

RESTORATIVE JUSTICE JURISPRUDENCE IN NEW ZEALAND (1998-2005)

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I. INTRODUCTION

Restorative justice, according to the New Zealand Ministry of Justice, is a “process to involve, to the 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.”¹ It is an approach to offending that sees crime as a violation of people and relationships rather than just a violation of the law and state.²

The place of restorative justice in the New Zealand criminal justice system was enhanced in 2001 with the introduction of the court-referred restorative justice pilot project. Since then, over 600 restorative justice conferences have taken place.³ During these conferences, victims and their supporters have a chance to express the full impact of the crime on their lives while offenders can take responsibility for what they have done and suggest ways to make amends for their actions. Conferences are completely voluntary and run by trained facilitators.

The pilot project was run in four courts throughout the country. The following year, the legislature passed the Victims’ Rights Act of 2002, encouraging the use of victim-offender meetings, and the Sentencing Act of 2002, requiring that judges take the results from any restorative justice conference into account when sentencing.

This article examines the restorative justice case law in both the High Court and the District Courts of New Zealand over the past four years. It identifies the central issues judges face in taking restorative justice into account when sentencing and the jurisprudence they have produced in response. This paper builds on the paper by Judge Thorburn, “Observing the Application of Restorative Justice in Courts of New Zealand: A Brief Survey of Cases Over

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¹ H Zehr cited in Ministry of Justice, *Restorative Justice in New Zealand: Best Practice* (2004) 7.

² H Zehr, *The Little Book of Restorative Justice* (2002) 37.

³ *Interview with I Brown*, Restorative Justice Co-ordinator, Auckland District Court (21 Feb 2006).

10 Years.”⁴ The judge’s essential framework is used (examining New Zealand’s recent restorative justice case law for jurisprudence) but the scope of inquiry is limited to cases that fall *after* the 2002 Sentencing Act and is expanded to include new cases and further analysis. The two exceptions to this time frame are *R v Clotworthy* (1998) 15 CRNZ 651 (CA) and *D v New Zealand Police* (High Court, Auckland, AP 161/99, 29 February 2000, Nicholson J). The former is mentioned in this paper due to its major role in developing the restorative justice case law in New Zealand over the past eight years and the latter has particularly relevant insights into the way judges can use restorative justice conferences within families.

The Sentencing Act of 2002 was a major milestone for restorative justice in New Zealand as it was the first time restorative justice was expressed in black letter law. According to s 8(j), judges were now required to “*take into account* any outcome of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case.” [Emphasis added.] While this provision in the Sentencing Act incorporated restorative justice into the mainstream justice system, judges continue to struggle with *how* they should take the conference outcomes “into account.”

Due to the flexible and unpredictable nature of restorative justice conferences themselves, the function of the reports and the manner in which they are taken into account by judges vary. Based on a review of over 100 cases, this article separates them into four broad categories. First, many judges are using restorative justice to re-examine questions of consistency in sentencing and looking at whether the multiple goals of the Sentencing Act may be accomplished *through*, rather than balanced *against*, the restorative process. These include goals like accountability, responsibility, deterrence and denunciation. Second, judges apply s 8(j) by using the restorative justice report to learn valuable information not available, or not available in as much detail, from the pre-sentencing report or the victim impact statement. Third, judges use the report to negotiate difficult sentencing tasks such as cases involving familial and cultural issues. Finally, judges use restorative justice outcomes to tailor appropriate sentences to offences outside of traditional crime, including regulatory offences.

II. BALANCE AND CONSISTENCY

Judges preparing to sentence an offender after the latter has engaged in a restorative justice conference are faced with a daunting task. The Sentencing Act not only requires the judge to take the outcome of the conference into account; they must also consider a variety of

⁴ Judge Thorburn, *Observing the Application of Restorative Justice in Courts of New Zealand: A Brief Survey of Cases Over 10 Years* (International Symposium on Latest Developments in Criminal Justice Reform, Shenzhen City, China, August 2005).

sentencing purposes. These include holding the offender accountable, providing for the interests of the victim, deterring others, denouncing the conduct, and protecting the community from the offenders (s 7(1(a-i))). In the landmark Court of Appeal case, *R v Clotworthy* (1998) 15 CRNZ 651, a man charged with wounding with intent to cause grievous bodily harm had engaged in a “rich and detailed” restorative justice conference with his victim, resulting in a full agreement outcome. While this case occurred prior to the Sentencing Act, the District Court judge took the conference, and the victim’s wishes, heavily into account. He gave Mr Clotworthy a two-year suspended sentence in addition to community work and a reparation scheme similar to the one worked out between the parties. The Court of Appeal quashed the sentence, lowering the amount of reparation greatly and sentencing the defendant to three years in prison.

