

An Experiment in Therapeutic Jurisprudence: Reflections on the Residential Schools Compensation Process¹

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Debate has raged for many years as to whether the judicial process should be used to seek out therapeutic as well as just outcomes. The academics who dine out on this subject call it “therapeutic jurisprudence” although I have always suspected that it should be more properly called “jurisprudential therapy.” The nub of the debate is whether we can do justice and contribute to healing at the same time.

While the principles of therapeutic jurisprudence have been applied for years in mental health courts, drug courts and even domestic assault courts, there are real questions as to whether the very idea is dangerous, whether we risk a blurring of roles and sacrificing the pure pursuit of justice as well as just and correct judicial outcomes if we become therapists in black robes, not to mention the real concern that lawyers and judges are not qualified or trained to do therapeutic interventions.

I have always counted myself amongst the cynics on this topic, influenced by the lessons found in the 1967 decision of the U.S. Supreme Court *In Re Gault*.² Gault was a fifteen-year-old boy who was alleged to have made an off-colour prank call to a woman in the neighbourhood, something that would have resulted, at most, in a fifty dollar fine after a finding of guilt at an adult trial. But Arizona treated juveniles differently in those days on the theory that the process was fundamentally therapeutic, not punitive, and that no due process or even evidence was required. Without bothering to hold a trial or hear from the boy, a judge committed the boy to a juvenile institution where he could be held until age 21.

At the Supreme Court, the state argued that the therapeutic purpose of the proceedings vitiated the need for legal niceties, that they were doing it for his own good and that usual courtroom trappings like evidence, argument, the right to hear the accusations against him and the right to be heard, not to mention findings of fact, just got in the way. In rejecting this position, the Supreme Court pointed out that, “The history of American freedom is, in no small measure, the history of procedure.” And, memorably, that “Procedure is to law what ‘scientific method’ is to science.”

Justice William O. Douglas, never a man to mince words, summed up the court’s disdain for the Arizona law with the memorable comment that, “the condition of being a boy does not justify a kangaroo court.”

And so the *Gault* case has always been central to my thinking. And I have always worried that the a court embracing the principles of therapeutic jurisprudence risked using the power and authority vested in it in a paternalistic way that deprives people of the right to be heard and tramples the basic principles of informed consent to therapy.

My experience in the last six or seven years, however, has tempered my views on therapeutic jurisprudence. Not about the absolute necessity for due process, the centrality of the principle of the right to be heard, the dangers of paternalism or the need to limit the exercise of arbitrary state power but about the more fundamental question of whether the legal process can contribute to healing in some limited circumstances without sacrificing its process and function. The purpose of this paper is to discuss a model, a process, that I have been involved in over that period that, for me, has cast the debate in a different light. But first I must set the stage.

Maybe you are six or seven or eight. You come from a family of nomads living in the unforgiving north moving from place to place to hunt and fish. You love the life. It is the only life that you have ever known. Your parents are kind teachers but they have been crying for days but unwilling to share with you the source of their sorrow. Suddenly a contraption like you have never seen lands on the ice, and you are flown south.

After a trip of some hours you arrive at a very large building. You are spoken to gruffly in a language you don’t understand when you don’t respond to commands that have no meaning for you or you try to respond in the only language that you know; for speaking your language is a crime in this place, a crime punishable by slapping or strapping or even having your mouth washed out with caustic soap. Because the government policy that brought you here is based on making you like them.

Your teacher hits you on the head for not listening when, in reality, you just don’t understand. Maybe she hits you on your ears so hard that they pop. Maybe they get puss-ey or bloody. Maybe the other children call you “Stink Ear” and you began to realize that you no longer hear very well. And your teachers and keepers tell you that your parents are devil worshipers, heathens and that they will burn in hell. In fact, they show you a terrible, frightening poster of the hell fires that your family is destined to descend into and the

demons that will torment them. You are terrified. Perhaps your keepers call all the children down to the furnace room and make you watch as objects sacred to your people are thrust into the fire.

Maybe you get home for Christmas and summer holidays. Maybe you have no contact with your family for five or six or seven or eight years. Maybe they call you a savage or a dirty Indian. Because, of course, I am speaking of the experience of native children brought to Indian residential schools, a programme conceived and established to “take the Indian out of the child” as a government memo of the time so eloquently put it.

