

"Restorative Justice: Turning the Tide in the Courts."

A paper by Judge R J Johnson*

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"The conclusion I have reached is that without strong leadership at the most senior levels of the judiciary, then so long as restorative justice is dependent on the courts, its emergence into a full, mainstream model could take as long as the gestation period of the adversary system, which was about a century. The adversary ethos is so deeply embedded in our legal structures, the legal profession, and the judges, who (in common law countries) are drawn from the profession, that restorative justice is continually pushed to the margins, despite the encouragement of the legislators."

- FWM (Fred) McElrea¹

I have begun my paper with this quotation from Fred McElrea, not only because it is challenging and I can't resist challenges, but mainly because it so simply and clearly identifies the malaise which I see existing in and around restorative justice in our Court system at the moment. I do not wish to be misunderstood on this because in pockets here and there judges and their communities are operating restorative justice in an admirable and very successful fashion. I would also not wish to overlook the admirable work being done within the Ministry of Justice to provide a framework for the use of restorative justice within the court system, or the Government's efforts in providing a sustainable flow of financial support for this. But it would be a gross exaggeration to say that restorative justice is flourishing in a wide-spread way in our court system, except of course within the Youth Court where it is well established and a system which has been greatly admired and emulated. It is fair to say that any failings within the Youth Court are generally related to conference scheduling or

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¹ "Restorative justice as a procedural revolution: some lessons from the adversary system", a paper delivered by FWM McElrea at the Fourth International Winchester Restorative Justice Conference, 10 October 2007.

follow up and are fortunately few in number. The annual Youth Court intake of 7000 however is tiny compared with the approximately 220,000 separate people charged in our adult courts every year.

Judge McElrea's challenge points to a conservatism both in attitude and in practice. Unravelling those will help us determine what we must do to achieve more court based enthusiasm.

Attitude

The first matter I discuss is about **definition**. It may seem simple enough to the converted who have lived through the development of restorative justice, but it remains an impediment to acceptability in the eyes of many judges. Partly this is experiential from the way in which in the early days of restorative justice there was a confusion between purely diversionary processes and the idea of restorative justice as a way of doing justice. Partly it is from a lack of realisation of the importance of the centrality of the victim in the process. There remain many who believe that restorative justice is about the offender getting a lighter deal when there are other ways on offer of achieving that.

I have tried to find a satisfying definition which makes it clear that central to the process is the attempt to achieve some victim satisfaction. You could read most definitions as incorporating that if you were so inclined but in addressing an audience which has operated in a system which has firmly set the victim on the outside for so long, the lack of specific reference to victims in definitions is apt to ratify lurking beliefs that restorative justice is only another form of dealing with an offender within his community. For instance the widely accepted definition in New Zealand, by Marshall:

*"... a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."*²

² Marshall T (1996) "Restorative Justice: An Overview". London, Home Office, p5.

takes us near the victim only if we are prepared to read that into his words. It requires pre-acknowledgement of the victim as a party in the criminal process.

I regret I see that problem also in Dr Howard Zehr's definition:

*"Restorative justice is a process to involve, to the greatest extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible."*³

I think Gabrielle Maxwell takes the pragmatic judicial officer closer when she says the aims of restorative justice:

*"... are to repair the damage created by criminal offending and restore the balance of rogue relationships within society."*⁴

I think that we have a statement we can work with to promote attitude to change in favour of restorative justice both on the Bench and at the Bar. In the explanation of restorative justice given by Fred McElrea (who possibly put it this way because he was a working judge) in the Bahamas in 2001⁵ he said:

"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."*

The judiciary need definition, need some formation, need some purity of practice, if they are to embrace restorative justice and take responsibility for restorative justice

³ "Little Red Book of Restorative Justice", Good Books, Pennsylvania, p37.

⁴ Maxwell G (2007) "The Defining Feature of a Restorative Justice Approach to Conflict", Institute of Policy Studies, p6.

⁵ "Restoring Justice", Judge FWM (Fred) McElrea to the Law Forum 2001 Organisation of Commonwealth Caribbean Bar Associations' Fourth Conference in Nassau, Bahamas.

outcomes, as they must in its use within the formal criminal justice system. The pre-contemplative judge will find no comfort in a rebellion against State co-option, managerialism and definition. In the wonderful way he uses language, Kim Workman has said:

“Pre-occupation with the question of whether an initiative “qualifies” as a restorative justice programme, encourages purism. Restorative justice does not exist in a pure state – it does not have that sort of pedigree. Restorative justice is a mongrel – it was conceived not in the ivory towers of the State, but in the dusty streets of despair and guilt. It will sleep with any one that wants it.”

Well, bravo to that, but the reality of the judicial task is that the judge stands accountable within the judicial chain for sentencing integrity. Restorative justice can plainly provide that in a context of regular aims and regular process.

