'.[13] The commitment to 'do right', is commonly thought of as an obligation to do justice to the parties coming before the court. But it does not give the judicial officer unconstrained power to act in any way he or she deems necessary to do justice to the parties. The judicial officer must act within the confines of the *Australian Constitution*, statute law and precedent.[14]

A traditional view is that the judicial function is directed towards the quelling of disputes.[15] This view is heavily influenced by the concept of the adversarial trial. Chief Justice French has proposed a 'simple model of judicial decision-making'[16] as follows:

> (i) The judge identifies a rule of law applicable to a class of fact situation.
>
> (ii) The judge determines the facts of the case.
>
> (iii) The judge applies the rule of law to the facts of the case to yield a conclusion in terms of the rights and liabilities of parties before the Court.[17]

In a recent article on the topic, Chief Justice French added: 'Awarding remedies where necessary to give effect to the rights or liabilities determined'.[18]

An essential part of this concept of the judicial function has been the passive role of the judicial officer in an adversarial process:

> The function of courts, at any level, is to resolve issues on the available evidence. The issues in a case are chosen by the parties, within the limits of the relevant substantive and procedural law. Not only do the parties, by their pleadings and their conduct of the case, define the matter or matters for decision; they also in large part control, by the evidence they choose to present, the factual information upon which the decision will be made. The adversarial process inhibits judicial creativity. Courts are not Law Reform Commissions. They do not select the questions they will decide; and in general they do not gather information extraneous to the evidence put before them. Courts do not have agendas. Generally speaking, judges must resolve the cases that come to them. They do not select the issues

13 For example, this phrase appears in the same or a similar form in the judicial oaths prescribed in the following statutes: *Supreme Court Act 1933* (ACT) sch 1; *High Court of Australia Act 1979* (Cth) sch; *Oaths Act 1900* (NSW) sch 4; *Supreme Court Act* (NT) sch 1; *Oaths Act 1867* (Qld) s 3; *Oaths Act 1936* (SA) s 11; *Supreme Court Act 1935* (WA) sch 2; *Magistrates Court Act 2004* (WA) sch 3. The Supreme Court of Victoria refers to the oath on its website: Supreme Court of Victoria, *Judges and Associate Judges* (27 July 2011) <http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/About+the+Court/Court+Structure/Judges>.

14 Toohey, above n 12, 4.

15 See, eg, Chief Justice Robert French, 'Judicial Activism — The Boundaries of the Judicial Role' (Paper presented at the Lawasia Conference, Ho Chi Minh City, 10 November 2009).

16 Ibid 2.

17 Ibid.

18 Chief Justice Robert French, 'Executive Toys: Judges and Non-Judicial Functions' (2009) 19 *Journal of Judicial Administration* 5, 13.

> they decide; and they cannot avoid deciding issues that are necessary for decision.[19]

Yet even within this view of judging there is an acknowledgement that not all that a judicial officer properly does within the judicial function involves the quelling of disputes. For example, in Australia, the *Marriage Act 1961* (Cth) s 12 empowers a person under marriageable age (18 years) but above the age of 16 years, to apply to a judge or magistrate for permission to marry on the grounds of exceptional circumstances. The *parens patriae* jurisdiction of supreme courts over children and the power of judges to make orders relating to the management of trusts are other examples.

B *Interpersonal Skills and the Changing Nature of the Judicial Function*

What properly comes within the judicial function is not fixed. Murray Gleeson noted that:

> Changes, sometimes large changes, occur over time, and as between societies that regard themselves as in the same tradition there are striking differences. Defining the field of proper judicial activity is a matter of public policy that is always under review.[20]

There have been significant changes in judicial functions in recent years. Two examples are particularly striking: case management by judicial officers and the introduction of new forms of judging in problem-solving courts such as drug courts, family violence courts, mental health courts, community courts and Indigenous sentencing courts.