Because the picture that I just painted for you is not fiction nor did it happen in some far off land or all that many years ago. This is our history. It happened in our land. And it was perpetrated at the behest of our government on our behalf. There were dozens and dozens of such schools scattered across the land, from east to west, north to south. And the last one closed not in 1936 or 1966 but in 1996.

And many thousands of residential school survivors complain of things far worse than what I have described above. Thousands and thousands, in fact, have claimed that they suffered seriously injurious physical abuse or that they were subjected to sexual abuse either once or occasionally or horrifically over months or years.

Now don't get me wrong. I have known residential school survivors who met kind teachers and workers in their schools, who learned a great deal and were fed well. But most survivors whose stories I have read or heard report that they were terrorized for the year or two or ten that they were in residential school. Some folks report that their school was run by good people and was generally good with some occasional bad experiences. Some say that school was pure hell with nothing good about it. Most say that it was mostly hell with a little something good here or there.

Some speak of the friends they made while some speak lovingly of a staff member or two that went out of the way to be kind and loving, or the hockey that they played. Indeed, I have met some folks who worked at those schools and who tell me of how loving they were and how positive the experience was for them and the children they worked with. And I believe them with all of my heart. But I also believe the literature and research that tells us that many survivors report an experience that was beyond horrible and that thousands did not survive at all. Now, I have, myself, interviewed three or four hundred residential school survivors. I can tell you that absolutely nothing in my experience contradicts the literature.

But there is more. Over 34,000³ thousand people have come forward over the past several years alleging that they suffered sexual abuse or serious injurious physical abuse while at those schools. Keeping in mind that most of residential school survivors are long dead and many others are incapable or unwilling to participate in the process, it is safe to conclude that the true level of abuse is several times this number. This remains the case even if we make a substantial discount for false claims although only 6% of claims have been rejected to date at the adjudicative stage.

I am one of a cadre of adjudicators dealing with cases of alleged serious sexual or physical abuse in the former Indian residential school. It is those hearings that I have come to talk to you about today.

No one talked about abuse in residential schools, sexual or otherwise, for many decades. Those who had suffered abuse lived with the overwhelming guilt and shame and fear that almost always seems to haunt sexual abuse victims. There is good evidence to suggest that it was the residential school experience that brought on the devastation that plagues our First Nations Communities, the drug and alcohol abuse, the sexual abuse, the violence, the social lethargy, the despair, the suicides and so on and so on. But no one spoke of it. Not on a national level, not within community and not even within families and marriages.

And then an amazing thing happened. A native leader spoke out about the abuse that he had suffered. And then more spoke up. And then even more came forward. Perhaps it was the influence of the exposure of the abuse at the Mount Cashel orphanage in Newfoundland. Perhaps it was the growing flood of sexual abuse cases involving clergy. But whatever the reason, come forward they did.

And they were angry. There was no stopping them. They hired lawyers and they sued the federal government and the churches that ran the schools. Eventually a settlement was entered into between the former students, the government and the various churches.

That settlement established the Truth and Reconciliation Commission and the Aboriginal Healing Foundation. And it provided for modest payments based on years of attendance to every former student on the theory that the overwhelming majority of students experienced devastating attacks on their culture and their dignity. It also provided for an enhanced compensation process for those who alleged sexual abuse or serious physical abuse. An adjudicative mechanism, known as the Independent Assessment Process, often shortened to “IAP”, was established to handle those serious claims.

By this time, everyone was aware of the Mount Cashel experience where the press seemed to conclude later that money was handed out a bit too freely. This tainted that process and the memory of those who had really suffered serious abuse. And so, everyone, but especially the Assembly of First Nations and other native leaders, was anxious that this new process have a mechanism to carefully weigh evidence.

What was necessary was a careful process that would do as much as humanly possible to weed out false claims and claims that did not meet the criteria to be established while, at the same time, avoiding re-victimization of sometimes seriously damaged people. It was equally important to be sure that the government and the churches, indeed, the taxpayer, were protected from false claims and that the integrity of this process, and the legal system in general, be protected. Only legitimate Claims should be allowed and the level of compensation paid should be legally appropriate. It was clear, right off the bat, that this was going to be very challenging. Thousands of people had to be processed, had to be given the chance to tell their stories, in a manner that sorted the wheat from the chaff, respected the rights of all parties, and determined the truth while attempting not to harm the participants. A tall order, indeed.

