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Alternatives to Adversarial Processes in the Regulation of Professional Ethics

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ABSTRACT *Professional regulatory bodies, including ethics committees, association boards, and government licensing authorities, oversee the ethical behaviour of professionals, specifically monitoring their use of power. A key element of such regulation is the hearing of ethics complaints against practitioners. This generally involves adversarial type processes which attempt to echo the legal system. The use of these adversarial models of investigation and discipline is called into question here and other possibilities are outlined. Copyright © 2015 John Wiley & Sons, Ltd.*

Key words: professional codes of ethics; regulation; regulatory bodies; alternatives to adversarial process; restorative justice; therapeutic jurisprudence

One of the tenets of the therapeutic profession is that it operates for the public good, and not only for the benefit of members of that profession. This is a major reason for the generation of codes of ethics: to keep the profession in good repute and, specifically, to keep professionals honest and competent. In order to achieve this aim, professional bodies at all levels are expected (and often required) to have mechanisms in place to hear grievances and evaluate professional breaches. These mechanisms have some of the trappings of legal processes – and often use legalistic type of language – although they may not take place in the context of a court system. Infractions which are deemed as lesser may be dealt with in other ways, but complaints are generally heard in an adversarial context which includes initial charges, an investigation, a prosecution process or hearing, and a judgement.

Concerns have been expressed about these pseudo-legal processes; to offer real justice requires sufficient expertise in the management of all stages – preliminary investigation, investigation proper, the conduct of the hearing, the passing of judgment, and overseeing any consequences imposed. Many organizations which are responsible for managing grievance procedures do not have sufficient resources to do this at a standard which provides due process and natural justice (Van Horne, 2004). The training and knowledge required are not generally in the skill range of the peers who tend to manage such disciplinary hearings (Hoffman, Tarzian, & O'Neil, 2000). This paper reviews and critiques the use of adversarial models of investigation and discipline, and outlines possible alternatives.

PROBLEMS WITH THE ADVERSARIAL PROCESS

A grievance or complaint about a practitioner performs a number of functions. It indicates that something went wrong – something that the professional clearly needs to learn from. It can be

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empowering for the client to speak up, articulate their boundaries and needs, and identify what they need in response (Jurkiewicz, Giacalone, & Bittick, 2004). Complaint procedures are also an important part of the checks and balances which are necessary to "keep the profession honest".

Professions have a number of priorities in addressing complaints: firstly, to ensure that perceived wrongs are seen to be addressed, that is, sending the public the message that infractions are taken seriously; secondly, that there is a corrective mechanism for any errors which have occurred; thirdly, to ensure that the professional will be less at risk of creating harm in the future; and overarchingly, to help ensure that the integrity of the profession is maintained (Pope, Tabachnick, & Keith-Spiegel, 1987).

To achieve these imperatives, regulatory bodies have adopted – however imperfectly – processes derived from the adversarial system that is characteristic of most courts in the Western world. The focus is on determining if the practitioner is guilty or innocent – a limiting reduction of the complexity of the professional relationship into one of two discrete categories (Menkel-Meadow, 1996). The resultant versions of events may become contested truths, losing sight of the understanding that they are in fact alternative "stories" of what went wrong (Mitchell, 1999). Investigations tend to simplify such stories in order to arrive at a clear finding, but much is lost in the endeavour to squeeze a range of facts into narrower categories (White, 1985).

A number of the complainants' needs may be bypassed by such systems and their procedures. Barstow (2013) argued that the needs of the person bringing a grievance are fundamentally relational ones. For instance, there is generally a need for an acknowledgement of their experience and pain; they often want to understand what was going on for the professional; they generally want an apology or expression of regret; they want an assurance that the professional has learned from this and will act differently in future; and they may want some kind of repair in the relationship, or else the ability to cleanly let it go. While regulatory procedures may result in some or all of these outcomes, the needs of the complainant more often get lost in the process (Freckelton, 2007b).