The Hon Acting Justice Ronald Sackville noted that case management 'evolved in response to the pressures created by expanding judicial workloads and to the realisation that the culture and attitudes of lawyers and litigants required change if delays, in particular, were to be substantially reduced'.[21] It is now an accepted and pervasive practice of courts.[22] Rather than simply conducting trials and hearing certain interlocutory applications, judicial officers are actively involved in managing cases through to trial, giving directions concerning such matters as the filing of documents, isolation of the issues in dispute, the use of ADR processes, the time allowed for parties in presenting their cases and the use of expert evidence. The aim is to not simply resolve disputes justly but to promote their resolution expeditiously and through the cost-effective use of court

19 Murray Gleeson, 'The Role of a Judge in a Representative Democracy' (Speech delivered to the Judiciary of the Commonwealth of the Bahamas, Commonwealth of the Bahamas, 4 January 2008) 12–13 <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_4jan08.pdf>.

20 Ibid 5.

21 Acting Justice Ronald Sackville, 'From Access to Justice to Managing Justice: The Transformation of the Judicial Role' (2002) 12 *Journal of Judicial Administration* 5, 9.

22 See especially Acting Justice Ronald Sackville, 'The Future of Case Management in Litigation' (2009) 18 *Journal of Judicial Administration* 211.

resources. The judicial oath to do right to people coming before a court thus extends to matters of economy and efficiency.

Problem-solving courts are directed not only to the resolution of litigants' problems as defined by law — such as criminal conduct and its effects — but also to the resolution of underlying issues relating to the problem. Hence, drug courts assist those with substance abuse problems, mental health courts assist those with mental health issues and family violence courts are directed at the protection and support of victims of family violence and in many cases, the promotion of the rehabilitation of the perpetrator. The judicial officer, through the use of a therapeutic jurisprudence approach to judging, promotes the attainment of these objectives.[23]

The aims of Indigenous sentencing courts include: providing a more culturally appropriate means of dealing with Indigenous offenders, promoting decreased recidivism of Indigenous offenders, promoting greater Indigenous participation in decision-making in the justice system and improved relations between the court and the Indigenous community, and between the wider community and the Indigenous community.[24] In circle sentencing courts and Koori courts, the judicial officer assumes a facilitative role, promoting respectful dialogue between the participants concerning what happened regarding the offending, its effects, what must be done by the offender to make things right and the appropriate sentencing disposition.[25]

Particularly when considered in light of the traditional view of judging, judicial commentary, judicial training and judging have largely focused on the purely legal aspects of the judicial function — how evidence is to be taken, how a court deals with differences between witnesses on the facts, the roles of judge, jury and counsel, what legal processes are to be used, how the law is to be determined and applied to the facts, what the proper approach in sentencing is, how judgements are to be written and the ethical duties and limits of the judicial role. There is also a sense that the processes that have been developed to perform these functions have focused on their technical aspects — purpose, efficiency, the needs of the professionals involved in performing their roles, as defined by law, and the effective administration of the court system.

The aspect of judging as a human interaction, one that involves an authority figure appointed on behalf of the community, interacting with litigants, counsel, witnesses, juries and others in and outside court and how that can be used to promote justice system goals, has only been explored in a very limited way until recently. This aspect of judging had mainly been concerned with how judicial officers control courtrooms and the ethical limits of judicial interaction. There has also been the suggestion that judicial officers should protect witnesses

23 King, above n 3.

24 Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29(3) *Sydney Law Review* 415, 432–5.

25 For a more detailed discussion of the judicial process in these courts, see also Michael S King, 'Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts' (2010) 19 *Journal of Judicial Administration* 133.

and litigants from unfair tactics.[26] However, especially in relation to child complainants in sexual offence cases, that form of judicial intervention has been sparingly used.

That judicial interaction skills could be actively used to promote justice system goals, is a matter that until recently has received little attention. While following ethical duties and having an orderly court room are important to promoting justice system goals they are mainly concerned with avoiding a negative — such as judicial officers being seen to be biased or lacking integrity — rather than value adding by using particular skills.