No one expected the more than 34,000 claims that were eventually

filed. But we did expect 12,000. Far more than the courts of this country could handle. And so a special process was set up involving carefully chosen lawyers instead of judges doing the judging.

A special rulebook was agreed to that set out the procedures to be followed. It uses a sophisticated point system for various kinds of and severity of assaults as well as the levels of psychological and employment impact of those assaults and established a compensation grid based on points arrived at in order to mirror, as closely as possible, what the superior courts would award in similar circumstances. It was recognized that the seriousness of the abuse would not translate directly into a given level of harm, that no two people would be impacted in the same way from any given level and type of abuse. Alleged perpetrators are offered an opportunity to give evidence and parties are allowed to call any witnesses they choose.

Everyone recognized the vulnerability of many of the Claimants and no one wanted to re-victimize people but we needed to get to the truth and weed out false or overblown claims. And so it was decided that the lawyers representing the parties would not ask questions at the hearings. Claimants were encouraged to hire lawyers and the Government was to be represented by specially trained paralegals or crown counsel. Churches were free to attend but not required to do so. But all of these people sit mute at the hearing and only the adjudicator asks questions. Counsel have input through frequent caucuses over the course of the day where they have the opportunity to suggest questions and approaches and through the right of submissions at the end of the hearing. The hearings are closed to the public, although Claimants are free to bring as many supporters as they wish but most appear alone.

Long before every hearing, I receive hundreds and sometimes up to a thousand pages about the Claimant. I get a lifetime of health records, corrections records, employment and tax material, etc. And I receive another massive pile of paper about the school including architectural drawings and memos and materials and so on and so on, and there is extensive research as to the Claimant's attendance as well as the presence of alleged perpetrators. I spend a day or two absorbing this material before the hearing. I have a day set aside just to examine the claimant.

The process is rigorous and there is no guarantee of success but it looks nothing like a trial. As noted, the original goal was to do justice while doing no harm. It quickly became clear to many of us, however, that the hearings had the potential, in fact, of being highly therapeutic in the right set of circumstances.

So how do we attempt to prevent or, at least, minimize re-victimization and turn the hearing into a healing experience as much as we can? We do many things. Let me share some of the components of our strategy with you:

- Lawyers are encouraged to maintain a close and supportive relationship with their clients throughout the application and sometimes long waiting process before the hearing, be aware of both their emotional and legal needs, and to prepare them both emotionally and legally for the hearing. Some lawyers do a stellar job in this support role. Some less so. Some work with their clients for years before the hearing. Some use a conveyer belt approach, utilizing outside consultants and/or

support staff to do all the preparatory work, only meeting their client the day before or on the day of the hearing.

- Counselling is available before and after hearings. A toll free line operates 24 hours a day for folks as they go through the process.
- Specially trained aboriginal health support workers, usually residential school survivors themselves, are available to attend every hearing in order to provide support and keep the Claimant safe.
- Claimants are free to bring whomever they wish to the hearing for support.
- Native elders will attend at Claimant request.
- If the Claimant wishes, prayers or traditional ceremonies or both may be performed before and after the hearing.
- The system is what lawyers call inquisitorial rather than adversarial. That means that I ask all the questions rather than the lawyers. More practically, it means only one person dealing with the Claimant, no-cross examinations, none of all that stuff. But the questioning, while always respectful and asked in muted tones, is still detailed and pointed. It has to be, I need the facts in order to make my decision and I have to test credibility and reliability. I even cross-exam if required.
- The hearing is conducted behind close doors and all participants are required to sign confidentiality agreements. The Claimant, of course, remains free to tell his or her story without limitation.
- I always dress in informal and moderately colourful clothing so that I will not remind the Claimant of the men who ran or worked at the school.
- I start the hearing with an off the record discussion where I take the following steps to minimize harm:
 - I start with an assurance of confidentiality and an explanation of how the day is going to unfold.
 - I give my solemn word that I will deal with the Claimant with dignity and respect. And I mean it. If I were the guy choosing adjudicators for this role, I would make it known that those without an abundance of humility and empathy need not apply. And, from what I have seen of my colleagues, I suspect that this rule has been enforced without my assistance.
 - I acknowledge that we will be discussing difficult matters but assure the Claimant that everyone present understands the difficulty. I promise to warn the Claimant when unpleasant questions are approaching.
 - I invite the Claimant to answer each of my questions with a story so that we can minimize the questioning and get better information. I also invite them to talk about anything they want because much of the hurtful

experience is non-compensable but important to talk about.