On the one hand, the case was deemed a success for restorative justice, as the Court clearly set forth its support for the process. At p 661 the Court declared: “We would not wish this judgment to be seen as expressing any general opposition to the concept of restorative justice.” On the other hand, the decision positioned restorative justice as a mitigating factor to balance *against* the values of deterrence and denunciation, rather than a process *through which* those values could be achieved. The Court stated on p 659:

A wider dimension must come into the sentencing exercise than simply the position as between victim and offender. The public interest in consistency, integrity of the criminal justice system and deterrence of others are factors of major importance.

On the consistency issue, *Clotworthy* and the cases that followed in its path highlighted the difficulties involved in blending two seemingly different types of criminal justice approaches. One was a community-based, case-by-case, problem solving approach, utilising the particular facts of the case and the wishes of the parties to shape an appropriate sentence. The other focused instead on the responsibilities of the state, including punishing wrongdoers, deterring others from committing the same crime, protecting the public and ensuring a consistent outcome. The New Zealand Chief Justice, the Right Honourable Dame Sian Elias, illustrated the tension between the two when, in 2001, she expressed support for restorative justice while simultaneously cautioning against the potential for inconsistent treatment of like cases.⁵ Fundamental fairness, she asserted, requires that people who commit the same crime should receive the same type of sanction or else “corrosive unfairness” would result.⁶ Michael Tonry, professor of Law and Public Policy at the University of Minnesota Law School has also noted that “the ideas that people should be treated fairly, especially by

⁵ DJ Schmid, *Restorative Justice: A New Paradigm for Criminal Justice Policy* (2003) VUWLRev 4.

⁶ *Ibid.*

the state, and that fairness includes equal treatment, are widely shared and present challenges for...community/restorative... sentencing.”⁷

Judge McElrea, a District Court judge in Auckland and a prominent restorative justice advocate, has responded to the disparity concern by advocating for an expansion on the question of what is “fair.” He writes:

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.⁸

Judge McElrea also enumerates the many ways that similar crimes are *already* treated differently on a case-by-case basis, such as according to the degree of damage to the victim, the mitigating factors of remorse and attempts at reparation, and the discretion of the presiding judge.⁹

Michael E. Smith and Walter J. Dickey, in their article, “Reforming Sentencing and Corrections for Just Punishment and Public Safety,” argue that, just like the term “fair,” the term “alike” should also be examined.¹⁰ According to the authors, the two factors by which the traditional criminal justice system deems cases “alike” are the offender’s prior record and the gravity of the offence. Although these factors are relevant at sentencing, they are “hardly sufficient to define a category of offenders who are ‘alike’ in culpability or in the threat they pose to public safety.”¹¹ The authors argue that society’s task should be to reduce the imposition of random sentencing, or sentencing based on bias. That is not the same as striving to give the same sentence to two offenders who committed similar crimes and with similar prior records, regardless of all other dissimilarities. Several authors have echoed this sentiment, arguing that the ultimate aim of criminal justice sentences should not be the imposition of *consistent* sentences, but rather *contextual*¹² or *comparable*¹³ sentences. Under a contextual or comparable sentencing framework, responses to crime could vary according to

⁷ M Tonry, *The Fragmentation of Sentencing and Corrections in America* (Sentencing and Correction: Issues for the 21st Century, No.1, September 1999, US Department of Justice, National Institute of Justice).

⁸ Judge FWM McElrea, “Restorative Justice – A New Zealand perspective” in D J Cornwell, *Criminal Punishment and Restorative Justice* (2006) Waterside Press, Winchester at p 130.

⁹ *Ibid* at p 131.

¹⁰ W J Dickey and M E Smith, *Reforming Sentencing and Corrections for Just Punishment and Public Safety* (Sentencing and Correction: Issues for the 21st Century, No.4, September 1999, US Department of Justice, National Institute of Justice) p 10.

¹¹ *Ibid*.