An integral aspect of what the law sees as important roles of legal actors in court — judges and counsel and their functions in relation to each other and in relation to lay participants such as parties and witnesses — is the fact that they are human interactions. Indeed, the courtroom is a rich environment of human interaction.[27] The background of the participants, their attitudes, expectations, psychological issues, interest in the proceedings, modes as well as content of communication, body language and how they interact, all contribute to the courtroom dynamic. The judicial officer is at the centre of it.

Being sensitive to the different aspects of this dynamic is an important part of the judicial function. Procedural justice research and therapeutic jurisprudence have demonstrated how differing aspects of this dynamic are important to the judicial function.[28] There is increasing recognition in the judiciary in Australia as well as internationally of the importance of procedural justice and the implications of procedural justice research for judging. In a White Paper that they prepared for the American Judges Association, Judges Burke and Leben emphasised the significance of procedural justice:

> Judges can alleviate much of the public dissatisfaction with the judicial branch by paying critical attention to the key elements of procedural fairness: voice, neutrality, respectful treatment, and engendering trust in authorities. Judges must be aware of the dissonance that exists between how they view the legal process and how the public before them views it. While judges should definitely continue to pay attention to creating fair outcomes, they should also tailor their actions, language, and responses to the public's expectations of procedural fairness. By doing so, these judges will establish themselves as legitimate authorities; substantial research suggests that increased compliance with court orders and decreased recidivism by criminal offenders will result. Procedural fairness also will

26 Toohey, above n 12, 11.

27 Michael S King, 'Therapeutic Jurisprudence, Child Complainants and the Concept of a Fair Trial' (2008) 32(5) *Criminal Law Journal* 303.

28 See, eg, Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006); Tom R Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' (1992–93) 46 *SMU Law Review* 433; Winick and Wexler, above n 1; King, above n 3; King, above n 25.

> lessen the difference in how minority populations perceive and react to the courts.[29]

'Voice' involves providing an environment where the litigant can present their case and have it considered by the judicial officer. 'Respectful treatment' involves courtesy in court and a demonstration that the litigant's case is being given due consideration. Judge Warren points out that the procedural justice element of trust in authorities — including courts and judicial officers — is not concerned with the judicial officers' competence, but with their character: '"trustworthiness" is based upon a perception of the judge's motives, *ie*, whether the judge truly cares about the litigant (demonstrates "an ethic of care") and is seeking to do right by the litigant.'[30] The proper use of interpersonal skills by the judicial officer in conducting the court process is vital to promoting 'voice', 'respectful treatment' and litigant 'trust' in the judge.

Procedural justice is important as it is intimately related to how people view authorities and whether they respect their decisions. Procedural justice research has found that parties are more likely to respect courts and their orders if they are allowed to tell their story to an attentive tribunal that takes into account what they say in making a determination, treats them with respect and engenders trust.[31] A US study found that perpetrators of intimate partner violence who were accorded procedural justice by police officers committed fewer new offences of intimate partner violence than those who were not accorded procedural justice.[32]

The use of therapeutic jurisprudence principles in problem-solving courts has illustrated how the method of judging can help promote positive behavioural change in participants.[33] There has been an unfortunate tendency to identify therapeutic jurisprudence-based judging with problem-solving courts. However, it is a mistake to so limit it. Its scope is far broader. For example, Wexler has described how therapeutic principles can be applied to judging in mainstream lists in criminal cases.[34]

Nevertheless, problem-solving courts have highlighted important aspects of this broader view of the judicial function: the fact that people with legal problems often come to court with underlying issues that need to be addressed if the court system is to promote the resolution of the legal problems. Properly done, the process of judging can assist by supporting the processes of positive behavioural change. Thus, taking a solution-focused approach to judging in the courts applying therapeutic jurisprudence involves practices that support motivation

29 Kevin Burke and Steve Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction' (2007) 44 (1–2) *Court Review: The Journal of the American Judges Association* 4, 4.