- I always tell Claimants that they are not expected to remember every detail from their childhoods. This never fails to dissipate a great deal of anxiety.
- I tell the Claimant that there may be things that they want to tell me that they never told their lawyer or wrote in their application. This happens frequently and we call it progressive disclosure. This will not come as a surprise to any who works with victims of sexual abuse.
- And I promise the Claimant that the hearing room is a safe place.
- My questioning begins with a discussion of the Claimant's pre-residential school years. This is usually a comfortable way to get things going before we get to the tough stuff, a way for the Claimant to settle into the role and tempo of the hearing.
- I have learned to be a patient. Members of many First Nation cultures are very careful with answers and like lots of time to contemplate before speaking. (Actually, I am overstating this point. I should say that I am learning to be patient. This is definitely a work in progress.)
- I then move to general issues about the residential school experience. It is at this point that Claimants often tell me about strappings and beatings for such things as stepping out of line or not knowing the language. Or for laughing. I often respond to this sort of evidence by saying to the Claimant something like, "So your crime was acting your age; acting like a seven year old when you were seven years old." or "I guess you were not allowed to be a child at that place." As I give this sort of feedback, I start to see the tension come out of the Claimant's shoulders. It can be quite remarkable.
- And then I start to ask about the abuse. I need the whole story from beginning to end; all of the who, what, where and when. And when some Claimants skip over the tough stuff, I gently bring them back. They have to tell me what happened. This is done respectfully, patiently and in plain language. No lawyer talk or clinical language. On the other hand, I am always careful not to talk down to the Claimant.
- I explore the presence of ongoing guilt and shame as part of the process but then I generally step outside of my inquisitorial role to tell the Claimant that the shame and guilt are real but belong to the perpetrator, not the victim. The effect of this can be profound as well. Many of these folks have never disclosed their secret to anyone and the absolvatory feedback from the adjudicator can have quite an effect.
- After discussing the abuse, I explore the Claimant's life in detail, canvassing possible effects on occupational and personal life. We talk about everything from sexual dysfunction to sociability and beyond. It is an intense exercise.
- We can award a sum for aftercare. This can take the form of western counselling or treatment or traditional care such as

counselling with an elder, sweats or sun dances. I explore this topic with the Claimant.

- I always offer the Claimant an opportunity at the end of the hearing to say whatever they want about anything. Many simply express their thanks for the opportunity to be listened to in a safe, respectful environment. Many say that they feel lighter or simply relieved to have shared their darkest secrets. Some have prepared remarks that express anger and pain towards a church, the government and, on occasion, the Hudson's Bay Company.
- After the Claimant's evidence is complete, I call on the Claimant's lawyer as well as Canada's representative to address the Claimant. This is an opportunity for them to tell the Claimant that they were heard and listened to and, if appropriate, compliment them on their dignity and strength. These representatives often repeat my comments about the guilt and shame belonging to the perpetrator.
- Canada's representative often apologizes for what happened to the Claimant.
- If a settlement has been reached, which is often the case, Canada's representative frequently points out to the Claimant that the fact of the settlement means that the Claimant was believed. I point this out if Canada's representative does not. The effect of all of this is often very profound.
- But, most of all, turning the hearing into a seriously meaningful healing experience really just boils down to treating the Claimant with empathy and respect, making it clear that you are both hearing them and listening to them, giving them a safe space in which to tell their story, and making it explicitly clear that they are not responsible for what happened.

So what is the effect of all of this? I have no double blind studies for you. What I can share with you is what Claimants tell me and what psychologists sometimes mention in their reports. Let me explain.

Many, many Claimants tell us that the hearing has been a catharsis, the start of their healing. They often come into the hearing nervous and leave optimistic and upbeat. I frequently see a profound change in body language, with heads down and stooped shoulders at the outset but straight shoulders and high heads at the conclusion.

I sometimes order a psychological or psychiatric assessment. Assessors have noted in their report that Claimants' various psychological issues are much improved after the hearing, that the hearings were a turning point in their lives. One assessor, however, reported the opposite, that the Claimant's emotional problems became markedly worse in the months before the hearing and that the session, itself, was traumatic.