Menkel-Meadow (1996) raised fundamental questions about the relevance and effectiveness of using the adversarial method of getting to "the truth". She pointed out that a contemporary post-modern view interrogates the notion of a singular truth which is stable and discoverable (see also Rosenau, 1992), suggesting instead that all such endeavours are contextualized by the interests and bias of the investigators. She suggested the existence of alternatives in which empathic enquiry is valued as much as rational and forensic processes, and ambiguity is accepted as inevitable. In fact, truths can be distorted by the exaggerated and selective representation of competing stories and the manipulation of information which is often part of the adversarial methodology. She challenged some core notions such as the idea that investigators can be objective, or judges can remain neutral, as well as the impact of cultural bias. For instance, in Confucian-based cultures striving for "harmony" is seen as of greater value than arriving at "the truth" (Baer, 2015); the Chinese may argue for both sides of a debate based on an underlying belief that both parties are partly right and partly wrong. Another example are truth and reconciliation hearings held in Sierra Leone; these only became effective when they stopped trying to uncover truth, and instead focused on rituals which produced healing (Kelsall, 2005).

Samuels (2014) presented two critiques of the adversarial process. The first problem with the attack–defence mode is that it tends to provoke survival behaviours which reduce the likelihood of hearing, repair or resolution. In endeavouring to protect the "public good", the complainant may not be well served. In fact, they can be further traumatized by the process of the investigation,

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particularly if it escalates in a way they did not anticipate and cannot stop. They may even be compelled to give evidence against their wishes, compounding their original distress. Secondly, the adversarial process places practitioners in an ethically untenable position. They are entitled to defend themselves, but in order to do so they may need to attack the complainant's evidence or reveal exculpatory information which would break confidentiality. This sets up a conflict between ethics around confidentiality and the right for self-defence, and may further damage their relationship with the complainant.

The following case demonstrates this concern: Trevor worked as a trainer in a psychotherapy school. One of his students was consistently disruptive in class, often picking fights with other students. The student brought an ethics complaint against Trevor, claiming that he was "wounded" by the way that Trevor had handled a conflict between the complainant and another student. The ethics committee upheld that the student had been harmed, and found against Trevor. When Trevor appealed the case, the appeal committee chastised Trevor for challenging the evidence, stating "Harm and risk are subjective experiences, not a matter of debate especially between a psychologist/trainer and a patient/consumer, and further demonstrates the lack of adequate understanding of the issues and ethical and professional responsibilities." The committee stated that the process was "communitarian, not adversarial", and therefore the trainer should have accepted the findings.

This convoluted logic characterizes the disciplinary process as not being adversarial, and therefore not providing a place for practitioners to defend themselves or make any appeal. This is reminiscent of double-bind theory (Gibney, 2006; Weakland, 1974), in which an authority provides two contradictory injunctions, both of which end in negative consequences. When a teacher/student or client/therapist dyad becomes embroiled in a complaints procedure, the nature of the relationship changes as the investigation process ostensibly allows the accused to defend themselves. This example shows the problematic juxtaposition of the responsibilities and languaging of the ethics of client care, and the language and setting of adversarial processes. It exposes some of the internal contradictions which can flow from using the adversarial system to protect clients from harm. Menkel-Meadow (1996) suggested that rather than a one-size-fits-all approach, there needs to be a range of ways to address client concerns. Such alternatives are explored below.

MALPRACTICE ALTERNATIVES

The malpractice system is one way that client complaints are addressed. Although it is predominantly used in relation to medical cases, other healthcare practitioners are also subject to claims (United States Department of Health and Human Services (USDHH), 2014). This is of note because it is a particularly lengthy, inefficient, and expensive way of addressing disputes, particularly in the USA. The statistics speak for themselves: most lawsuits (60%) are dismissed, yet still cost up to $80,000 to defend (Weinstein, 2009). The total system costs are estimated between US $76 to $122 billion a year (USDHH, 2002) and the cost of resulting defensive medicine is estimated at $55 to $151 billion (Kessler & McClellan, 1996; Mello, Chandra, Gawande, & Studdert, 2010; Burkle, 2011). Defensive practices include the provision of additional precautionary treatments (with minimal benefit), forgoing risky but beneficial treatments, limiting practice to less complex/difficult conditions, and generally operating in ways which are less about patient needs and more about reducing liability risk. Cases are generally lengthy, averaging five years; despite this, the success rates for plaintiffs is less than 10%, and

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in the end most of the awards go to attorneys (Sohn & Sonny Bal, 2012). The process is also stressful for both the plaintiff and the defendant (Klebanow, 2013).