30 Roger Warren, 'Public Trust and Procedural Justice' (2000) 37(3) *Court Review: The Journal of the American Judges Association* 12, 14.

31 Tyler, *Why People Obey the Law*, above n 28; Tyler, 'The Psychological Consequences', above n 28.

32 Raymond Paternoster et al, 'Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault' (1997) 31(1) *Law & Society Review* 163.

33 See, eg, Winick and Wexler, above n 1.

34 David Wexler, 'Robes and Rehabilitation: How Judges Can Help Offenders "Make Good"' (2001) 38(1) *Court Review: The Journal of the American Judges Association* 18.

and self-efficacy — a person's confidence in their ability to initiate and maintain change — such as by offering choice as to whether to participate in a program, allowing participants to set goals and strategies for their time in court programs, involving them in problem-solving and providing positive reinforcement upon the attainment of goals, such as remaining drug-free.[35]

This approach to judging requires judicial officers to have an understanding of the steps of behavioural change and the processes that uphold it, developed active listening and other communication skills, sensitivity to their own emotions, the emotions of others and the ability to manage them and to promote inclusiveness in problem-solving and decision-making. Without this knowledge and these skills, there is a risk that rather than upholding the process of behavioural change, the judging process will inhibit it.

There are other examples of contemporary developments in judging where the interpersonal skills of the judicial officer are seen to be important. Mediation is increasingly used by courts in an endeavour to promote a resolution of cases by the parties without the need for a trial, particularly in civil cases. While mediation of court cases is commonly performed by a court registrar or a private mediator, in some courts and in some situations, judges are acting as mediators. The question of whether judicial officers should act as mediators is controversial.[36] However, one of the outcomes of the debate on this issue is a sharp focus on the nature of adjudication and mediation and the interpersonal skills needed for each function.

An adjudicative role in an adversarial system requires the judicial officer to be uninvolved and to allow the opposing parties to present their cases and to attempt to discredit the case of an opposing party, to listen to the evidence, evaluate it, make factual findings, determine the applicable law, apply the relevant law to the ascertained facts and reach a judgment. On the other hand, when a judicial officer acts as mediator — particularly in facilitative forms of mediation — they seek to assist the parties to move from an adversarial mode into a conversational mode.[37] The judicial officer endeavours to facilitate a dialogue between the parties, to promote the parties' ability to reach a decision for themselves.[38] This requires the skills necessary to facilitate the process, such as active listening skills, the ability to promote the parties telling their story in a respectful context, encourage discussion and party respect for the position of the other, detect and manage the

35 Winick and Wexler, above n 1; King, above n 3.

36 See, eg, Justice Michael Moore, 'Judges as Mediators: A Chapter III Prohibition or Accommodation?' (2003) 14 *Australasian Dispute Resolution Journal* 188; Laurence Street, 'Note on the Detachment of Judges to Mediation' (2006) 17 *Australasian Dispute Resolution Journal* 188; David Spencer, 'Judicial Mediators: Is the Time Right?' (2006) 17 *Australasian Dispute Resolution Journal* 130; Louise Otis and Eric H Reiter, 'Mediation by Judges: A New Phenomenon in the Transformation of Justice' (2006) 6(3) *Pepperdine Dispute Resolution Law Journal* 351; Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009) 226–7; Chief Justice Marilyn Warren, 'Should Judges be Mediators?' (2010) 21 *Australasian Dispute Resolution Journal* 77; Tania Sourdin, 'Five Reasons Why Judges Should Conduct Settlement Conferences' (2011) 37(1) *Monash University Law Review* 145.

37 Otis and Reiter, above n 36, 383.

38 Hugh F Landerkin and Andrew J Pirie, 'What's the Issue? Judicial Dispute Resolution in Canada' (2004) 22(1) *Law in Context* 25, 56.

emotions of the parties and, where necessary, the ability to bring parties back on track in a respectful manner.

