AN ARGUMENT FOR THERAPEUTIC JURISPRUDENCE IN AOTEAROA: A MAORI MENTAL HEALTH COURT UNDERPINNED BY PRINCIPLES OF TIKANGA AND THERAPEUTIC JURISPRUDENCE

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Whakataukī

Ma Te huruhuru, Ka rere Te manu
Adorn the bird with feather so it can fly

Mihimihi

Ko Ngāpuhi te iwi
Ko Te Hikutu te hapū
Ko Hokianga taku Tūrangawaewae
Ngā mihi mahana kia a koutou
Ko Jessica Aroha Hope Reid taku ingoa

The imperative for this paper comes from the fact that in modern day Aotearoa, the number-one health concern for Māori is mental health.1 Yet despite this fact, Māori are more likely to come into contact with mental health services through a justice doorway than a primary care point2. This essay will make the argument that it is time for a Māori Mental Health Court based on principles of Tikanga and therapeutic jurisprudence. This Māori Mental Health Court would use the principles of therapeutic jurisprudence to enhance the law’s therapeutic agency and promote the healing of individuals within the court process. This would open the door for a holistic incorporation and realisation of principles of Hauora Māori, Tikanga and Wairua within the court. Together, the complementary principles of Tikanga and therapeutic jurisprudence could be interwoven to underpin a Māori Mental Health Court which could bring Maori mental health back into balance.

MĀORI MENTAL HEALTH: THE NEED FOR A MAORI MENTAL HEALTH COURT

Māori are one of the most prominent groups in Aotearoa’s criminal justice and mental health system. Māori feature highly in the criminal justice system, where they have increasingly high rates of incarceration and a greater recidivism and offending rate than non- Māori.3 Māori also dominate the statistics in the mental health sector, where they manifest a higher level of mental illness than non-Māori, with one in two Māori experiencing at least one disorder in his or her lifetime, and are gravelly over-represented in forensic mental health services.4 However, the most telling statistics are those that show the close nexus between incarceration and mental illness; Māori are overrepresented in prisons5 and have a much

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4 Baxter at al, above n 2.
5 Morrison et al, above n 3.
higher prevalence of substance abuse and psychotic illness.\textsuperscript{6} One explanation for this is that the policy of deinstitutionalisation has led to higher numbers of people with mental illness living in the community.\textsuperscript{7} Many of these people cannot or refuse to maintain their treatments and, left unchecked, this can lead to behaviour that the justice system regards as ‘criminal’, such as urinating in public or petty theft.\textsuperscript{8} Many commentators have referred to this process as the ‘criminalisation of the mentally ill’\textsuperscript{9} and for Māori this can be disproportionately exacerbated by the stress of remand, court appearances and possible sentencing, all of which can lead to further deterioration.\textsuperscript{10} This raises serious questions about whether imprisonment is the appropriate response for Māori individuals whose presence in the criminal justice system is more a result their mental illness than their criminality.

**The Importance of Wairua in Tikanga and Haurora Māori**

The reason that Māori are one of the most prominent groups in the legal and mental health systems may be because they are also one of the most vulnerable. It has been contended that the acute negative statistics for Māori indicate that something is out of balance in world of Māori mental health. One explanation for this lies in the fact that the Māori approach to hauora (health), mate Māori (sickness) and mate hinengaro (mental illness) is based on a holistic wellness model which is grounded in principles of Tikanga, the right way(s) of living for Māori.\textsuperscript{11} This means Māori understandings of mental health are inextricably linked to Te Ao Māori (the Māori world view) and the especially important Te Ao Wairua (the spiritual world).\textsuperscript{12} This connection is acknowledged in Mason Durie’s foundational model for Māori mental health, *Te Whare Tapa Wha*. In this model, hauora is represented as te whare, the house, in which the four sides of the house represent the four cornerstone elements of hauora. If one of the four dimensions is missing or damaged, then a person or a collective may become ‘unbalanced’ and unwell. The four dimensions are: te taha hinengaro (the health of the mind), te taha tinana (the health of the body), te taha whānau (the health of the family) and te taha wairua (the health of the spirit).

While Māori health and well-being is a multi-faceted experience, it is acknowledged that *wairua* is the most vital part of that experience.\textsuperscript{14} For Māori, the spiritual essence of a person is their *Mauri*, their life force. *Wairua* is not only a sense of spirituality; it determines them as an individual and as a collective, who and what they are, where they have come from and

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\textsuperscript{11} Note that many Maori acknowledge that terms such as tikanga, hauora and wairua can, like other tenets of Te Ao Māori, escape precise definition in the English language. While measures have been taken to adequately represent these concepts in this paper, a more in-depth exploration can be found in Hirini Moko Mead, *Tikanga Māori, Living by Maori Values* (2003).


