

Notes for address to JPs conference, Greymouth

4 March 2006

Judge FWM McElrea

What does it mean?

The term “restorative justice” applies to an approach to conflict resolution which seeks to bring together the parties most directly affected by crime (or other form of conflict) and to encourage them with the support of their relevant communities to address the harm done and try and agree what might be done to put right the wrong.

Compared with the common western form of criminal justice, the restorative intention is:

- to produce an agreed outcome rather than one imposed by the State,
- to heal the wounds of the parties caused by their conflict, and
- to address ways of avoiding such problems in the future.

Although punishment has a role to play it does not have the primary place accorded to it in the usual court-based system. While restorative justice 10 years ago was generally contrasted with retributive justice (i.e. concentrating on the object of the exercise) there is an acceptance now that the difference lies more in the procedures than in the goals. I therefore prefer to look at the contrast between restorative justice and adversarial approaches.

Unfortunately victims are often portrayed by the news media as people wanting vengeance or retribution for what they have suffered. Our experience of restorative justice in both youth and adult models is that typically this is not true of victims. Rather, their prime concerns are to receive an explanation (and, they hope, an apology) for what has happened, to have their questions answered, to have their needs met (especially in terms of reparation) and to know that this is not going to happen again.

It must be remembered that restorative justice does not pretend to supplant the adversary system for dealing with disputed cases but rather is confined to those cases where guilt is admitted or (in the Youth Justice system) proved at a defended hearing. Therefore the traditional western protection of the rights of the individual defendant still apply.

The contrasts with the adversarial model

Having been involved in both the traditional and the restorative types of system – as a District Court Judge since 1988 and as a Youth Court Judge since 1990 – I can say that the contrasts are remarkable. The contrasts to which I refer are these:

1. Victims are more satisfied with the restorative justice system than the normal court sentencing process. They feel that they are involved in a meaningful way and that their voices are heard. The restorative conference produces a recommendation to the Court that is not binding on the Court but has a considerable influence. For myself I take it as the starting point in any sentencing where there has been a restorative conference – that is, I ask myself whether there is any reason to depart from the solution which the parties themselves prefer. Interestingly enough, according to a recent Australian study, victims find the restorative processes more fair than Court processes – and that is true also of other participants in the conference (RISE Project, Canberra, Australia). It is noteworthy that in NZ, Victim Support has supported restorative justice
2. Outcomes of restorative conferences are more imaginative than Court sentences. Judges are tied largely to the sentences allowed by their empowering statutes. Ordinary people do not start from these assumptions and will often devise imaginative and much more meaningful solutions – for example “Kevin’s Sentence” in Canada, or the type of apology in ***ARC v Times Media Ltd***
3. Because the parties are able to meet together and talk about what has happened there is a real possibility for reconciliation and healing to occur. The usual Court processes prevent this because they discourage any direct dialogue at all between victim and offender. Indeed the British concept of putting the

prosecution “to the proof” can be seen as a discouragement to people to plead guilty and accept responsibility for what they have done.

4. Responsibility for offending is seen in a wider context in a restorative conference. It is possible to look at the responsibility of different people for what happened and for that to be taken into account in formulating a plan or outcome. Other family members, or indeed officials, might be asked to explain their role in affairs.
5. The dynamics of restorative conferences have a lot to do with empowering the primary stakeholders, who under “conventional” adversarial processes are largely in the control of professionals such as lawyers, judges, social workers or probation officers. Restorative outcomes are much more likely under an inclusive and empowering process than one which excludes meaningful participation and disempowers the key players. This has important consequences, including the fact that conference plans are more likely to be implemented than Court sentences. Restitution is more likely to be paid if the offender has agreed to it than if it has been imposed by a Court. (In fact families are more likely to offer to pay reparation for offenders than would ever occur in the Court setting in New Zealand).
6. Restorative justice is more inherently a community-based approach. Best practice in Youth Justice is founded on a wide involvement of different community agencies or individuals able to contribute to a positive outcome. In one adult scheme in Timaru there is a community panel of some 15-20 persons with expertise in a variety of areas and two of those panel members are selected for each case depending upon their particular areas of expertise or experience. They then become part of a restorative conference. The Timaru scheme won an international award in London in 2000 for its outstanding results. The Courts pilot scheme uses trained volunteers from the community to run conferences, and they can invite other suitable community people to participate.