The next problem relates to the **position of victims** in the criminal justice process. It will of course be well understood by this audience that for some centuries the criminal justice process has been a two sided one between the State and the alleged offender. Until relatively recently the victim was displaced from a role in the process except as a witness. The advent of restitution as one method of disposition of cases, brought a feature which was restorative in nature, but in practical terms suffers from the problem that many offenders who cause actual damage have no financial means to put it right. The Victims' Rights Act 2002 required that judges, lawyers or offenders, court staff, probation officers and prosecutors should encourage the holding of a meeting between a victim and offender to resolve issues relating to the offence if it can be facilitated. This is not enforceable as a legal right and, I regret to say, has been virtually ignored by the players named in the Act.⁶ It is obvious that such well-intentioned legislation will be meaningless without attitude change, education and systems to facilitate a change.

The victim's position in the case and the institutional approach to victims within the case is inextricably tied up with the adversarial process.

⁶ Section 9, 10 Victims' Rights Act 2002

To understand this we need to reflect on attitudes about victims which are currently expressed in our community. There are some who want to take a greater part in the prosecution itself, some who want nothing to do with it, some who simply want their story to be heard. If we reflect on the history of criminal justice under the system we operate we realise there have been times when all of those attitudes have had their day. If we were able to take a time trip and say to our celestial horologer “beam me up Scotty” and land in Kent in 603AD at the time of the Anglo Saxon King Aethelbert we would find the community emerging from a period of private vengeance by blood feud as a reaction to crime and the emergence of a system where the parties were required to agree to a sum to be paid in compensation for an injury. Where the parties could not agree on an amount the King set a tariff which was fixed according to the social status of the injured party. This included something called the *wergild* or, in other words, a man’s value.

“Nothing to do with the offender was taken into account. Intent was not enquired into, so an accidental injury was not excused, nor could any other extenuating circumstances be pleaded. They were just not conceived to be relevant. The punishment was simply a penalty for an evil done and a deterrent from law breaking in the future. It took the form first of a civil indemnity, a bot - usually the wergild – then, in many cases, a further indemnity, a wite – to the King. This payment to the King was another innovation and, with later additions, was to feed the wealth, and the growth, of royal power for centuries to come. Represented at the beginning of the encroachment of political considerations into the arena of criminal justice with the Crown exerting more and more controls.”⁷

Our time machine would take us into the future when the King’s Peace was established but still the prosecutor was the victim in person, and finally to the development of representatives in the form of the King’s prosecutor and by the early 1700’s the commencement of representation by defence counsel. At this stage the displacement of the victim from the process was almost entirely completed.

⁷ John Hostettler, “A History of Criminal Justice in England and Wales” (2009) Waterside Press, p15.

Today we hear echoes of all these historical things. How often is it expressed publicly by emotional citizens that a sentence does not adequately reflect the value of the life of their relative. Even offences which are based on accident rather than intent draw this criticism. I regularly tell new judges of the reaction they will face when sentencing someone in a traffic accident in which the fault has been minor but the consequence major. Bereaved citizens are apt to regard the failure by a driver to see another road user resulting in injury or death as an offence of culpable homicide or intentional grievous bodily harm. They cannot understand why the maximum penalty for such offences might be three months imprisonment and the actual sentence less. Victims or their relatives are often heard to say in public that they were denied a “right” to read a statement condemning the offender by prosecutors or judges who have regarded them as inappropriate or inflammatory. Victims are often heard to say that they were never given the chance to put their side of the story.

Only in recent decades has the trial and sentencing process begun to grapple with the place of the victim as an important player who should be heard and has still not resolved that problem satisfactorily. I accept that restorative justice offers opportunities in all these things but my purpose in mentioning them is to discuss the background for conservative attitudes relating to the place of victims.

The next issue relates to the problem of **adversarialism**. Everyone understands how the adversarial system gets in the way of restorative justice even though it is capable of operating contemporaneously with restorative justice. Restorative justice does not interfere with the fact finding process relating to the verdict. The difficulty is that for lawyers who practice in a solely adversarial way to achieve a win is to gain an acquittal. It matters not how that acquittal is won. The greatest satisfaction comes from the pure form – a verdict on the merits of the case. But more often than not these days the game is to exhaust the system on a procedural basis. In some kinds of cases delay can result in the case collapsing because the witness is unable to sustain the desire to give evidence, such as in family violence cases. In other cases, perhaps extreme cases, delay may result in the case being stayed for procedural abuse. In all cases, delay can cause failures or inadequacy of proof. And yet, how does a recidivist offender win by having a case dismissed for procedural reasons

when he has not made peace with his victim or his community or his criminogenic problems. He lives to return to court.

The problem with this kind of delay is that it is an influence against remorse, apology and forgiveness which are component parts of restorative justice.