\textsuperscript{14} Huakere Valentine, *Kia Ngawari te Awaata: The Relationship Between Wairua and Maori Well-being: A Psychological Perspective* (Doctoral thesis, Massey University, 2009).
where they are going. A traditional Māori analysis of physical manifestations of illness will unquestionably focus on wairua as a key element in determining whether damage there is a contributing factor to any illness. Despite the significance of wairua, as recognised by the Ministry of Health, for many Māori, modern health services lack recognition of this spiritual element of te taha wairua. Indeed, many Māori believe that these negative health statistics are directly linked to the loss of Māori spiritual beliefs and practices. This sentiment was captured well in the words of Māori tohunga, a prestigious Maori tohunga, who said:

The approach to life is governed by one’s perception of reality. Since ultimate reality for Māori is the reality of the spirit, the concept plays a major role in his approach to healing. While the Western world has begun to take on board the psychological aspects of its practice, in the Māori view, psycho-somatic medicine is still deficient in that the spiritual element is not taken into account.

This quote from Reverend Marsden reflects the fact that Western health professionals have historically struggled with the notion that spirituality could be studied empirically and scientifically as a factor in health. While this element is now becoming increasingly recognised, it is still limited to a Western perception of spirituality. This is seen in certain Western characterisations of tohunga as priests, rather than healers, and mākutu as a curse of bewitchment rather than a transgression on the ancient Tikanga of tapu. Thus this quote is also poignant in the fact that it expresses the sentiment that as Te Whare Tapa Wha reflects Te Ao Māori; the modern Western medical model that currently dominates mental health reflects and is perhaps limited by Te Ao Pakeha, the Western worldview.

THERAPEUTIC JURISPRUDENCE AND MENTAL HEALTH COURTS

The touchstone principle of therapeutic jurisprudence: Therapeutic agency

Therapeutic jurisprudence is, at its simplest, the study of the law’s healing potential. It is a movement which was pioneered by American mental health law academics, Professors Bruce Winnick and David Wexler, who observed that the operation of the law can have a direct psychological impact on the offenders, lawyers, judges and other actors it encounters and, importantly, that this impact can be either therapeutic or anti-therapeutic. Herein lies the challenge posed by therapeutic jurisprudence: to become aware of this effect and to seek to make and apply law in a therapeutic way to achieve a criminal justice system which helps

15 Ibid. 47.
17 Valentine, above n 14, 5.
18 See the sub-chapter on Wairua, Healing and the Tohunga Supression Act in ibid. 30.
people to receive and achieve mental health, while still respecting traditional judicial values such as justice and due process. In this way, the law can be given therapeutic agency to make a real change in the psychological and physical well-being of an individual.

**Manifesting therapeutic agency through Mental Health Courts**

Mental health courts are one of the newest and most effective means by which one of the key goals of therapeutic jurisprudence is realised; to interrupt the ‘revolving door’ cycle of repeat offending and incarceration. It has been contended by advocates of therapeutic jurisprudence that one of the newest and most effective ways to limit the entry of the mentally ill into the prison system and successfully treat them outside this environment is through the establishment of mental health courts. A mental health court would be in the position to link the offender to the critically needed medical treatment, apply the appropriate release conditions and incentivise compliance through the threat of imprisonment. In this way, the court could move toward effectively breaking the cycles of endemic psycho-social dysfunction that defies resolution in the conventional courts. The critics of the mental health courts have deemed this approach as ‘soft’ law in the sense that it is overly paternalistic, anti-intellectual and unsubstantiated. Yet, problem-solving courts, such as American drug courts, have been one of the most heavily examined and researched areas in mental health law. Thus, although therapeutic jurisprudence and its mental health courts are not without their criticisms, it must also be acknowledged that advocates of the discipline have made great efforts to address these concerns.

