

The Power of Myth: A Comment on Des Rosiers' Therapeutic Jurisprudence and Appellate Adjudication

Edward A. Dauer*

Nathalie Des Rosiers' discussion¹ of the Canadian Supreme Court's opinion in the Québec Secession case² suggests, in a most compelling way, the value of a therapeutic jurisprudence (TJ)³ approach to the unending problem of Québec's identity in the Canadian federation. In his Introduction to this Symposium, David Wexler applauds the idea and, inspired by Des Rosiers' argument, sees in the Québec decision the potential for TJ-oriented appellate decision-making more generally. I have no doubt of either the descriptive or the prescriptive accuracy of Professor Des Rosiers' analysis, and little doubt that her implicit prediction will come to pass: that because the court in that case adopted a TJ-like approach (albeit without so identifying it), the underlying problem of Québec and "The Rest of Canada" was made less corrosive rather than more.⁴ The more debatable question is whether Wexler's broader hope for TJ can be achieved. In the American legal system, the myths surrounding judicial decision-making may pose significant impediments.⁵

* Dean Emeritus and Professor of Law, University of Denver College of Law.

1. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority/Majority Conflicts*, CT. REV., Spring 2000, at 54.

2. Ref. Re Secession of Québec [1998] 2 S.C.R. 217.

3. TJ has come to be the accepted nickname for Therapeutic Jurisprudence, a subject originally created by David Wexler and Bruce Winick. Various definitions of TJ have been offered, including one in Professor Wexler's Introduction to this Symposium. See David B. Wexler, *Therapeutic Jurisprudence in the Appellate Arena*, 24 SEATTLE U. L. REV. 217 (2000). I prefer this statement of TJ's objectives, the briefest and most direct: "People who have been through the legal process should feel better after than they did before." *Id.*

4. See Des Rosiers, *supra* note 1, at 54.

5. This is not the first time I have found myself ruminating about, rather than wholeheartedly embracing, Professor Wexler's program for a more therapeutically-oriented legal system. See Dennis P. Stolle, et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997), in which my role as an author was to wonder aloud whether lawyers could be brought to drink from the TJ trough. See also Edward A. Dauer, *Preventive Law Before and After Therapeutic Jurisprudence: A Forward to the Symposium*, 5 PSYCHOL. PUB. POL'Y & L. 4 (forthcoming 2000), in which I identify some of the more trenchant challenges the TJ movement must surmount. I am, nonetheless, a firm pro-

Courts, we are taught, are confined to the preexisting law, applying it to the conflict as the law itself requires that the conflict be framed.⁶ This is, in many ways that matter, a belief system that is not conducive to the TJ way.

The difference between passive, legalistic adjudication and the TJ approach, as Des Rosiers describes it, is striking. Even more striking is how closely her view of the latter tracks modern mediation rather than traditional adjudication. Appellate courts, she argues, should be "process-oriented listeners,"⁷ recognizing the value to each party of an opportunity to explain its view and its position, and reflecting those concerns in an opinion crafted in part as an empathetic "letter to the loser."⁸ Courts should also appreciate their power to act as facilitators, creating the possibility for ongoing dialogue and negotiation.⁹ The relationship between the parties should be valued as both a source of joint welfare and as an objective of the adjudication.¹⁰ For their part, lawyers may have to relinquish their monopoly on telling the parties' stories,¹¹ allowing the narratives to express more authentically the implicated needs and values. In all, appellate opinions TJ can:

legitimiz[e] the [competing] concerns, fram[e] the dispute around a series of hopefully shared values, identify[] the pitfalls of each position, and possibly articulat[e] processes for resolving future disputes. [The court] cannot pretend to have all the answers.¹²

I dare say that anyone familiar with the literature of mediation would find the descriptions of that process and of the mediator's role

ponent of the philosophy of TJ. Part of a critic's job is to illuminate the bugbears of the dark—not to help them bite, but to help them be slain.