However, the courts can become an agency for change. A wide range of non-adversarial processes has been sweeping the common law world in the last two decades. New Zealand is not exempt. The range includes reforms to the way in which family law is processed on a non-blame basis; the development of the primacy of mediation processes in civil litigation and a leading example is the new District Court Rules in New Zealand effective from 1 November last year, and in the criminal justice arena, the Problem Solving Courts such as Drug Courts, Family Violence Courts, Indigenous Courts and courts involved in community collaboration. These all have connections with restorative justice in the sense that they involve a non-adversarial stance post plea of guilty, but they have all been adversely affected by the adversarialist's emphasis on the fight.

The lawyer role needs redefining to cope with this new non-adversarialism⁸ by embracing the "extra – legal" factors which touch on their client's emotional, psychological and relational wellbeing and their place in the communities they live in and their relationships with fellow citizens. If they do that with the same gusto that they have embraced the extra legal factor of their client's financial situation, they will be on the road to acquiring the future lawyering skills necessary for effective lawyering in a new non-adversarial justice environment which embraces aspects of both distributive and restorative justice after plea.⁹

So, accepting that there are attitudinal and practice changes required, what assurance is there that the judiciary will be able to make them given the apparent lack of progress since the seminal changes to the sentencing procedure with the

⁸ See King, Freiberg, Batheol and Hyams 2009, "Non-Adversarial Justice", the Federation Press, chapter 15.

⁹ Daicoff in King et al p232-233.

2002 Act gave restorative justice a legislative place which has not been universally acted upon.

Well, I want to tell you about **the wave**. But before I get there I need to explain that the District Court judiciary has been involved in reform of its processes on a scale unprecedented in living memory during the last several years. Work which commenced early this decade on the reform of the civil litigation procedure (which relates to civil disputes) has been brought to fruition and put in place with the new District Court Rules effective from 1 November 2009. They bring revolutionary change to the civil procedure and have no exact precedent anywhere else in the world. They include compulsory mediation processes and requirements of exchange of information between citizens even before the matter is filed in court formally. Then we were engaged in a time consuming relationship of advice to the Law Commission in connection with the then Government's project on sentencing guidelines which ultimately has gone nowhere. We were diverted into a consultative position relating to the effective interventions project and we have lobbied for and participated with ideas for replacement of the Summary Proceedings Act 1957 which governs our criminal procedures and which has been out of date for twenty years. This legislation will be introduced to Parliament later this year.

In the course of the effective interventions project we realised in a stark way our culpability as the gatekeepers of the prison sentence, in particular connected with the rate of incarceration of Maori. So we formed a judicial committee to consider ways in which judges could have an effect on reducing that appalling level.

Contemporaneously with this Judge Taumaunu of the Waitakere Court was proposing sittings on a Marae at Gisborne related to the Gisborne Youth Court, a town from which he hailed. He had been to see the Koori Courts in Australia. As a Bench we have fostered that idea and now there is such a court at Te Poho-o-Rawiri Marae in Gisborne, Manurewa Marae connected with the Manukau Court, and the Hoani Waititi Marae connected with Waitakere Court. There will be three or four more Youth Marae Sentencing Courts later this year. This is where the wave comes in. The enthusiasm of the Maori community to embrace this form of sentencing is mind blowing. Marae up and down the country are competing for the opportunity to participate with the courts and various judges have had amazing experiences in

meetings with those Marae community. Earlier this month the Prime Minister opened the Waitakere Youth Sentencing Court at Hoani Waititi Marae and the Principal Youth Court Judge was able to announce a new name for such courts, **Rangatahi Court**. A new waiata to celebrate such courts was written by Judge Taumaunu and others and performed in public for the first time by he and other judges at the powhiri. With his permission I have included the waiata as a footnote¹⁰.

¹⁰ **Waiata**

Tēnei matou
Te whakatipuranga
O tēnei ao
Te nui o
Ngā rangatahi Māori
E raru nei

Ko te anga whakamua nei
Kia whakahoki tātou e
Ki te Reo me ōna Tikanga
Kia mohio mai
Ko wai? No whea?
A tātou rangatahi e

E whai nei matou
I te ara tutuki pai
Aratika
Mō ngā tamariki
Mokopuna e raru nei
Kia ora ai

Ko te anga whakamua nei
Kia whakahoki tātou e
Ki te Reo me ōna Tikanga
Kia mohio mai
Ko wai? No whea?
A tātou rangatahi e

Te Kooti Rangatahi
(E) whakahoki nga taiohi
Ki te marae
Ka pu te ruha
Ka hao te rangatahi
Te kaupapa

Ko te anga whakamua nei
Kia whakahoki tātou e
Ki te Reo me ōna Tikanga
Kia mohio mai
Ko wai? No whea?
A tātou rangatahi e