**THE INTERWEAVING OF Tikanga AND THERAPEUTIC JURISPRUDENCE**

The reasons that a Maori mental health court based on principles of Tikanga and therapeutic jurisprudence could be successful way forward for Māori mental health are three-fold. Firstly, a significant feature of therapeutic jurisprudence, which separates it from other disciplines, is that therapeutic jurisprudence is not intended to be an over-riding charter but rather a lens through which the law and legal processes can be examined. It does not assert that therapeutic concerns are more important than other factors in or consequences of the process. In this case, therapeutic jurisprudence would be concerned with the fact that often for Māori individuals with mental health concerns, the law has an anti-therapeutic effect through involvement in the justice system itself and that this is magnified by the Western

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22 See Winick and Wexler, above n 8.
28 Toki, above n 10.
view of ‘justice’ through which legal processes are carried out. Yet, importantly, therapeutic jurisprudence does not assert a substantive process by which this should be remedied. Thus Tikanga can be the ‘first law’ of the Māori Mental Health Court. This is important, as a Māori mental health court must be ‘for Māori by Māori’, meaning that the court must be authentically grounded in principles of Tikanga and a background of Te Ao Māori to avoid risking any further erosion of Māori understandings of hauora.

The second element which makes Tikanga and therapeutic jurisprudence ideal partners to found a mental health court is they are both principle-based, forward-looking and based on a relational ethic; thus they are able to co-exist well together in a legal system. Firstly, both Tikanga and therapeutic jurisprudence are principle- or value-based, rather than rule-based. For the therapeutic component, this means the focus is on enhancing the therapeutic nature of the process and using the tools of the social sciences to promote psychological and physical well-being. For the Tikanga component, this opens the door for the utilisation of key dispute resolution values such as utu, mana and tapu. Secondly, both therapeutic jurisprudence and Tikanga are forward-looking in that, unlike the traditional criminal justice system which is primarily penalty-oriented, they look for the ‘right way’ or the tika way, which ultimately results in healing for the participants and the community. Finally, both disciplines have a relational-based ethic. Tikanga holds collectivity to be of great importance to Māori and Te Ao Māori emphasising relational principles such as whanaungatanga. Therapeutic jurisprudence also promotes itself as a relational-based method, promoting an interdisciplinary approach and collaborating with communities and community-based government organisations.

Thirdly, Aotearoa has been embracing principles of therapeutic jurisprudence for many years but has simply not recognised it as therapeutic jurisprudence. This can be seen in the many problem-solving courts already at work in New Zealand. The most prominent cluster of therapeutic jurisprudence principles in action can be seen in the New Zealand Youth Court, which has long embraced the principles of restorative justice, a theoretical cousin to therapeutic jurisprudence. In the Youth Court, the mechanisms involved in the Family Group Conference, Intense Monitoring Group and Youth Drug Court all display the key elements of a therapeutic approach to justice. Therapeutic jurisprudence has also manifested itself in the adult criminal justice system, as seen in the Drug and Alcohol Courts, Family Violence Courts, Homeless Court and the ‘Restorative Justice Process’ utilised in the District Courts. Furthermore, and most importantly to this cause, therapeutic jurisprudence has already met principles of Tikanga and produced a successful problem-solving court, as seen...
in the Youth Rangatahi Courts, which utilise the location of a marae, processes such as pōwhiri, and attempts to reconnect the young person with their cultural roots through rituals such as mihimihi. This indicates a great deal of work has already been done toward the creation of a Maori mental health court and such momentum will be greatly beneficial in movements forward from this point.

CONCLUSION/POROPOROAKI

Ka pu te ruha, ka hao te rangatahi,
The old worn out net is cast aside, and the new net goes fishing.

This whakataukī was an important element in the formation of the Rangatahi Court and contributes to the court’s namesake. It reflects a notion that both Principal Judge Andrew Becroft and the founding judge of the Rangatahi courts, Judge Heemi Taumaunu, have emphasised: that the new problem-solving courts do not abandon the law, they are merely an attempt to become more culturally appropriate by bringing together the elements of the justice process and Te Ao Māori. It is clear from the research that the current ‘one size fits all’ model of health is deficient in that it does not respect Tikanga Māori, which is the basis of the holistic approach to hauora Māori, and the vital element of wairua which is critical to Māori mental health. This means Māori pass through the justice system again and again, without accessing the appropriate care and treatment they so desperately need to break this cycle. Therapeutic jurisprudence is a unique innovative framework which eschews this model for a framework which seeks to obtain and promote therapeutic legal processes which maximise the law’s potential to heal, rather than harm. These two strong cores of Tikanga and therapeutic jurisprudence could be interwoven to form a pathway forward for Māori mental health. If this is done and waiho wa te ma, the time and space, is given to allow this promising initiative to develop, what could be produced is something which is tika, right, meaningful and effective for Māori and for the future of Māori mental health.

38 Valentine, above n 14, 47.