Concerns about fairness

The New Zealand Law Society gave its support to the idea of piloting a restorative justice scheme for adults when that was mooted in 1994. It was very pleasing to see

the legal profession supporting a new initiative and they have continued to do so. However the point that most often worries lawyers is the question of fairness to different defendants. The concern is that there will be widely differing outcomes resulting from similar offending because of the differing membership of the restorative conferences and in particular the victims' attitudes. The point is an important one and I do not dismiss it. However I believe that it is founded on a concern about fairness that looks entirely to a defendant's viewpoint rather than asking what is fair from the viewpoints of defendant, victim and the community. Western legal systems have traditionally given very little weight to victims' views about sentencing.

There are other answers to that issue I could give if there were time.

Good practice essential

For restorative justice good practice is just as important as it is in court. In New Zealand we have very good systems of training run by the Ministry of Justice, as well as manuals and other materials. Best practice is based on sound values and standards, and the Restorative Justice Network has produced an excellent document setting those out. Currently there are moves afoot to establish a tertiary course for restorative justice practitioners.

Community building

I wish now to stress the way in which restorative justice can help build stronger communities. Some people ask whether restorative justice can work where there is no sense of community e.g. in large cities or where people are separated by long distances from their natural community. Experience both in Canada and New Zealand has shown that restorative justice is a community-building process. When you bring together people (including a victim) who are asked to devise ways of making things right, you are inevitably putting some measure of support around the victim, the offender and those involved with them. People are asked to take responsibility for each other – and that is what a community is all about. There is some scope even for officials to be held accountable – police can be asked why it was necessary to arrest and hold a young person in the police cells; social workers can be asked why they have failed to carry out the terms of earlier conference

outcomes or court sentences; where a school is involved, questions might be asked about the way the school has handled the matter – and so on. (New Zealand uses restorative conferencing in a number of schools.)

It can in fact be a form of participatory democracy at a community level – ordinary people, affected by conflict, taking responsibility for doing something about it.

The Sentencing Act and the Victims' Rights Act 2002

In brief, these *encourage* victim-offender meetings (via s 9 of the Victims' Rights Act), and *require* a court to take into account the outcome of any restorative justice process in sentencing an offender (s 8(j) of the Sentencing Act). The latter also provides some new sentencing purposes for which restorative justice is particularly well suited – holding offenders accountable, encouraging them to take responsibility for the harm they have caused, and providing for the interests of victims. For those interested there is a very recent paper by a visiting American scholar from Northeastern University School of Law in Massachusetts *Restorative Justice Jurisprudence in New Zealand (1998-2005)* by Yael Shy. She suggests that sentencing goals such as accountability, responsibility, deterrence and denunciation may be accomplished *through*, rather than balanced *against*, the restorative process. In other words, a restorative justice process is not just another mitigating factor. I believe this is amply demonstrated by the cases of both the High Court and the District Courts mentioned in Ms Shy's paper.

A recent example of the restorative justice process

The very recent case of ACC v Shaw (2 March 2006, Auckland District Court) is an example. I cannot discuss the sentence, as there is still an appeal period to run, but I can discuss the process. I quote from the Court transcript:

[15] *In summary, the public meeting allowed many affected people to express their views about the value of the tree to them, and the effects of this offending upon them. That had value for those who were upset at what had happened, for the defendant, who could experience first-hand the effects of his conduct on others, and ultimately*

for the public in terms of shaping a proposal to “put right the wrong” for the benefit of the community.

[16] It is worth noting the mixture of people who attended that first meeting. There were Community Board members; local residents and former residents; City Councillors and some Council staff; representatives of The Tree Council, the Onehunga Club, the Mt Eden North Residents Association and other community organisations; and of course Mr Shaw and his wife, his counsel, his real estate agent, and others who spoke in his support.

[17] Views expressed were obviously varied, but seem to be encapsulated in the concern of one Community Board member for the flagrant breaking of rules for personal gain, indicating that it was insulting to people who give time to the community that others should show no respect for the rules. Different speakers stressed the visual pleasure derived from the tree over generations, especially at Christmas, the importance of the rule of law for community life, the need to protect venerable old trees, and a concern that Mr Shaw should not profit from his actions.

[18] After a tea break, Mr Shaw apologised to the community and the Community Board for the destruction of the tree. He offered no excuses and said he was deeply remorseful. He totally accepted all the criticisms made at the meeting, and he wanted to try and restore the position and make things right. He was willing to plant a replacement tree and care for it, as well as to pay for tree planting in other places and indeed to take part in the tree planting. He said that the offence had occurred because of financial stress and a desire to sell the property, but he did not offer this as an excuse. He said that he had now given up property development.