¹² J Braithwaite, “In Search of Restorative Jurisprudence” in L Walgrave (ed) *Restorative Justice and the Law* (2002).

the needs of all parties, as long as they were meaningfully tethered to the nature and effects of the crime.¹⁴

Finally, many of these authors mention that the final check on the possibility of disparate sentencing is the oversight provided by the judge, who can adjust the sentence suggested by the conference as he or she sees fit to ensure fairness.¹⁵

While these arguments address the concerns of many who emphasise the importance of consistency in sentencing, they do not speak to the additional balancing concerns of deterrence and denunciation. It is still unclear as to what guidelines judges should use to determine the weight given to restorative justice and how it should balance against the judges' other duties to ensure public safety and public confidence in the system.

As the case law currently stands, judges most often impose or uphold sentences harsher than those desired by the victims. John Braithwaite noted this in his article "In Search of Restorative Jurisprudence".¹⁶

He wrote:

The empirical experience of the courts intervening to overturn the decisions of restorative justice processes, which has now been considerable, particularly in New Zealand and Canada, has been overwhelmingly in the direction of the courts increasing the punitiveness of agreements reached between victims, offenders and other stakeholders.¹⁷

This is often a result of the balancing act mentioned above in which judges are required to take part under the Sentencing Act, as well as the judges' perceived duty to protect the safety and values of the larger society. As Judge McKegg noted in the assault-with-intent-to-injure case of *R v Reynolds* (Nelson District Court, CRI-2004-042-593, 15 June 2004, Judge McKegg):

I have read the results of the Restorative Justice Conference. I congratulate you for undertaking that. . . Your victim has made through that meeting, a strong plea that you not be imprisoned. Victim forgiveness or concern is a factor, but it is not determinative, because in fact when you strike out at someone in the way that you did, the blow you deliver is also a blow against society as a whole which is entitled to be protected from you. (para [3])

¹³ L Kurki, *Incorporating Restorative and Community Justice into American Sentencing and Corrections* (Sentencing and Correction: Issues for the 21st Century, No.3, September 1999, US Department of Justice, National Institute of Justice, 9).

¹⁴ Ibid.

¹⁵ See Judge D Curruthers, *Restorative Justice: Justice of the Future, A View from the Bench* (Keynote Address, Restorative and Community Justice: Inspiring the Future International Conference, March 2001); Judge FWM McElrea, *supra* at no.4.

¹⁶ See note 6, above.

¹⁷ Ibid.

Several judges, however, have begun to respond differently to the balancing question, conceptualising and describing restorative justice as much more comprehensive than just another mitigating factor at sentencing. In various judicial decisions, restorative justice is emerging as a process whereby several seemingly opposing Sentencing Act requirements, such as the need to hold the offender accountable *and* the need to take into account the offender's situation, are both accomplished. Judge McElrea captured this conceptualisation in the purse-snatching case of ***R v Sami*** [2006] DCR 128. Judge McElrea, rather than using language of accountability *in spite of* the restorative conference (i.e. ***Clotworthy***), found instead that Mr Sami had been held accountable most effectively *through* the restorative justice process. In his justification for not giving Mr Sami a prison sentence, Judge McElrea said at para [26]:

I certainly accept the need to denounce this crime. I do so strongly now, and I am sure that that denunciation has already occurred through the defendant's family and the restorative process. He has been held accountable not just through the Court but in a direct, face-to-face way. He has assisted the victim in a way that many defendants do not...Putting all of those matters together...[a prison sentence] would be counterproductive from several points of view and the public interests and the interests of all concerned are best served by a sentence of community work, supervision and reparation.

In two High Court cases, ***R v Cassidy*** (High Court, New Plymouth, T2/03, 10 July 2003, Paterson J) and ***R v Hēpi*** (High Court, Hamilton, CRI-2005-019-2278, 14 July 2005, Rodney Hansen J), the Courts, like in ***Clotworthy***, found that prison sentences were necessary for deterrent and denunciation purposes. The judges in both cases, however, noted how transformative the respective restorative justice conferences had been, how deeply the offenders felt the remorse of their actions *through* the process and how much the victims' families had benefited as a result. These cases show that unlike many other mitigating factors such as the age of the offender or an apology offered, restorative justice conferences are not static. Through them, feelings can be deepened or changed, victims' needs can be addressed and their questions answered, and several of the purposes of sentencing under the Sentencing Act can be accomplished with a reduced amount of state intervention.