6. The idea that the common law system preserves certain myths about itself was first essayed by Jerome Frank, whose personal program was to debunk these myths. See JEROME N. FRANK, *LAW AND THE MODERN MIND* (1930). One of the "submyths" Judge Frank identified was the idea that judges can find rather than create the law, i.e., that legal outcomes can be predicted *ex ante*. *Id.* at 148-49. Lawyers and judges, he argued, purport to make use of precedent: that is, they purport to rely on the conduct of judges in past cases as a means of procuring the predicates for action in new cases. *Id.* Since what was actually decided beneath the surface in the earlier cases is seldom revealed, however, it is impossible in any real sense to rely on these precedents. *Id.* The paradox of the situation for Judge Frank is that, granting there is value in a system of precedents, the actual use of illusory precedent makes the employment of real precedent impossible. *Id.* at 148-59.

7. Des Rosiers, *supra* note 1, at 54.

8. *Id.* at 56.

9. *Id.* at 54-56.

10. *Id.* at 55-56.

11. *Id.* at 62.

12. *Id.* at 58.

to be remarkably parallel, if not identical to Des Rosiers' desiderata for the courts. To those of us who have made a living distinguishing mediation from adjudication, the problem may be obvious—can such an assignment be formally accepted by the appellate judiciary, or was the Québec secession case truly unique?

Professor Des Rosiers herself sees the case not as unique, but certainly as one of a kind. She proposes its lessons for application in other matters of a constitutional character, in which the respective roles of majority and minority populations within a single nation are the source of ongoing adjustment, friction, and opportunity. It is difficult to imagine many other lawsuits quite like the Québec Secession case. The assemblage of a nation from disparate cultures inevitably gives rise to claims of identity, the titles to which can be rooted nowhere so firmly as in the telling of historical narratives, of the importance of distinctiveness, of the promises of its preservation, and, most of all, of the conditions for the consensus from which the legitimacy of a unified or a multicultural state may emerge. This is heady stuff. "Rules" hardly do it justice. Decisions that do not consider the underlying realities will solve only symptoms, making the juridical incisions into fragile scars.

One could imagine other cases where the values of TJ might be the same, and therefore where the temptation to depart from the conventional myths might be irresistible. TJ may be even more irresistible at the appellate level than in the trial courts, for it is at the appellate level that courts, in the guise of deciding individual disputes and legal cases, articulate in public ways the social and political values around which individuals in society find comfort, esteem, and belonging. Examples might include cases on "Official English," same-gender marriage, or the rights of immigrants and aliens. Likewise, cases involving abortion rules call into play not legal questions, but rather competing versions of religious and cultural commitments. These are the things by which peoples define themselves. Although it was a trial-level case, imagine the untoward sense of alienation that the Italian-American community must once have felt with the decision (and the process) in the case of Sacco and Vanzetti.¹³

13. The Supreme Court of Massachusetts dismissed Sacco and Vanzetti's petitions for a new trial, wherein they argued that as two Italian immigrants they had been subjected to prejudice by the presiding judge at trial. *Commonwealth v. Sacco*, 151 N.E. 839, 255 Mass. 369 (1926). The trial of Nicola Sacco and Bartolomeo Vanzetti for robbery and murder is arguably the most politically charged murder case in the history of American jurisprudence, and has been the source of much academic debate since the decision was handed down in 1926. An important aspect of the outcome of this case involves the alienation of certain ethnic groups from the American legal system. Sacco and Vanzetti proclaimed the effects of ethnic bias until the very end. In his statement to the judge upon being sentenced to death, Vanzetti stated:

All of this, however, is only to say that appellate court TJ is a good thing, not that it is a likely thing.

To give a concrete setting for advancing the discussion in this somewhat critical direction, I would like to pose a rather different kind of case. This is a dispute that is presently in process in several courts, in several styles of legal dress. It is not constitutional. It is not even necessarily a matter involving national or group-identifying values. But it is, to everyone involved, terribly important.