Later in the sentencing notes are these comments:

[26] Looking at the agreed outcome as a whole, it represents an impressive package of proposals that are aimed at putting right the wrong done by the defendants, so far as that is possible, to the satisfaction of those most affected. And committing Mr Shaw to be part of a community building exercise in which the

“poacher turned gamekeeper” works alongside volunteers to plant trees in other places.

...

[59] This is a strong plank of restorative justice, the need for respect on all sides – to show respect, and to promote respect, in this case respect for the environment, for neighbours, and for the rules of the community, and ultimately for Mr Shaw. I expect that Mr Shaw will have earned some respect already from those who attended the restorative justice meetings. If he were to carry out the whole of the programme he has agreed to, he would build for himself yet more respect, in proportion to the respect he demonstrates for others in this way. The trees he pays for and plants, will be one measure of this growing respect for the environment, and for him. From being the offender he can become part of the solution. It is in his hands.

Recent results

The courts pilot was evaluated after four years. The experience of the process by all concerned had been very positive, and the value for victims was significant. There were also benefits in reduced reoffending rates. There were evaluated again after a two year gap. My comment on the report has been this:

... although several of these figures are said to be not statistically significant, I find that hard to understand, perhaps because I'm not a statistician, but let me just give you a couple of examples. The report talks about a 4 percent reduction in the reoffending rate for those who went to restorative conferences compared to the comparison group. The real figure is nine percent because the reconviction rate of one group was 45 percent and of the restorative group was 41 percent. Now, you might say the difference is 4 but as a proportion that 4 is one eleventh of 45 and one eleventh of 100 is nine percent. So you've got a nine percent difference if you compare the reoffending rate of those who go to conference and those who don't. Likewise the difference in the imprisonment rate for those who went to conferences and those who didn't was 17 percent on the same comparison. And very significantly, not only did those who went to restorative conferences reoffend less, they did so at a later stage when they did reoffend, and the seriousness of their reoffending was only half that of the comparison group. Now, I think all that shows

that you can operate a much better system, particularly for victims but also for everyone else involved, and at the same time make the community safer.

So the news seems to be good news. I hope our media can see it that way, and that it can be profitable to tell the good news as well as the bad.

Recent developments in New Zealand

Perhaps the most significant development in recent years in New Zealand, apart from the Sentencing Act, has been the expansion of restorative justice into areas not previously touched. Sexual abuse cases were deliberately omitted from the courts pilot, but a new provider group – Project Restore - has been established (by survivors of sexual abuse) to deal with such cases and was launched by our Minister of Justice last month. In the province of Marlborough prosecutions under the Health and Safety in Employment Act – essentially, for unsafe work practices – have been trialled using restorative justice procedures. There have been several environmental prosecutions where restorative conferences have produced very good outcomes. Very significantly, the Corrections Act 2004 requires the Corrections Dept to provide access to “any process designed to promote restorative justice between offenders and victims”. This appears to raise an obligation to make provision for funding such matters, and will greatly assist the possibilities of restorative justice being used in prisons, and as part of the parole process.

However, personally the most significant thing I have read in a while is the result of an interview in a legal journal of the justice spokespersons for the five main political parties before the 2005 parliamentary elections. All five were supportive of restorative justice. This does not stop politicians thumping the old “tough on law and order” drum, but it does mean that there is a willingness to have a more diverse system, and specifically one that gives a much better deal to victims. Restorative justice has now reached the point where it is commonly referred to in the media, and has been associated with one or two high-profile cases concerning road deaths. A newly elected Member of Parliament for the National Party has publicly spoken of her work with Victim Support in Timaru (the home of Project Turnaround) and says that she is a passionate supporter of restorative justice.

I believe that restorative justice is now in the mainstream of public consciousness, and with widespread political acceptance as well it is ready for a major advance.

A final thought

As we tackle the task of making justice more accessible, community based and victim-oriented, I commend to you these words of wisdom from Dr Nigel Biggar, then of Oriel College, Oxford, in an article “Can we reconcile peace with justice?”

“Justice is primarily not about the punishment of the perpetrator but rather about the vindication of the victim.”

Footnote:

This address includes some material previously presented by the speaker in the Bahamas and in Minnesota, USA.