In another decision that eloquently captured this broad and fluid nature of restorative justice, Judge Thorburn in the case ***R v Folaumoeloa*** [2006] DCR 135 spoke on how restorative justice touched upon several purposes of sentencing listed in the Sentencing Act. Nevertheless, he said at para [18]:

Restorative justice and its influences or effects are not measurable in any scientific or empirical way and so the way to evaluate the effect of a restorative justice meeting cannot be formulated. The extent of acceptance by a victim of an apology, for example, such as expiates or mitigates the wrong can't be measured. What is expiation in such a context? The legislation

does not say. I think at least it would include a process that returns some peace and confidence to the heart and emotion of a victim – a feature or quality which is, of course, not measurable.

Judge Thorburn continued to speak of the way the crime and the conference had affected the families of both the offender and the victim in the case at hand. He noted that the offender's greatly reduced prison sentence was a direct result of the aforementioned immeasurable impact of the conference and the judge (and victim's) hope for the offender's rehabilitation.

III. INFORMATION GATHERING

In order to make an adequate determination of an offender's remorse, his or her desire and ability to make amends, and the underlying issues that led to his or her criminal activity, judges require information. The court already has information gathering mechanisms in place through the use of pre-sentencing probation reports. However many judges are using the restorative justice conference report as another way to gain insight into the background situation of the offender and the context of his/her offending. The High Court appeal case, *C v Police* (High Court, Wellington, CRI 2004 485 125, 25 August 2004, Wild J) dealt with an incident of child abuse committed against the offender's young son. The judge listed the restorative justice conference report along with the pre-sentence report and reports from the offender's psychiatrist and the psychologist as evidence of the offender's troubled background as well as his later attempts to turn his life around.

Dickson v Police (High Court, Wanganui, CRI-2004-483-23, 30 November 2004, Gendall J), another High Court appeal decision, dealt with a mentally ill man who began attacking his co-worker at a freezing works for no apparent reason. Details of the offender's illness, a Schizo-Affective Disorder causing him to act under delusions of paranoia, were aired at the restorative justice conference, granting relief to the confused victim and insight to the sentencing judge. The illness did not, however, exculpate the offender as it was the second time this type of incident had occurred, and the offender was meant to be on his medication at the time of the attack. Nevertheless, as in the other cases, the restorative justice conference provided a richer context for the facts, enabling the judge to make a better-informed sentencing decision.

In *R v Folaumoeloa* (supra at paras [24-25]), the judge called attention to the family of the offender:

The restorative justice process revealed that this young offender has deeply committed parents who are ashamed by the behaviour of their young one. The family bond was demonstrated before the victims – the prisoner and his family held hands. All of this was an experience of human reality for those in attendance.

It is not just the background of the offender or the remorse of the offender's family that is illuminated through the restorative justice conference report. Judges also use the report to ascertain the level and quality of remorse shown by the offender him or herself – a task that is very difficult to accomplish without such a process. In *Anderson v Police* (High Court, Christchurch, A 22/03, 6 March 2003, Panckhurst J), a nineteen-year-old first-time offender appealed from a 15 - month imprisonment sentence for reckless driving causing injury. Panckhurst J remarked on the offender's deep and genuine remorse, made evident through the restorative justice conference in which she participated. He said, "I have read the report from that conference and it is impressive reading, albeit there was nothing that the participants could do, obviously, to turn the clock back."(para [10])

In *R v Cassidy*, (supra) Paterson J devoted significant attention to the details of the restorative justice conference and the emotions that were revealed therein. Giving the offender credit, His Honour said at para [10]:

[Y]ou accepted full responsibility for what happened and expressed your sorrow and deep remorse. You acknowledged the Kendall's family's right to express their anger towards you and apologised on several occasions. The facilitator of the conference noted that the goodwill displayed by both families during the highly charged emotional atmosphere experienced at the conference will be a starting point of the healing process for all involved.

And further at para [16]:

I intend to give you credit for the restorative justice process. I know you have said it is the hardest thing you have done and I can understand that. You did not need to do it, and you will be given credit for that. I accept there has been genuine remorse and a genuine attempt by you to assist the victim's family.

The offender's acceptance of responsibility is another goal listed in the Sentencing Act. Accomplishing this *through* the restorative justice process, as referred to in para [10], is yet another example of the comprehensive nature of restorative justice raised in the previous section.