Kia mohio mai
Ko wai? No whea?
A tātou rangatahi e

Song

Here we are
This generation
Living in today's world
(Alas) the great number
Of our Māori youth
Who are in trouble (with the law)

The vision for the future
Is for us to return
To our Māori language, its customs and protocols
So that our Māori youth will know
Who they are, and where they are from

We are seeking
The pathway to achieve success
The right path
For our children
And grandchildren who are in trouble (with the law)
To secure their well-being (for the future)

The vision for the future
Is for us to return
To our Māori language, its customs and protocols
So that our Māori youth will know
Who they are, and where they are from

The Rangatahi Court
Returns the young person
To the marae
On the basis that
The old worn out net is cast aside
And the new net goes fishing

The vision for the future
Is for us to return
To our Māori language, its customs and protocols
So that our Māori youth will know
Who they are, and where they are from

So that our Māori youth will know
Who they are, and where they are from

A second example is the project for the sentencing of adult offenders I have instituted in Northland which will be based on Kaikohe Court and code named Matariki.

Discussions are occurring with Ngapuhi at this time to develop a procedure to ensure that s27 Sentencing Act 2002 conferences (which relate to participation of whanau and iwi in the sentencing process) can take place on a basis which they feel comfortable with and own, and in which they are acknowledged as process partners. The process to be used is not yet ready for exposure because it is under development between a working party of Ngapuhi and judiciary with the hope that this organic kind of birth will give it endurance. I have recently been north on this matter and the enthusiasm for community connection with the court has amazed me.

Even more substantial in our desire to work with our community is the project surrounding the Porirua Court in which the local Judges Kelly and Walker have spent months tramping the streets to community organisations to make contact and find out what they do, culminating in a massive public meeting at the courthouse recently to discuss ways in which the court can help the community and the community can help the court. The initial inspiration comes from community justice centres which have spread from the United States to Canada, Britain, Australia in the past decade, but it is different from all of those and has a distinctive Kiwi flavour. I went to that meeting and the fervour of the community to engage in the process of criminal justice was moving. I spoke of a wave but it feels like a tsunami.¹¹

There is a community hunger to engage with the courts in the criminal justice processes which we are detecting through these projects which feels like a minor tsunami. There is no reason why restorative justice should not be part of that.

A plan for the future

Well, we have a situation in New Zealand where the portents for restorative justice within the criminal justice system are favourable. The legislature has done its part

¹¹ Dominion Post, Saturday March 13th, 2010, "Putting a spoke in the crime cycle" by Britton Broun.

with the enactment of the Sentencing Act 2002¹² and the Victims' Rights Act 2002¹³. Practitioners of restorative justice have organised under the umbrella of Restorative Justice Aotearoa¹⁴. Restorative justice has been proven to work in the adult sentencing context in New Zealand in 2005 (between 4% and 17% reduction in reoffending over two years depending on the way the maths is calculated) and in the United Kingdom in 2008 (27% reduction in reoffending within two years as a result of restorative justice)¹⁵. The Ministry is funding conferencing on a basis that we would hope would increase incrementally. As an academic study restorative justice has tenure at the Restorative Justice Centre of Aotearoa/New Zealand at Auckland University of Technology.

But where are the mainstream of judges?

I am now back to where I began. Judge McElrea called for judicial leadership. In 2004 my predecessor Judge Carruthers made a pact that he would seek to influence the setting up of a restorative justice centre at the University. It has happened through his hard work and that of Fred McElrea.

Here is a plan from me. I will:

1. Establish a Restorative Justice Judicial Forum among the District Court judiciary to encourage debate, exchange of ideas, practice reform and compliance with the legislative intentions contained within the Sentencing Act and the Victims' Rights Act.
2. Influence the Board of the Institute of Judicial Studies to establish a standing elective restorative justice orientation course for judges of all judicial levels.
3. Negotiate a corporate or other form of associate membership of Restorative Justice Aotearoa for the judiciary.

¹² Sentencing Act 2002 ss 7-10, 25-27, 32, 62, 110 and 111 all contain aspects authorising or facilitating restorative justice processes.

¹³ Victims' Rights Act 2002 ss 9, 10 and 14.

¹⁴ www.restorativejusticeaotearoa.org.nz

¹⁵ <http://www.justice.govt.nz/publications/victims/restorative-justice>

4. Ask the Ministry of Justice to establish a system of monitoring the use of restorative justice in each of the courts for the collection of statistical information around that.
5. Suggest to those engaged in the reform of the legal aid system a competency measure for legal aid counsel relating to their propensity to comply with the aims of the Sentencing Act 2002 and the Victims' Rights Act 2002.
6. Encourage the New Zealand Law Society to provide further continuing legal education programmes on restorative justice.

I finish by reading the words of the judicial waiata Rangatahi footnoted earlier in this paper.