Even though they may not assume the role of mediator, it is common for judicial officers to try to promote negotiations between the parties to see if a settlement can be reached.[39] This may involve discussions at court on the day of trial or at an earlier stage in the litigation process. Here also the judicial officer may assume a facilitative role, seeking to promote party dialogue and accommodation. The interpersonal skills referred to in the preceding paragraph are essential if the function is to be performed sensitively, successfully and without the parties feeling coerced into agreeing to something they do not want and/or have little commitment to implement.

C *Interpersonal Skills in Judging in Mainstream Courts*

Awareness of the intricacies of the human dynamic is not only important for wellbeing related goals, less conflictual methods of dispute resolution and public respect for the justice system. It is also a necessity if the justice system is to perform its technical aspects, such as taking and properly considering evidence. The situation of children in court and Aboriginal people in the justice system, provide good examples of where interpersonal judicial skills are vital to judges and magistrates being able to do right to those coming before a court.

There is evidence that the court system is increasingly recognising the interpersonal dynamics of courtrooms as being important to protecting participant wellbeing and to promoting justice system goals. The Australasian Institute of Judicial Administration recently published a Bench Book to assist judicial officers in adopting a more child-friendly approach to taking evidence in trials involving child complainants.[40] The Bench Book informs judicial officers of developmental factors affecting how children give and how courts should take evidence; the effects of child abuse on victims; processes that can promote the integrity of evidence taking; and dispels myths concerning children and their ability to give reliable evidence about traumatic events. It has been argued that prior to the introduction of more child-friendly practices, legal processes concerning taking and assessing evidence from children were based on myths and inhibited the court's ability to take reliable evidence and to treat it with the respect it deserved.[41]

Questioning — particularly cross-examination — used processes that were insensitive to children's ability to understand and answer questions — such as using complex questions, language children could not understand, repetitive questions, emotionally overbearing behaviour and questioning that was prolonged

39 Tania Sourdin, 'Facilitative Judging' (2004) 22(1) *Law in Context* 64.

40 Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2009).

41 King, above n 27.

and/or belittling to children.[42] It is questionable whether these processes could have resulted in the taking of reliable evidence from children. Even if reliable evidence could have been taken from children in such circumstances, myths entertained by judicial officers, counsel and jurors often meant that their evidence was misinterpreted.[43] These myths included children fantasising about sexual matters, children lying more than adults do and children's memories of traumatic events fading over time. These were often the content of counsels' addresses and judges' charges to juries.

The Royal Commission into Aboriginal deaths in custody highlighted the problems many Aboriginal people have had in traversing the justice system, with its use of language and processes foreign to their experience and inappropriate to meet their needs.[44] It is questionable whether a court that is ignorant of the special needs of people coming before it can really listen to them, take their position into account in its determination and thus render justice according to law. To address these concerns, the Australasian Institute of Judicial Administration published an Aboriginal Bench Book for Western Australian courts, to inform the judiciary of Aboriginal cultural issues and how they affect methods of communication, particularly those used in court.[45] Indigenous sentencing courts have been introduced for the purpose of promoting more culturally appropriate processes for Aboriginal people.

Similar concerns have been raised as to whether other people with unique cultural backgrounds or special needs have been treated appropriately by the courts, due to judicial officers' lack of knowledge and understanding which affected their ability to understand these people's situations and how to communicate effectively with them. This has led to Australian courts and other jurisdictions developing equal treatment Bench Books to address these needs.[46]

The premise behind the use of equal treatment Bench Books is the overriding obligation of judges and magistrates to adhere to the judicial oath to do right to all manner of people.[47] These Bench Books acknowledge the diversity of people coming before the courts — in terms of their age and their linguistic, cultural, religious, gender and physiological (such as hearing and visual impairments) attributes — and the need for judicial officers to have the requisite knowledge concerning the effect of these differences in relation to the legal problem and their ability to participate in the court system. The Bench Books seek to provide this

42 Ibid.

43 Ibid.

44 *Royal Commission Into Aboriginal Deaths in Custody* (29 April 1998) Indigenous Law Resources — Reconciliation and Social Justice Library <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>.