A number of other countries also use the tort system (e.g., Japan, Israel, Australia, and the UK), although in different ways. For instance the UK system emphasizes local resolution (Wada, Saegusa, & Nakanishi, 2012). One of the mooted benefits of the tort system is that it deters practitioners from acting in a negligent manner; at least some of this effect may derive from administrative delays which result in prolonged processes (Hyman, 2002). Aside from this, the actual impact of deterrence is substantively very small, given only 2% of those injured end up filing a claim (Localio et al., 1991). Overall, the effect is less evident in improved practices; instead there is a significant decrease in the willingness of professionals to admit errors (Gawande, 2005), fuelling a climate of mistrust and defensive practice (Bishop, Federman, & Keyhani, 2010). As a consequence, 92% of physicians have reported practising defensively (Jackson Healthcare, 2009). Compounding these problems are the marked number of medical malpractice cases (25%) in which the court erred significantly in its findings (Studdert et al., 2006). The general legislative response has been to impose caps on pay-outs, but the standards vary widely (Loughlin, 2009), and this approach is not generally seen as successful as a result of the above-mentioned problems (Burkle, 2011).

Other aspects of the malpractice system are also questionable. Non-economic losses are subjective, as putting a price on pain, suffering, and trauma is often determined by how the personality of the accused is perceived, particularly through the theatrics of a hearing in front of a jury (Belk, 2013). The problematic effects of the whole system is indicated by the response of those doctors who forgo malpractice insurance and consequently limit their practice, refusing to take certain patients (e.g., those who have experienced trauma) or perform high-risk procedures (American Academy of Pediatrics, 2004).

One alternative – for medical malpractice at least – is a no-fault administrative model whereby compensation is offered for injuries that are either avoidable or preventable, pre-calculated by standardized accounting methods (Bovbjerg, Tancredi, & Gaylin, 1991; Mathews, 2010; Studdert et al., 2006). In addition to economic equity and reining in costs, the result is improvement in patient safety (Kachalia, Mello, Brennan, & Studdert, 2008). Unlike the negligence-based model, which shuts down communication due to fear of guilt and blame, this approach encourages communication and provides incentives for best practice (Mello, Studdert, Kachalia, & Brennan, 2006). Another no-fault approach allows for automatic compensation for harm resulting from practices falling outside pre-set guidelines (Stimson, Dmochowsk, & Penson, 2010).

Other models are used around the world. For example, Scandinavian countries use a well-established administrative system which separates client complaints from compensation, therefore containing costs; however, it is weak at resolving issues at a local level (Wada Saegusa, & Nakanishi 2012). New Zealand also uses an administrative system. Although the tort system is used in Japan, matters are dealt with by a panel of judges. In France special commissions provide a uniform response and in Denmark specific health courts hear these matters. These systems reduce costs and time delays, providing more responsive and effective means of complaint processing (Klebanow, 2013).

A more contextual solution is *enterprise liability*, which involves shifting legal responsibility from the individual practitioner to the healthcare organization, devolving the onus onto the institution to monitor appropriate care (Studdert et al., 2006). This reduces stress on individual practitioners, and creates an environment where best practice is a collective issue.

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ALTERNATIVE DISPUTE RESOLUTION

An essential claim to legitimacy is that a profession has a complaints procedure and that code violations are appropriately sanctioned (Nitsch, Baetz, & Hughes, 2005). The mechanism used for achieving this is almost inevitably on a pseudo-legal model, utilizing adversarial approaches to addressing grievances. As explored above, this places the complainant and the professional in combative positions, each struggling to prove their own case and disprove the other; complex relational dynamics are often reduced to black and white assertions (Williams, 2013). A cycle of attack and defence can ensue, sometimes magnifying the original harm. This competitive orientation is more likely to lead to destructive than constructive outcomes (Deutsch, 2000), and research has consistently shown that cooperative dispute processes are more likely to lead to better psychological health (Johnson & Johnson, 1994). If a case is managed as a mediated conversation rather than an investigation and trial, the fuel for denial or defensiveness is significantly reduced.