Of course, there have been some cases where a restorative justice conference highlights an offender's *lack* of remorse, which, under s 8(j), must be taken into account as well. In the High Court case of *Glenie v Police* (High Court, Hamilton, AP79/02, 14 November 2002, Gendall J), a restorative justice conference was held after the offender committed a series of thefts as a servant while working at a Hamilton business. The conference did not lead to any conclusion satisfactory to the victims and the probation officer

found that the offender did not show any obvious signs of remorse. Mr Glenie was sentenced to six months in prison. **

In *Payne v Police* (High Court, Dunedin, AP 22/02, 12 September 2002, John Hansen, J.), the appellant argued that the sentencing judge did not give enough weight to the restorative justice conference in which he participated with some of his victims after a three-week raft of offending. John Hansen J described the results of the conference with a bit of scepticism, noting in para [5]:

It may be that some of [the victims] were in an older age group because the victims felt that good hard physical work like scrub cutting would be good for this young man. That is a view that is generally attributable to an older section of the community, like those who believe compulsory military training would solve all the ills of modern society.

Although he eventually granted Mr Payne's appeal and lowered the offender's sentence due to the offender's young age, Hansen J clearly set out the proposition that sentencing judges are freely entitled to take a cynical view of an offender's alleged remorse after a conference has been held (para [9]).

Laurenson J in the High Court case *R v Tuitupou* (High Court, Auckland, T.023457, 27 May 2003, Laurenson J) followed this precedent. In reviewing the case of Mr Tuitupou who was convicted of three charges of aggravated robbery and three of converting motor vehicles, Laurenson J was contemptuous of the offender's claims of remorse. He said at para [8]:

I notice from the pre-sentence report that following your most recent robberies you had attended a restorative justice conference and had realised the impact of your offending on the victims. You said that you had "stepped up from doing homes to doing shops" as you had drawn the conclusion that such offending against business premises was less harmful than the burglary of victims' homes. Whilst this might indicate some recognition of the impact of you offending on others, I have to say I find it superficial to say the least.

He sentenced the offender to nine years and six months imprisonment.

Likewise, in *Wahidulhaque v Police* (High Court, Christchurch, AP97/02, 25 September 2002, John Hansen J), the judge also viewed the remorse expressed in the restorative justice conference to be devoid of meaning. Mr Wahidulhaque was appealing a year-long prison sentence for five charges of false pretences with no leave to apply for home detention. The judge called his offending "particularly mean spirited" (para [4]) as it preyed

** The courts have, however, stressed that lack of remorse is not an aggravating factor but rather the absence of a mitigating factor.

upon members of an immigrant community with very little financial resources. He also referred to the restorative justice conference as “singularly unsuccessful. The appellant made apologies, and claimed to be full of remorse. He said he would make reparation. He was an unemployed man and reparation was unrealistic...the offers made by this man were hollow.” (para [12]). John Hansen J dismissed the appeal.

Restorative justice conference reports are sources of information not only about the offender. One of the new provisions of the Sentencing Act, s 7(c), states that a purpose of sentencing is to provide for the interests of the victim of the offence. Conference reports, coupled with the already-established victim impact statements, have been very useful to judges in doing so.

Many judges cite the victim impact statement in their decisions to highlight the ongoing suffering and pain by the victims of crime and their families. The restorative justice conference outcomes, by contrast and quite miraculously, often express victim forgiveness, reconciliation, and a plea for mercy on the offender’s behalf. In the High Court case of *Feng v Police* (High Court, Auckland, A.127/02, 4 September, 2002, Salmon J), a young man driving while high on cannabis and with a suspended licence crashed his vehicle, killing his best friend in the passenger seat. The offender was sentenced to two years imprisonment with no leave granted to apply for home detention, the latter part of which he was appealing. The restorative justice report recorded the offender’s deep remorse and the fact that he cried himself to sleep every night missing his friend. In response, the mother of the dead young man said to Mr Feng, “We are not here to punish you or judge you.” (para [18]) She also expressed hope that Mr Feng would have a good future, and said that she hoped to have him over her to her house to see the album that the family of the deceased had compiled on their son’s life (para [19]). Salmon J, noting this reconciliation, granted the appeal and the leave to apply for home detention.