After conducting three or four hundred cases, do I like the model? I most certainly do. Do I have reservations? Absolutely. It was really designed to get to the truth while doing no harm. It has, however, proven to be a profoundly healing exercise in the right circumstances. I am reminded of the Claimant who approached me after his hearing a few years ago (and whose story I share with

his permission.) He told me that, like Santa Claus, he carries a sack on his back and figures that he always will. He explained that his sack is not full of toys but, rather, contains packages with memories, pain, sadness and anger as the result of his school experience. He went one to say, however, that he had left much of that on the hearing room table and that he was confident that his burden would forever be much lighter.

I worry that the lack of any therapeutic training and experience on the part of the adjudicators could result in amateurs playing around in dark corners where they don't belong. I am also concerned that the judicial aspects of the matter could be overshadowed by the therapeutic in the wrong set of hands. This being said, it is my sense that these concerns are more theoretical than actual. And I am worried about opening old wounds without sufficient follow-up although we routinely grant funds for counselling and special pre- and post-hearing support is available.

I am not, however, worried about the *Gault* problem, the sacrificing of procedural protections and the necessity for legal proof on the alter of paternalism or therapy. I do not believe that anyone's rights are compromised in our process or that fact-finding is any less thorough or effective because of the emphasis on healing. This being said, perhaps this should be assessed by someone more neutral and detached than I can be.

Do I think that our model has application in other settings, particularly the resolution of what legal academic call mass torts, which simply means legal wrongs that profoundly effect very large numbers of people? The answer is that it merits much more study but I think that, with proper construction of the model and appropriate vetting and training of the judges, it is possible to do justice and healing at the same time in some circumstances.

What is really needed, however, is some good research and structured follow-up. Our process, as I noted, involves tens of thousands of Claimants. It is, I believe, the largest alternative dispute resolution project for a mass tort in legal history. A PhD candidate or three or three hundred somewhere should be interested in exploring the issues. For a start, we need to know if the process is really as therapeutic for the majority of claimants as I think, in what sorts of circumstances is a process of this sort appropriate, how might it be better structured and on and on.

But what we know so far is this:

- While the adversarial system is time-tested and effective, there are other ways for the legal system to get to the truth.
- It is possible to structure an adjudicative process that protects the interests of all parties and elicits the truth without harming vulnerable and traumatized people, without patronizing the person who is the subject of the hearing or talking over them and without turning lawyers into anything other than compassionate human beings who are strongly advocating for their client's position but doing so in a sensitive manner.
- It is even possible to make the process into a positive, healing experience.

As a seasoned practitioner of this strange art, however, I have to

tell you that it is enormously difficult to wear all of the hats that I am required to wear at the same time. Even Houdini, the famous magician and contortionist, would have been impressed with the fete of near magic required to advance the interests of the plaintiff and the defendant at the same time while fearlessly pursuing the truth and taking care not to harm the witness-plaintiff and actively promoting his or her healing. But we do it.

I think that our experiment should be a shining example and model for the future resolution of mass torts. I am, however, too deeply imbedded in the process to be truly objective. What is needed, as I have noted, is careful research and analysis by both academics and legal policy makers. Our experience cries out for this examination.

And just one more thing; this process can take an enormous toll on the adjudicators. There are only so many rapes and other real-life horror stories that you can hear about in a day or a week or a month or a year before it starts to eat at your soul. This raises a further question as to the ability of a judge to successfully engage in the juggling act that I describe above over a long period while preserving his or her own health.

Not easy issues.

So, I don't really have any final answers. I am pretty sure that the process that I am engaged in is a valid and valuable model ripe for emulation but I am not 100% sure.

But then again, this may simply reflect the fact that I have reached the stage in my career where I have far more questions than answers.

Footnotes

1. This paper was prepared for presentation at the Sixth JEMH Conference on Ethics in Mental Health, Peterborough, Ontario, November 29, 2012. The paper is entirely my responsibility and put forward in my personal capacity.
2. 387 U.S. 1 (1967)
3. According to the Indian Residential Schools Adjudication Secretariat website, 37,684 applications were received by the cutoff date of September 19, 2012. It appears, however, that some of these applications will not be moving forward for various reasons such as duplication or not meeting the requirements of the model. My best information is that there are between 34,000 and 35,000 viable applications although a final number has not yet been determined.

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