There are well-proven alternatives to the legalistic model of complaint processing, many of which frame the complaint as a problem in the *relationship* between practitioner and client. Responses can include negotiation, mediation, facilitation, and alternative dispute resolution (Freckelton, 2007b; Sohn & Sonny Bal, 2012). These processes help identify the underlying interests and needs, support people to feel heard and understood, explore issues with a view to finding resolution, and encompass listening and communication techniques. They conclude with a written agreement which is later followed up. One defining difference is that those conducting such processes are not arbiters but supporters who empower the parties to come to a mutual understanding (West & Gibson, 1992).

In this alternative approach to justice, power is not imposed from above in terms of authoritative decisions, but the facilitator endeavours to create the ground whereby any differential in power between the two parties is managed so that their needs can be fairly considered (John Howard Society of Alberta, 1997). The emphasis is on problem solving rather than dispute resolution, and the development of a cooperative dialogue rather than conflictual engagement (Wexler, 2011). There is a focus on process – the way people are treated and dealt with by the system - emphasizing voice, validation, and respect (Tyler, 1990). This orientation involves a comprehensive and holistic approach to all aspects of the enquiry process, and a focus on creative problem solving, framed by a multidisciplinary scope (Freiberg, 2011).

This approach can be critiqued as containing a naive view of power differentials; it can be argued that clients need the power of an institution to take on the status of a professional (Osborne, 1992). The notion of a negotiation implies a level of power equity which may not be perceived, or may not be the case. A structural view suggests that institutions, professions and professionals hold *status*, *position*, and *collective* power (Johnson, 2005). Therefore, despite the presence of a mediator, the dialogue is not likely to be balanced, increasing the risk that the complainant will not be able to hold their ground. Pyke (1996) was critical of mediation, claiming it could legitimize the interests of the professional while "forcing the victim to bargain for her rights" (p. 5). Countering these concerns, Young (2006) suggested that in putting two people together with a mediator problems which originated in the context of a professional relationships can come down to "human size" and be dealt with person to person. From this perspective, the personal empowerment of both parties can lead to genuine dialogue and the possibility of resolution. Unlike in a formal hearing, the complainant retains some control over the process.

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Even where the rupture in relationship has been devastating for the client, mediation has been found to have successful outcomes (TMI, 1999). However, this involves the complainant forgoing – at least within the mediation process – their ability to harness the power of the regulatory body to investigate, interrogate, expose, find guilty, and punish the practitioner (Bazemore & Umbreit, 1995).

In cases of serious allegations such as sexual misconduct, the objection to mediation is that the consequences for the offender may be insufficient. There are also concerns that facing the complainant with their abuser could exacerbate their distress, especially if the professional denies what occurred (Pyke, 1996). This remains an open question, however, as the adversarial system creates significant motivation for denial. This is reduced in a context which involves real dialogue, especially if the professional is faced directly with the experience of the complainant and is able to hear them non-defensively. Changing the ethos to one of communication is more likely to support this non-defensive stance, ultimately benefiting the complainant (Rabinovich-Einy, 2011).

Mediation is not generally undertaken in criminal cases in which the state brings the case and the goals are retribution and deterrence, or in other situations where it is desired that a public message be sent, as mediation is generally a private process (Neiman, 2014). To be successful, mediation requires certain attitudes such as good faith, patience, preparation, and a willingness to listen and speak authentically. The skill of the mediator in facilitating the process is obviously an important variable (Young, 2006). If these factors are not present, it is less likely to have a positive outcome.

One of the consequences of the adversarial system is a pattern of defensive communication commencing at the first hint of a complaint. When a dispute starts to escalate, the professional may hunker down into a self-protective position and communication may become increasingly limited. This can be driven by fear of a formal grievance, as well as by advice from legal counsel (Hetzler, Morrison, Gerardi, & Hayes, 2004). Unfortunately and ironically, this defensive stance in itself can trigger escalation into a formal complaint (Celenza, 2010). The advice given to practitioners is to consider their own best interests at this point (Austin, Moline, & Williams, 1990; Crawford, 1994), a stance antithetical to any kind of transparency or reconciliatory process.