I will state it starkly, as the plaintiffs in some of these cases would: Should physicians be required to tell their patients that the physicians work within a system that rewards them for withholding medical care?¹⁴ In one of its many forms, this problem is now before the United States Supreme Court.¹⁵ How should the Court address

This is what I say: I would not wish to a dog or to a snake, to the most low and misfortunate creature of the earth—I would not wish to any of them what I have had to suffer for things that I am not guilty of. But my conviction is that I have suffered for things that I am guilty of. I am suffering because I am a radical and indeed I am a radical; I have suffered because I was an Italian, and indeed I am an Italian; I have suffered more for my family and for my beloved than for myself; but I am so convinced to be right that if you could execute me two times, and if I could be reborn two other times, I would live again to do what I have done already. I have finished. Thank you.

Russell Aiuto, *The Legacy of Sacco and Vanzetti* (visited March 6, 2000) <<http://www.crimelibrary.com/sacco/saccomain.htm>>. For an in-depth reading on specific details of the case and its aftermath, see LOUIS JOUGHIN, *THE LEGACY OF SACCO AND VANZETTI* (1964).

14. There are two principal ways that physicians in managed care plans may make more money by providing less service. The first involves capitation. "The simplest form of primary care capitation involves payment of a fixed monthly amount to a primary care physician (PCP) on behalf of each managed care member who chooses the physician. The primary care physician is then responsible for providing a specified list of primary care services to the managed care member." HOWARD KIRTZ, *THRIVING IN CAPITATION: A PRACTICAL GUIDE FOR THE MEDICAL LEADER* ch. 4 (1999).

A second occasion involves incentive plans—physician compensation or reimbursement plans that include a bonus or other incentive structure to reduce treatment through "withhold" provisions, which require that a portion of the contracting physicians' salary or payment be withheld pending a review of the contracting physicians' medical costs.

Id. See, e.g., *Herdrich v. Pegram*, 170 F.3d 683, 684 (7th Cir. 1999), *cert. granted*, 527 U.S. 1068 (1999) ("[t]he HMO structure differs substantially from traditional fee-for-service medicine in giving the HMO an incentive to skimp on care once an illness is discovered."). See also *Ehlmann v. Kaiser Foundation Health Plan of Texas*, 198 F.3d 552, 554 (5th Cir. 2000). Additionally, HMOs sometimes use "referral funds" to pressure their contracting physicians to keep down medical costs by limiting treatment to their plan-member patients. *Id.* The *Ehlmann* court defined a "referral fund" as "an additional percentage of per-patient compensation from which amounts for every referral, laboratory or diagnostic test, emergency treatment, or hospitalization are deducted against the possible bonus amount available to the physician who provides or authorizes the service for his patients." *Id.*

15. In *Herdrich*, physicians who were employed by a HMO failed to diagnose a patient's appendicitis before the patient's appendix ruptured, causing peritonitis. 170 F.3d at 683-84. Upon detecting a lump in the patient's abdomen, the physician scheduled the patient to be seen

this issue? May—or can—the Court behave as the process-oriented facilitator Professor Des Rosiers describes and that Professor Wexler hopes is more frequently possible?

In conventional terms, the issue calls for the application of two related bodies of law. One is statutory: ERISA¹⁶ governs most employer-sponsored health care plans. It contains a provision that requires a plan administrator to act as a fiduciary for the plan's beneficiaries. The legal issues are: Are attending physicians plan administrators? In dispensing health care to an individual patient, are they engaged in the administration of the plan? If they are, does the fiduciary duty that attaches to that action require that the attending physician disclose the economic incentives that may (or may not) affect her judgment about the appropriateness of additional specialized services? The second body of applicable law is similar, though not statutory. ERISA is not the only source of fiduciary duties. The statute by its own terms incorporates rather than displaces the common law. The common law is full of rules about fiduciary duties, and so many of the same issues arise. Is a physician a fiduciary? If so, is such disclosure required?