45 Stephanie Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts — (AIJA Model Indigenous Benchbook Project)* (Australasian Institute of Judicial Administration, 2008).

46 See, eg, Judicial Studies Board, *Equal Treatment Benchbook* (2010); Supreme Court of Queensland, *Equal Treatment Bench Book* (Supreme Court of Queensland Library, 2005); Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2006); Department of the Attorney-General Western Australia, *Equality before the Law Bench Book* (2009).

47 Chief Justice Wayne Martin, 'Foreword' in Department of the Attorney-General Western Australia, *Equality before the Law Bench Book* (2009) v.

knowledge and to suggest processes judicial officers can use in appropriate cases. Without this knowledge and without these skills, judicial officers may not be able to do right in relation to particular court users, as they may not be sensitive to the subtleties of a situation brought about by differences between the judicial officer and those with whom the judicial officer interacts in court.[48]

Acknowledgement and active and appropriate responses to differences are regarded not as creating differential treatment but as promoting equality before the law. As the former New South Wales Chief Justice, James Spigelman commented: 'In this respect, the operation of the legal system applies the traditional principle of Aristotelian ethics — that injustice inheres as much in treating unequals the same, as it does in treating equals differently.'[49]

The technical aspect of operating the court so as to do right to all those coming before it, emphasises the importance of the way in which judicial officers interact with court users and the positive results that can come from appropriate means of interaction. Queensland Chief Justice de Jersey observed:

> That commitment to the law as the constraining, indeed controlling, consideration must not neuter the Judge or Magistrate out of a lively perception of the importance of attendant circumstances, like presentation in the courtroom, the demeanour of the presiding officer, treatment of other participants — parties, witnesses, legal representatives, court staff, and the play of basic considerations like respect, dignity, and even — dare I suggest — friendliness and cordiality.[50]

Therapeutic approaches to judging, greater sensitivity to cultural issues, increased awareness of substance abuse, family violence and mental health issues and more appropriate and sensitive approaches to children giving evidence are all discrete developments in judging practice. All of these developments are examples of a greater awareness of the personal interaction involved in judging. However, there is a risk in viewing these developments in isolation — that the human, interactional aspects of judging in other contexts may be ignored.

It has been argued elsewhere that there should be an ethic of care in judging:

> Judicial officers should be mindful of the effects of their conduct on those involved in or affected by the court proceedings. Where possible under the law, they should endeavour to use processes that minimise negative effects on wellbeing and that promote positive effects on wellbeing that are related to court functions such as respect for the law and the comprehensive resolution of the legal problems involved in court proceedings.[51]

48 Judicial Studies Board, above n 46, 1–2; Chief Justice Paul de Jersey, 'Foreword' in Supreme Court of Queensland, *Equal Treatment Bench Book* (Supreme Court of Queensland Library, 2005) xi.

49 James Spigelman, 'Foreword' in Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2006) iii.

50 Chief Justice Paul de Jersey, above n 48, xi.

51 King, above n 25, 152.

This ethic of care embraces the content of therapeutic jurisprudence. This is an important component of the approach to judging that this paper proposes. However, there is another dimension of the judicial knowledge of the nature of interaction within the court that is important — awareness of when the fact-finding and legal problem resolution processes may be promoted or compromised due to the approach to judging. We have already considered the situation of children and Aboriginal people in the justice system as examples. While the therapeutic and functional reasons for the use of appropriate interpersonal skills in judging will often overlap, there may be cases where they are distinct. For example, there may be situations where a party says something in court the full import of which is not recognised by the judicial officer and the party does not realise that this is the case — as may be the case with new migrants. Still, even in that situation an opportunity for the court to have a therapeutic effect by acknowledging cultural issues may have been lost.