Alternative dispute resolution (ADR) processes have been used successfully in a wide range of institutional settings to increase communication skills and build the capacity to deal with difficult situations, thereby reducing the likelihood of complaints escalating to time-consuming hearings. The presence of a neutral party to support the process increases the chances of such approaches being successful (Rabinovich-Einy, 2011). This suggests a role for courts and regulatory bodies in assisting ADR, rather than being a context for an embattled hearings process.

Another approach is to use mediation as part of a rehabilitation plan, after a client's concerns have been heard by a regulatory body. An experienced therapist meets with the transgressing professional and the client for several sessions, providing an opportunity for the client to talk about how they experienced the betrayal and an opportunity for the practitioner to offer an apology (Celenza & Gabbard, 2003). Mediation has a 75–90% success rate in avoiding subsequent litigation, while achieving significance cost savings and high (90%) satisfaction rates for both plaintiffs and defendants (Sohn & Sonny Bal, 2012). It creates a less formal atmosphere and allows space for various types of resolution other than monetary compensation or punitive outcomes. In fact, in one survey of plaintiffs, money was not their primary goal: more important was an apology and information about how the adverse events occurred (Szmania, Johnson, & Mulligan, 2008).

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CONVERSATIONAL MODELS

The emphasis in professional ethics is often on what to avoid (Geraghty, 2005), particularly in these days of risk management when ethics discussions tend to defer to the question of what is legal (Geraghty, 2012). The focus of both the education and administration of professional ethics is generally oriented around ideas of right and wrong in reference to an organizational code with the regulators being the ultimate guardians and evaluators (O'Donohue & Ferguson, 2003).

An alternative to this is the approach offered by the constructivist perspective (Freedman & Combs, 1996; Chambon, 1999), where truth is understood as being "illusive, partial, interpretable, dependent on the characteristics of the knowers, as well as the known, and most importantly, complex" (Menkel-Meadow, 1996 p. 49). By creating an opportunity for stories to be authentically told, the orientation changes to empowerment and an invitation to tell versions of personal truth (Mitchell, 1999). White and Epston (1990) pioneered a narrative approach to both therapy and wider social issues. They proposed the creation of a conversational space in which people could come forward in new ways, sidestepping defensiveness and engaging in multiple descriptions of the problem (White, 2005). This idea of multiple meanings is a core part of a social constructivist thesis, and incorporates terms such the "decentred position" (Geraghty, 2012) and "not knowing" (Anderson & Goolishian, 1992). Applied to ethics investigations, these processes would achieve outcomes that deepened understanding and transformed meaning about the grievance, as well as supporting a greater capacity on the part of the professional to take full responsibility and be empathic with the complainant (see, for instance, Jenkins, 1990).

Constructivists challenge the idea that there are objective facts to be discovered, or that there is an objectivity that can be impaired or lost; a case in point being the code of ethics of the American Psychological Association (2010) and its concern about situations "that would likely lead to … loss of objectivity" (p. 5). Claims to objectivity are seen as containing unquestioned cultural views (Martin & Sugarman, 1999) that lack critical evaluation (Kaye, 1999) and ignore "positionality" (Bartlett, 1990). Instead, what really matters in professional practice – and by extension, in dealing with complaints – are conversations which develop a shared meaning about events (Strong, 2005). Heinz Von Foerster (Von Foerster & Poerksen 2002; Von Foerster & Broeker 2010) pointed out that as soon as ethics are codified they come to serve a variety of agendas, often diverging from their original aims. He proposed a radically different way of languaging ethics – one that is oriented towards enquiry, discovery, and focusing on what allows ethics to "flow implicitly, without becoming explicit" (2010, p. 17). Foerster's proposed ethics can be summarized in his direction to "act at all times so as to increase the number of choices" (2010, p. 15). This is clearly contrasts with normative or deontological approaches which judge ethical probity in relation to a set of ethical rules.