There may be other ways of framing the problem in legal terms, such as the duties of a physician as they might arise from express or implied contract, or from an inverted application of the tort rules of informed consent (for withholding rather than applying some *nos-trum*). They would have the same character as the fiduciary rules; they are rules of law, preexisting in some more or less inchoate form in either the common law or in the statutes of the land. In the conventional appellate procedure, everyone will focus on the applicability and the application of those rules. The conversation will be limited to the facts and the arguments that the rules make relevant, even if, to the

by an approved HMO provider eight days later, instead of recommending a non-HMO provider who could have examined the patient immediately. *Id.* at 684. The court found that this delay resulted in peritonitis. *Id.* In another case involving incentives to health care providers for withholding medical care, the United States Court of Appeals for the Eighth Circuit held against a provider for failing to disclose the existence of an incentive plan. *Shea v. Esensten*, 107 F.3d 625 (8th Cir. 1997). That case involved a patient whose primary care doctor refused to make a referral to a cardiac specialist at the patient's request due, it was alleged, to an incentive program in place at the HMO. *Id.* at 627. As a result, the patient died from heart failure. *Id.* The patient's widow was allowed to proceed with a claim that if her husband would have known his doctor could earn a bonus for treating less, he would have disregarded his doctor's advice, sought a cardiologist's opinion at his own expense, and would still be alive. *Id.*

16. The Employee Retirement Income Security Act (ERISA) is the federal act governing the funding, vesting, administration, and termination of private pension plans and, though it was not intended to be so at the time it was enacted, the Act governs employer-funded health plans as well. 29 U.S.C.A. § 1001 et seq. The Act contains specific provisions dealing with fiduciary responsibility. 29 U.S.C.A. §§ 1101-14.

patients involved, the legal notion of "fiduciary" might have absolutely no meaning whatever.¹⁷

How then should the court go about its business? The conventional approach just described and the TJ approach that Wexler hopes possible look rather different; the conventional approach may be holding the cards of the trump suit.

How would this problem look if it were to come to a process-oriented mediation, given my admittedly somewhat exaggerated equivalent of Des Rosiers' TJ approach to appellate adjudication? The underlying interests would surely be elicited and explored, with each side explaining its needs to the other. For patients, it would be the deeply painful concern that their physicians, into whose hands they have entrusted their lives and the lives of their loved ones, may have an allegiance to something other than their personal welfare. This concern is not just an objective danger; it can be deeply personal and hurtful. There can be great value in its expression, in its being said and being heard, even if the outcome does not fully preserve it. Certainly this concern is important to the relationship.

The managed care health plans have their own story to tell and, while they might not be allowed as parties to the traditional lawsuit, they would most surely be essential participants in any effective dialogue. At one time, the country was at risk of runaway overspending on health care, to the point at which the costs of consumption so often exceeded their benefits that (it would be argued) some of the most impecunious people were deprived of essential medical services. The health plans might say that managed care was created to reverse that danger. Managed care managers are, however, unable to dictate the terms and protocols of each medical intervention; they are forbidden to describe fully in advance the forms of medical practice they must pay for. They are obligated to husband the group's assets and to tread fairly between those who demand a procedure today and those who may need even more imperative and costly procedures tomorrow. Managed care managers are subject to intense strains from "moral hazard," "adverse selection," and the absence of any effective method for controlling expenditures other than to place both authority and responsibility in the same hands—to make, that is, the providers internalize the costs of their decisions. And so capitation and physician incentive plans have been born not of greed, but of necessity.

Physicians would, in turn, describe their professional duties and assert their personal integrities, assuaging (and at least initially resent-

17. See Edward A. Dauer, *Justice Irrelevant: Speculations on the Origins of ADR*, 74 S. CAL. L. REV. 83 (2000).

ing) the suspicion that they might be unable to serve their patients while, in this unavoidable way, also serving themselves. Physicians would tell of their own frustrations with the confining strictures of modern managed health care: of the risks they and their families face in the form of feared retribution should they depart very far and very often from what health plans think of as the norms for specialist referrals and costly tests. There would be great value for physicians, and for their patients, in telling—and hearing—this narrative.