Achieving the potential of judging requires a more systematic approach to this human, interactional element. It requires judicial officers to be aware of the interpersonal dynamics of courts and judging in diverse contexts. It also requires them to have good communication skills and other skills in the application of therapeutic principles. This knowledge and these skills are particularly important for judicial officers taking a solution-focused approach to judging. But arguably all judicial officers should have training in the interpersonal aspects of judging.

III THE INTERPERSONAL DIMENSION AND THE LIMITS OF JUDGING

In considering the application of the interpersonal dimension of judging in whatever context, it needs to be borne in mind that it must be undertaken within the contours of constitutional, statutory and common law provisions and be subject to ethical principles. While the rewards of pursuing the interpersonal in judging, in terms of promoting the integrity and purpose of the court system, are significant, there are also risks involved if the boundaries of the judicial role or of the application of therapeutic, interpersonal principles are not preserved.

This article is not concerned with arguments regarding the constitutionality of problem-solving courts and whether these courts and the exercise of therapeutic jurisprudence take judicial officers beyond the judicial role. It has been argued elsewhere that they are consistent with the judicial role.[52] This section of the paper stresses that there are legitimate constraints on the judicial emphasis on the interpersonal aspect of the role and the exercise of interpersonal skills in pursuing interpersonal values and that these constraints, in part, help preserve the effectiveness of both the technical and interpersonal aspects of the judging role. The practice of solution-focused judging and the operation of problem-solving

52 King et al, above n 36, ch 14; King, above n 25.

courts provide useful examples of where possible challenges can occur and the potential consequences where an appropriate approach is not taken.

Taking a solution-focused approach to judging provides the judicial officer with the possibility of facilitating a more comprehensive resolution of the legal problem. In criminal cases, instead of the court being the revolving door where defendants with underlying problems, such as substance abuse, come through the court system time and time again with the same problems and no resolution, the court assumes a role in helping to stop the revolving door.

The judicial officer uses techniques that help to promote the healing process. But that does not make the judicial officer an expert in addressing underlying issues. It does not entitle the judicial officer to interfere in the activities of treatment and support agencies or to direct the form of counselling or support services to be used.[53] These are matters beyond the expertise of the judicial officer and are best left to the appropriate treatment agency and the relevant participant to discuss and decide. Arguably, in such cases the judicial officer is at risk of promoting an anti-therapeutic effect — the resentment of the participant and agency of the judicial officer due to the interference —and of venturing beyond the judicial, supervisory role and into the province of the delivery of services.[54]

In the context of a problem-solving court, the delivery of services is either an executive or community function, or a mixture of the two. Moreover, a judicial officer over-stepping the mark arguably misunderstands the source of the therapeutic effect that he or she may have. It is suggested that it is the judicial officer, a person in a position of authority appointed on behalf of the community, properly performing their role and yet acting with concern and respect for those coming before them, that promotes a therapeutic effect and participant compliance with court programs and orders.

Further, the therapeutic role of judicial officers is not a licence for the implementation of purely personal views as to what is therapeutic and what is not in relation to judging. A courtroom should not be a laboratory for personal experimentation with judicial techniques. Therapeutic techniques of judging should have a sound theoretical basis and have some research support. It is conceded that therapeutic approaches to judging are a new phenomenon, that there is little or no guidance from precedent or statute and very little research on effective judging techniques.[55] Nevertheless, therapeutic jurisprudence literature suggests that therapeutic judging techniques draw on theory and research findings from the behavioural sciences and apply it to the legal context. There is a growing body of literature that provides guidance to judicial officers as to properly grounded judicial techniques.[56]

There are limits to what a judicial officer can do in relation to process. The judge or magistrate may be aware of the need for more sensitive processes but be or feel