In another case, *Police v Kapua* (Auckland District Court, CRN 4092008760, 29 June 2004, Judge Mathers), the victim submitted two impact statements – one prior to the restorative justice conference and one afterwards. The crime was one of robbery, where the offender grabbed the victim’s purse after engaging in a struggle which was very physically and emotionally painful for the victim. The victim’s first impact statement detailed her lasting trauma, her specific fear of the offender herself and her general fear in walking down the street. The revised report showed the results of the restorative justice conference and the healing that took place therein. The victim said that she still remembered what happened; however, she noted:

I feel much better after meeting and speaking with the lady who robbed me. I believed her when she said she was very sorry. I am worried about what will happen to her children if she goes to jail.” (para [7])

The judge, giving the appropriate credit for the conference and the victim’s wishes, sentenced the offender to 13 months imprisonment. She also enforced the terms of the restorative justice outcome agreement, including requiring the offender to complete budgeting and parenting skills workshop and to pay reparation.

In fact, creative, specifically tailored sentences (like the one in *Kapua*, (supra)) designed and agreed upon by the participants, are another key element of the restorative justice outcome. While judges have full discretion on how they handle the restorative justice agreement, the majority of them enforces at least a part of it, or uses it as a guide. Sentences often include making reparation to the victim and requirements of counselling or treatment for the offender. The victim in *R v Sami* (supra) wanted her reparation payments to be placed in a savings account for her children. The victims in *R v Singh* (supra) wanted the offender to work at the local community temple and to learn to read all the scriptures. In *Police v Walker* (Auckland District Court, CRN 2004081529-30, 2 July 2003, Judge McElrea), the victim of a hold-up wanted the offenders to pay for her self-defence courses.

In *Police v Tairea* (Auckland District Court, CRN 3004041441, 24 October 2003, Judge Thorburn), in which the offender was convicted of burglary, the judge did not feel able to impose a non-custodial sentence. This was due to his view of the importance of denunciation and deterrence under s 7(1)(e) of the Sentencing Act. He nevertheless took into account the forgiveness offered by the victims, remarking at para [4]:

It is so interesting to note that, although this victim company had no insurance, its representatives are not screaming for every pound of flesh or ounce of blood...They respect the fact that [the offender] will have a future, of course, and needs to make something of his life and they do not want this particular incident, for all of its shame, to ruin everything else about his life.

R v Singh (Auckland District Court, T014945, 18 December 2002, Judge Lockhart QC) is one of the more unusual cases where the sentence agreed upon at the restorative justice conference was found to be sufficient as it was, without the need for any revision by the presiding judge. The crime was one of harassment, while knowing that such harassment was likely to cause that person to reasonably fear for his safety and the safety of those with whom he was in a family relationship. While the facts surrounding the crime are missing from the decision, the judge was clear that the offender was required, under the restorative justice

agreement, to observe and perform several stringent conditions and acts. The judge noted that the offender “exceeded the requirements” of that agreement, and the judge therefore discharged Mr Singh without conviction (para [3]).

Also a very unusual case was *R v Henderson* (District Court Tauranga, DCT 98/03, 13 August 2004, Judge Callander), where, despite a restorative justice conference and profuse apologies by the offender, the victim (justifiably) remained angry and unforgiving of the offender. In this case, the offender was convicted of an assault causing injury. The judge noted at para [3]: “I think I need to re-emphasise the seriousness as to what happened. It was really an unprovoked and very nasty offence where you really seemed to just lose control completely.” Nevertheless, the Court gave quite a lot of credit to the offender for his obvious and thorough inroads into turning his life around. He was sentenced to 18 months in prison with leave to apply for home detention, down from the maximum of seven years.

On the other hand, occasionally, judges take into account a victim’s view from a conference that is adverse to the offender’s interest. In the case of *Police v Letele* (Auckland District Court, CRN 2004021464-69, 10 June 2002, Judge Gittos), the offender made a request for discharge without conviction on a theft as a servant charge after a successful restorative justice conference. He made this request on the basis that his co-offenders qualified for diversion and escaped any conviction and therefore he, though not qualifying for diversion, should receive the same sentence. Judge Gittos rejected this request, incorporating the viewpoint of the victim into his justification for doing so. He said at para [7]:

I see from the restorative justice report that [the victim] is reported as expressing some frustration and concern that none of these other people really were made to take any responsibility or wear the consequences of their actions in any formal way.