Employers, who eventually foot the bill for all of this, might complain that they too are victims of a system built by no idiot in particular, in which health care is attached to employment rather than to persons—and so on.

There is no single solution. An ideal process would be one that creates and shepherds an ongoing process. The mediator does not have all the answers. The relationships among the parties are both sources for solution and values to be preserved. The narrative of each party deserves validation and legitimization and, regardless of the outcome, there is great importance and benefit in doing that.

Deriving a solution—or a framework for solutions over time—demands one other thing. As negotiation theorists would put it, the parties must put aside their positions and focus on each other's interests in addition to their own. Knowing *what* each demands is far less useful than knowing *why*. The health plan's *position* might be that "we must be allowed to have capitation and incentive systems." Their *interest*, however, might be that "we must be able to regulate consumption so as to maximize the benefits for all of the members of the group, doing so within what the market of payers allows." The physicians' position is, "we must be allowed to participate in managed care without being held liable for a failure to disclose the economics of that system." Their interest may be, "we cannot be put in a position in which we must disclose things we cannot avoid when the disclosure itself may have effects adverse to the therapeutic relationship." Those who are familiar with mediation, or with contemporary theories of negotiation, will recognize this distinction as a familiar one. Effective mediation requires the expression, discovery, and sharing of interests and the deemphasizing of positions. Conventional litigation, perhaps especially at the appellate level, demands just the contrary. Lawyers, judges, and eventually the parties, are driven willy-nilly to articulate positions. Interests are makeweights, when they are weights at all. The effect is made all the more likely by the additional fact that courts do not have much freedom in fashioning remedies. With the exception of rare structural injunctions, typically in macro-justice cases

involving such issues as voting rights and school desegregation, courts generally cannot fashion a new deal. A court might permit or proscribe the nondisclosure of a physician payment incentive plan; if the plan is proscribed, that might drive its elimination in favor of something else. The court itself cannot, however, address other structural alternatives that might make for a better solution to the underlying economic and professional stresses. It would be regarded as nothing short of an outrage if a court were to undertake a comprehensive analysis and revision of even a small part of the health care system,¹⁸ which is of course precisely what a productive form of facilitation should be willing to do. Thus, the limitation on the remedies that are available to the court forces the parties (or more precisely, their attorneys) to focus their presentations on achieving the outcome they prefer from among the limited kinds of outcomes that are permitted. That is very much a focus not on interests, but on positions.

Moreover, as Professor Wexler himself has noted,¹⁹ in the Québec Secession matter, the Supreme Court of Canada was exercising its *original* jurisdiction. It was sitting, in effect, as a trial court. It is in the trial court that facts are offered and found. Appellate courts yield strong deference to the factual conclusions reached below. Their job is mostly a matter of law. There is, conventionally, not much room for the kinds of narratives a facilitated, process-oriented appeal would require. Therefore, to ask that a court entertain the physician disclosure dispute in a TJ way is to ask for a more considerable departure from judicial norms than might at first seem to be the case. As a life-long iconoclast, I am usually in favor of turning over whole apple carts when the cart no longer delivers the best apples; the TJ program might correctly say the same about conventional litigation and the appellate system.²⁰ The point here is that there will be strong forces and cogent arguments arrayed to keep the appellate part of the apple cart upright, for I believe these judicial traditions are not accidental.

18. Keep in mind what happened when the Executive Branch tried to do just that in 1994. In his 1994 State of the Union message, President Clinton issued his famous warning that "I'll take this pen and veto" health care reform that does not guarantee private health insurance for every American. The Clinton plan for a thorough overhaul of health care met a crushing defeat. Some believe it was this issue that paved the way for a Republican takeover of the House of Representatives, ending 40 years of Democrat rule. See John Hall, *Clinton Maps Far-Reaching Agenda; Much of Program Was Gore Plug*, MEDIA GENERAL NEWS SERVICE, January 28, 2000.