In fact, constructivist ethics tend to be agnostic about what morals and ethics should be (Hoffmann, 2009), focusing instead on the question of interpretation and the construction of meaning (Strong, 2005). These appear to be abstract questions, far from the practical realities of behaviour in professional relationships and the processing of grievances. However, constructivism allows us to reflect on the frame though which we view the world (Bem, 1993), and thus can help us examine assumptions which are embedded in standards of practice and ethical codes (Foster & Lasser, 2011). One of the bedrocks being questioned in this critique is a focus on the psychology of the individual, proposing instead a social and biological conception of ethics (Cottone, 2004). Bateson (1972) pointed to the mind as being a social matrix, while

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Gergen (1985) saw thought as arising from the sharing of language, and a manifestation of social interaction.

In this sense, the decision making of a professional is shaped by and emerges from a social context that includes biological and social forces, which has been referred to as "the field" (Bell-Boule, 1999). Ethical decisions arise out of a "consensualizing" process, an interpersonal dynamic taking place in a professional context (Cottone, 2004, p. 8). Ethical conflicts such as occur in a grievance can therefore involve the negotiation of different truths, rather than a search for *the* truth.

Codes of ethics themselves are expressions of negotiation and consensual agreement amongst organizational representatives or committees. Therefore, these codes represent "a conduit for communicating the rich history and professional culture of the profession … a message of tradition … an excellent example of a social construction of ethical and unethical professional behaviour" (Cottone, 2004, p. 12). The quality of the ethical culture of the profession is seen here as an essential ingredient in the ethical behaviour of individuals, and may be just as appropriate a place of intervention as the behaviour of a specific professional.

In contrast, the large body of literature detailing the nature of ethical practice in the therapeutic and health fields, identifying dangers and suggesting remedies, is focused almost exclusively on the responsibilities of individual practitioners. White (1993) suggested that professional ethics are situated in a professional monoculture in which *thin descriptions* (Geertz, 1978) lead to *thin conclusions*. An alternative perspective is provided by a "multiply contextualised" ethics (White, 1993 p. 123), which utilizes a multifaceted approach to fostering responsible professional behaviour as well as dealing with lapses in the use of power. In these terms, the range of possible systemic responses include detection of impairment, educational programmes, opportunities for collaboration and mentoring, reducing isolation, increasing dialogue and awareness, improving standards of supervision and training, and encouraging self-assessment and consultation.

Some of the post-modern perspectives explored here, particularly the radical and social constructivist propositions, are vulnerable to charges of ethical relativism (Dean & Fleck-Henderson, 1992) and a type of groundless morality (Koppelman, 2009). Thompson (2000) answered this critique by suggesting that through questioning apparent certainties and epistemic assumptions, self-reflection is encouraged and alternative perspectives are considered. However, he also acknowledged that there *are* times when it is appropriate to act with certainty. These are important considerations when using a constructivist approach to professional ethics, as the need for standards must be accounted for alongside considerations of the multiplicity of truth and the questioning of underlying certainties. What such perspectives can offer to the consideration of client grievances is an attitude of humility or "not knowing" (Dean & Rhodes, 1998), which can stand alongside ethical guidelines and create a broader range of ways of promoting, monitoring, and policing ethical issues.

RESTORATIVE JUSTICE

Restorative justice (Braithwaite, 2002) is another approach which can be applied in constructing a dialogue between complainant and professional. Legal-type processes are usually framed in terms of the state (or professional association) versus the accused (practitioner), and can continue even if the complainant drops the case (Adams, 2001). An alternative approach is to increase the involvement of the complainant at all stages. This is framed by the proposition that harm is

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something that occurs between persons, rather than being a violation against an organization or the state (Umbreit & Carey, 1995).

This contrasts with the usual modus of the legal system which purports to represent the complainant while making them peripheral to the whole process (Christie, 1977). Therefore, alternative solutions to complaints involve direct dialogue (Austin & Krisberg, 1982), with a focus on rehabilitation and restoration of status of the professional. Adversarial processes tend to be more oriented towards sanctions, punishment, retribution and "'harm in response to harms done" (John Howard Society of Alberta, 1997, p. 5). Restorative justice proponents view this as expressing a spirit of revenge rather than resolution, and propose a focus on the broader relationship of complainant, accused, and society (Bazemore & Umbreit, 1995). This provides a different way to consider "the public good" – a phrase that is heavily emphasized by regulatory bodies.