Similarly, a minister victim whose church had been burned by four young arsonists in 2004 praised the presiding judge for being sensitive to the what actually took place in the conference rather than just giving a blanket amount of credit to all the offenders who took part in restorative justice.¹⁸ When interviewed for the author’s previous paper, the victim commented:

[Offender T] was such a lippy kid – I definitely walked out of that meeting feeling disgruntled. I think the Judge got that sense from reading the restorative justice report because [Offender T] got formal probation and formal supervision with the gangs and the other boys got informal supervision by us. Which I thought was very good.¹⁹

IV. INTRA-FAMILY AND INTRA-COMMUNITY CRIMES

¹⁸ Y Shy, *Following Up on Restorative Justice: A Report to the New Zealand Chief District Court Judge* (Auckland, 2006).

¹⁹ Ibid at p 28.

Restorative Justice outcomes are often taken into account, and the process actively employed, when judges handle difficult cases centering around cultural, familial and community issues. *Police v Spring* (Whangarei District Court, CRN 3088023903-13, 31 March 2004, Judge Everitt) was the case of an assistant principal at a large school who failed to account for nearly \$30,000 from two Maori educational and community-based trusts after she became addicted to Pokey gambling machines. The money in those trusts had been saved over many years and was meant to help build a Marae as well as other buildings and centres. Judge Everitt remarked on the right of the community to be angry and demand revenge or punishment. He noted, however, that this did not happen in the wake of several informal restorative justice conferences between the offender and her community.

He said at para 6:

There is a matter I want to address...and that is the dilemma that you place your people in as to what to do, how to deal with this. Should we deal with it the Maori way, or should we deal with it by the law way, the English law way, the New Zealand law way, the common law way, whatever way?"

He left the question in the hands of a community leader, who advocated for resolving the matter in the Maori fashion and keeping Ms Spring in the community.

Judge Everitt justified his deference to the community and the subsequent non-custodial, rehabilitative sentence as follows:

People may say "Well, why should the Court listen to what people come along and say?" Under the Criminal Justice Act formerly, and now under the Sentencing Act, the Court is able to hear from persons who want to speak on your [Ms Spring's] behalf...The Court is given reasonably wide powers to enable whatever is being said to be taken into account where appropriate... I am pleased to have heard [those who spoke on your behalf] also because this offending directly touched on the victims. This is not some amorphous anonymous organisation that nobody knows such as big bank face. This is the face of your community, the community you live in, your whanau lives in and your work community, teachers and friends. So it is very relevant and I do accept that. (para [6])

Of course there are also times when intra-cultural crime occurs and the family/community of the deceased victim *do* desire traditional "Western" justice. In the case of *R v Maposua* (25/8/04, CA131/04), that reached the Court of Appeal, a factory worker swung a broom at a co-worker in a fit of irritation, inadvertently killing him. Because both men were Samoan, the offender and his family took part in the Samoan process of Ifoga, an indigenous type of restorative justice. The family of the offender gave nearly all of their life savings to the family of the victim as reparation. Nevertheless, the Court, on the wishes of the victim's family, did not give an overwhelming amount of weight to the practice. The father of the victim explained that even in Samoa, Ifoga is not considered the complete punishment,

and that, in moving to New Zealand, he “still wanted, and was entitled to, the protection of the law for his family” (para [11]). Mr Maposua was sentenced to two – and – half years imprisonment from a five year starting point – still a significant reduction.

The complexities involved when the State must intervene into a specific community pale in comparison to the difficulties of when the State must intervene into a family. In the High Court case of *D v Police* (High Court, Auckland, AP 161/99, 29 February 2000, Nicholson J), Mr D raped his two daughters on several occasions while drunk and grieving the death of his son. At the restorative justice conference, the victims expressed extreme anger and hurt towards their father for the suffering and trauma he caused, but they also expressed love for their father and a desire to put their family back together. Justice Nicholson, granting Mr D’s appeal and removing a year of prison from each charge, emphasised the court’s interest in encouraging the reporting of sexual offending and rewarding self-disclosure. The flexibility and adaptability of restorative justice conferences, he remarked, were critical in holding perpetrators of family violence accountable while enabling the family to begin its healing process.