19. Wexler, *supra* note 3, at 2.

20. Edward A. Dauer et al., Patient Safety Implications of Medical Malpractice Claim and Resolution Procedures, in PROCEEDINGS OF ENHANCING PATIENT SAFETY AND REDUCING ERRORS IN HEALTH CARE, Nov. 1998, at 156-59 (proceedings of a Multidisciplinary Conference at the Annenberg Center for the Health Sciences).

Courts are nonmajoritarian institutions, and historically a bit patrician to boot. Judges are not usually elected in the usual political sense, and in some systems (including the federal system) they cannot be removed for any reason short of the commission of an actual criminal act. Judges are therefore quite properly forbidden to "make law," for, absent the constraint of law itself, we have no way to prevent them from making laws out of whim. Appellate opinions must explain the outcome of a case in terms of the preexisting law, and the arguments must find their footing in decisions and authorities that were crafted apart from the pressures of the case presently before the court. It is no surprise to find that opinions frequently do the contrary of what Professor Des Rosiers would like. They are most often written in an argumentative form that justifies the result against the contrary, not in a way that validates both sides and makes the outcome seem less compelled by the preexisting legal rules.

Courts, we are taught by our myths, must not regard the emotions and the needs and the ethics of the named persons before them. Never mind that courts may do so all the time; it is the official myth that matters here, not the unofficial, often-winked-at reality. Facing the fiduciary disclosure case I have posed, an appellate court may determine that the relevant statute does or does not apply, not based on its view of whether the statute directs the better outcome, but on its articulated exegesis of what the legislature most likely meant. If the statute does apply, its provisions are employed and implemented with the same seeming obeisance. Courts do not make law. Likewise for the common law approach, where the ratio of finding law to making law might be rather more heavily the latter and where the canons of common law reasoning give more latitude for decision than do the canons of statutory construction. But it is still hardly a free rein.

Thus, there are the myths that we have written to protect ourselves: that courts are in the main passive decision-makers; that they find rather than create the law and, perforce, find rather than create the outcomes; that they adjudicate between opposing versions, not of value-laden narratives, but of the law taken apart from the complexion, fears, and idiosyncrasies of the parties before them (for we value equal application even more than we value empathy). These are myths with important jobs to do. We cannot confront them lightly without embarrassing them, and if they are embarrassed, their ability to do their job may be put at risk. We depart from the lessons of our myths only cautiously, only sometimes, almost never explicitly. Can the TJ approach work if it is not explicit?

To put a sharper point to it, the agony of the physician's dilemma is unimportant unless it can be translated into the much narrower language of the rules the court must discover rather than invent. The degree of freedom offered to interests, as opposed to legal positions, is limited. Can a court change this out in the open? I suspect that to do so would be to confront the myths too patently. That is something most courts will be reluctant to do.

Nevertheless, the argument for TJ is a compelling one—perhaps even in a case such as this, where we care not about nations or cultural minorities but “only” about people enmeshed in situations that, while important to them, are not of their own making. The difficulty of achieving TJ on appeal is plain, but the gains from doing so are plain as well.

How then shall we proceed? Perhaps by telling stories of our own. Perhaps, with the doctor-patient-disclosure case poised for imminent decision, the time is right for TJ's proponents to tell the tale as they believe it should be told—to offer some exemplary narrative of an appellate opinion that could itself serve two masters—one the myths, and one the method. I would not conclude that it is impossible. However, given the tenacity of the myths TJ is up against, it is going to be difficult. The rewards, however, that Professor Des Rosiers describes and that Professor Wexler believes are possible, are so enticing, it should indeed be worth the effort to shuffle the deck and deal some cards, to see if a winning hand can be had.