In contrast to aiming for deterrence via punishment, the restorative justice approach seeks the goal of reparation, allowing the accused to make amends (Austin & Krisberg, 1982). Current systems actually interfere with this process: for instance, when money is awarded to a complainant, it does not come directly from the accused but from their insurance provider. The sums have become so large that they are generally beyond the means of an individual practitioner. Therefore, the idea of reparation has arguably become distorted and inflated, losing its potentially healing aspects. Where reparation occurs via a pre-emptive out-of-court settlement by the insurance company in order to ward off a full trial, there is even less opportunity for any kind of acknowledgement or amends process as it bypasses the professional, the complainant, and the content of the issue at stake. A comparison of the adversarial and restorative approaches is shown in Table 1365, adapted from the John Howard Society of Alberta (1997).

It can be seen from these comparisons that restorative justice is based on a significantly different value set from the current adversarial systems. Unfortunately there is little consideration of a restorative approach within the field of professional ethics and licensure, and there are few examples of where this has actually been applied. Saperstein (2006) described a relatively unusual attempt at what she terms "psychoanalytic justice", which centres on a process of ethical inquiry.

Table 1. Comparison of adversarial and restorative approaches

	Adversarial	Restorative
Central issue	Breaking of rules	Harm done to a person
Aims	Sanctions and deterrence	Restore complainant, accused and community to a pre-offence status
Offender's role	Guilt or innocence determined, sanctioned	Make amends, "right the wrong"
Complainant's role	To report the offence and give evidence; otherwise peripheral	To reconcile with the offender; central
Complainant's rights	Background; possibly receive monetary compensation	To confront the offender and receive restitution
Focus	Backwards looking: determination of guilt, administration of pain	Forward looking: search for solutions and promotion of reconciliation
Concept of justice	"Right-rules", tested by process and intent	"Right-relationships", tested by outcomes

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This approach focuses on providing a context in which the aggression and anger that generated the complaint can be fully heard and held, rather than allowing the splitting into "good" and "bad" that usually characterizes adversarial hearings.

A salient feature of this difference is that the focus is on justice-within-relationship. The professional relationship is the setting where things have gone wrong, and this approach sees the solutions as lying within the relationship. The adversarial system is more likely to produce the experience of exclusion for the professional; even when the outcome is "exoneration", the process of a disciplinary hearing is alienating for practitioners, and often destroys collegial relationships (Adams, 2001). By supporting client, therapist, and the dyad itself, restorative forces within the professional relationship can be engaged in achieving resolution.

Another example of this relational ethos is contained in the aims of the grievance procedure of the Eastern Mennonite University (2014), which is based on constructivist ideas and notions of critical reflection: "The main concern in any grievance is to bring reconciliation and growth in ways that enhance community" (p. 23).

A comprehensive review by Strang, Sherman, Mayo-Wilson, Woods, and Ariel (2012) demonstrated the efficacy of restorative justice in terms of recidivism and victim satisfaction. While the most common application of this is in the field of juvenile justice, it is worth considering how it might be piloted in the management of professional ethics violations. The field of psychology is ostensibly about the valuing and enhancement of relationship, so "ruptures" generally need the kind of support that is offered by a restorative justice approach, rather than the attack mode inherent in the adversarial model.

THERAPEUTIC JURISPRUDENCE

The twin dangers for professional tribunals are in being either overly sympathetic to the practitioner, leading to a diminishment of faith from the community, or being over-censorious, for instance going beyond the scope of the enquiry to critique the practitioner's clinical work (Freckelton & List, 2004). There is an additional danger of such tribunals acting in a purely legalistic fashion out of a fear of being appealed.