53 King, above n 27.

54 King, above n 25.

55 King, above n 3.

56 See, eg, Winick and Wexler, above n 1; ibid.

bound by precedent or statute in terms of what he or she may do. For example, judicial officers have been reluctant to interfere with the robust cross-examination of child witnesses, even though grounds to do so may have been made out under statute on the basis of inappropriate questioning, lest the judicial officers be seen to be preventing the defendant from having a fair trial.[57]

A further example of constraint on the degree to which a judicial officer can take a more sensitive approach in addressing interpersonal issues is where there has been a significant delay between an alleged sexual assault and the complainant reporting the matter. The High Court has said that in such circumstances, judges should direct juries that 'as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy'.[58] Several of the judges in the case were influenced by misconceptions about children's alleged propensity to fantasise about sexual matters and supposed deficiencies in memory.[59]

The underlying assumptions concerning children, complainants in sexual assault cases generally and the effect of *Longman* warnings — a not too subtle hint from the judge to acquit the defendant — came under trenchant criticism from law reform commissions, the wider community and from some members of the judiciary.[60] The principle in *Longman* has since been restricted to cover the situation where the accused has suffered some demonstrable disadvantage, rather than to assert delay as a ground in itself for such a warning.[61] It is noteworthy that *Longman* warnings have been abolished in some jurisdictions.[62]

In contested trials in most contexts the judicial officer is the problem-solver. The judge or magistrate determines the relevant facts and law and then applies the law to the facts to reach a judgment that can be enforced by coercive means. But to strictly apply such an approach where the aim is to promote rehabilitation or other therapeutic law-related goals may well have an anti-therapeutic effect. Thus a judicial officer whose main strategy in a problem-solving court is the use of coercion, may well promote an anti-therapeutic effect, according to therapeutic jurisprudence.[63] Such a judicial officer, who forms his or her own view of what is right for the participant and forces that on to the participant, may well encounter resistance to change, thus frustrating the therapeutic goals of the court.

57 King, above n 27.

58 *Longman v The Queen* (1989) 168 CLR 79, 91 ('*Longman*').

59 Ibid 101 (Deane J), 107–9 (McHugh J).

60 King, above n 27.

61 See, eg, *Tully v The Queen* (2006) 230 CLR 234, 281.

62 See, eg, *Evidence Act 2008* (Vic) s 165B(4); *Evidence Act 1995* (NSW) s 165B(4); *Evidence Act 2001* (Tas) s 165B(4).

63 Bruce J Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37(6) *Villanova Law Review* 1705; Winick, above n 6.

While judging requires particular interpersonal skills, it also requires that those skills be exercised within legal and ethical boundaries. By not attending to legal and ethical principles, the judicial officer risks compromising therapeutic principles as well. The legal and ethical dimensions of judging need not be in conflict with its interpersonal and therapeutic dimensions, in fact, in proper circumstances, they can enhance their effectiveness.

IV CONCLUSION

Judging is directed at achieving a number of justice system goals, including the resolution of disputes between parties before a court, the promotion of community trust in the justice system and, in some cases, the promotion of positive behavioural change needed to prevent the recurrence of legal problems. The exercise of appropriate interpersonal skills in judging is vital for the attainment of these goals.

The interpersonal dimension of judging has received particular note through the exercise of facilitative, change-oriented and inclusive judging practices in problem-solving courts and in the use of therapeutic jurisprudence in other contexts. It has also been exemplified in the acknowledgment within the judiciary of the necessity to be more aware of and sensitive to the needs of individuals from diverse backgrounds, who come before the court in various capacities.

If the interpersonal aspect of judging is to be developed further, there needs to be an integrated approach in terms of its study, research and judicial training. The risk in taking a fragmented approach is that the interpersonal may be seen to be an aspect of some forms of judging but not of all. The further development of this important aspect of judging offers the potential for a richer and more satisfying judicial role, in providing a more effective and therapeutic court process and a more user-friendly and supportive experience for those coming to court.