Therapeutic jurisprudence provides an alternative approach that focuses on the impact of the law on the well-being of all participants (Wexler & Winick, 1996). This views the investigation process as a clinical intervention, potentially having positive effects for all concerned (Freckelton, 2007b). This is a complete turnaround from the adversarial mindset, which is focused entirely on winning, and in which being heard or validated is of little importance (Shapiro, Walker, Manosevitz, Peterson, & Williams, 2008). Disciplinary proceedings have tended to draw on a traditional model of criminal investigation (Wexler, 1993); the result is a significant potential of traumatisation of the participants. Therapeutic jurisprudence involves balancing accuracy and fairness with processes and results that are therapeutic for the practitioners, notifiers, witnesses, community members, and the investigating authorities (Winick & Wexler, 2003). The emphasis is on minimizing adverse outcomes, and attending to social relationships and emotional issues arising from the process (Freckelton, 2008).

This innovative approach takes a caring attitude towards all parties, sitting alongside other pioneering approaches such as preventive law, restorative justice, procedural justice, facilitative mediation, alternative dispute resolution, holistic law, law in society, law in context, and ethics of care approaches (Freckelton, 2008).

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The following outline is derived from the extensive work of Freckelton (2006, 2007a, 2007b, 2008), and Freckelton and List (2004) in this field. It is an exceptional example of an alternative approach that addresses many of the concerns raised in this paper.

Notifiers are generally emotionally vulnerable and need sensitivity and assistance. They are likely to need support throughout the process and are therefore offered sessions with a health practitioner during and after the hearing. A respectful investigation process is seen to involve transparency at each step, providing the notifier with as much information as possible, including details of the thinking process of the hearing body. If a decision is made to drop the case, the notifier is provided with a summary of the whole process, including the reasons for closing the file. Respect also includes ensuring that notifiers only reveal what and when they are ready to. What they generally need is empowerment and validation, but what often happens in adversarial proceedings is that their story is taken from them and twisted into an altered narrative that suits the purposes of the case.

The stressors on a practitioner in the course of a case are multiple. Their professional identity is challenged, they are likely to experience shame, and they may feel guilty simply because a client is angry enough to make an allegation. Investigators are cognisant of this and are therefore careful in drawing inferences from the professional's behaviour. It is seen as a responsibility of the regulatory body to also provide support to the practitioner, and to help them cope with any adverse decision that is likely to have a major ongoing impact on their lives.

Increased scope is given for ventilation by both parties to the hearing – more so than would be normally tolerated in court proceedings. This is consistent with a broader emphasis on achieving a therapeutic and healing outcome.

The exposing nature of a hearing can be embarrassing and distressing for both parties, and can lead to further trauma and the possibility of stigmatization (Coverdale, Nairn, & Clausen, 2000). However, for the practitioner, public shaming and exposure may be a necessary powerful source of motivation to change future behaviour. In order to ensure this is a positive rather than traumatic experience, the process is made more personal; for example, judgements are delivered with the accused practitioner standing and able to interact with the panel while the decision is delivered. The aim is not humiliation but to communicate powerfully about the conduct in question, provide a perspective on the causal factors, and direct the practitioner towards reparative steps. This can be a sobering but revelatory experience for a practitioner who needs to come to terms with what they have done while seeing this moment as the start of a journey towards new learning. Judgements include a focus on mentoring, and communication to the practitioner about how they can move forwards in their career, take steps to make improvements, and avoid future problems.

The notifier is also present at this ritual and the panel may also speak to them directly. This can include an acknowledgement of the difficulties they have experienced in bringing the case forward and the beneficial result for others of their actions.

These types of processes take time (and are therefore more costly) and require a higher degree of skill from tribunal members. This pioneering direction has yet to become more widely known, let alone gain acceptance from the regulators or the community.

CONCLUSION

While adversarial processes are an established means to conduct enquiries into the alleged wrongdoing of professionals, they are not necessarily the best approach as additional problems

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are often created for the complainant, the accused, and even the wider context of the health professions. It is only in questioning the assumption that this is the best response that alternatives can be considered. Such alternatives have been shown to be successful in the legal arena but the health professions have been slower to experiment.

In the realm of psychotherapy where the focus is on care, healing, and healthy growth, it seems somewhat of a contradiction that when something goes wrong this focus is not maintained in addressing the concerns. There is a need for the development of new versions of disciplinary hearings, which involve care for both sides, an orientation towards healing, and support for the growth and empowerment of both complainant and practitioner.

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