This was certainly the situation in another High Court case, *Jan v Police* (High Court, Auckland, CRI-2005-404-148, 27 May 2005, Baragwanath J). The appellant, after his first time drinking alcohol at the celebration of his friend’s daughter’s birth, crashed his automobile killing his mother – in – law and his two stepsons, and injuring his wife. The offender, his wife, his father – in – law, the boys’ father and support people attended a highly emotional restorative justice conference. The boys’ father, originally the angriest participant, felt comforted by the conference and advocated against the offender going to prison. The offender’s wife made an impassioned plea for a community-based sentence as she was herself a victim in terms of her injury (for which she required many surgeries) and her enormous loss. Mr Jan’s original prison sentence of three years was lowered to one year on appeal, with the deferment of the start of the sentence for up to two months to enable Mr Jan to stay with his wife through the early stages of her grief.

V. REGULATORY OFFENCES

Restorative Justice conferences and the requirement on judges under s 8(j) to take their outcomes into account have begun to extend beyond traditional criminal cases. Judges have begun to use outcomes from restorative justice conferences in environmental and other regulatory offence cases to tailor appropriate sentences for these types of crimes.

The Resource Management Act cases of *Auckland Regional Council v Times Media Group Ltd* (Auckland District Court, CRN 2084004885, 16 June 2003, Judge McElrea) and *Waikato Regional Council v PIC New Zealand Ltd* (Auckland District Court, CRN 405750079&82, 29 November 2004, Judge McElrea) are prime examples of how judges have been able to use restorative justice to hold companies who cause environmental damage directly accountable to the community that has been affected.

In *Auckland Regional Council*, a company owning a printing press did not maintain its biofilters, despite numerous warnings that it must do so. This resulted in the failure of these biofilters and the repeated emissions of “offensive and noxious” odours. These odours caused the neighbours to report breathing difficulties, headaches, sleep deprivation and mental stress. A restorative justice conference was convened with a large number of local residents and company representatives and an outcome plan was agreed upon. The company was required to take several remedial actions, including commissioning tests as to the damage it caused, building a new barrier around the plant, giving a donation to a tree-planting project, and making a public apology in one of the newspapers it published. Judge McElrea, presiding over the case, praised the process and the outcome. About the apology, he remarked at para [25]:

It seemed to me...that a public apology coming from a source which in effect controlled the local news was entirely appropriate and I regarded it as an inventive solution, the likes of which would not have come to pass except for the restorative justice conference.

Although the judge recognised some of the glitches in the process, such as the lack of space to accommodate the total number of interested residents, he also emphasised the benefits of the conference to the community. In para [33] he said to the residents:

You were able to be consulted in a way which never would have occurred if it was not handled through [the restorative justice] process. You were able to speak your minds face to face with Mr Cook, the representative of the company, in a way that is just not possible under our normal court system. You were able to receive an apology from him face to face and to have him agree to publish that for all the world to see. That would not have happened if you had not taken part in this process. You were able also to express your criticisms of the [Regional Council]’s slowness in responding to your complaints, as you saw it. That opportunity does not normally arise.

The judge took the whole conference heavily into account, mitigating the fines he gave to the company and enforcing the terms of the restorative justice agreement that had not yet been completed.

One year later, in the second environmental case mentioned above, *Waikato Regional Council v PIC New Zealand Ltd* (supra), the court commended the excellent restorative

justice conference and outcome that resulted. In this case, untreated piggery effluent was leaked from a pipeline into a farm drain and then discharged into the Waikato River and possibly into the ground water. The offending company initiated the restorative justice conference, taking responsibility for the problem and expressing apologies. It was agreed that the company would make a large contribution to the Haka Reserve Project, a tree-planting project in a local area where the piggery was situated. Judge McElrea extended the Court's congratulations to the Council and the defendant on their willingness to work together towards such a beneficial result. After the offending company paid, as per the agreement, \$15,000 dollars to the local project and \$24,500 of the Regional Council's costs, the judge convicted and discharged them without any further penalty.

Just as victims (even when they are an entire community) have been able to hold companies accountable through restorative justice when the companies commit environmental offences, so they have also been able to do so when companies commit other regulatory offences. In *Department of Labour v Areva T&D New Zealand Ltd* (Whakatane District Court, CRN 04087500566, 12 April 2005, Judge Ingram), a mid-level error on a construction site caused a wire rope on a crane to make contact with an adjacent high voltage line, electrocuting an employee of the defendant company. The employee later died. The defendant company held a restorative justice conference with the family of the deceased and subsequently paid out of pocket over \$38,000 to the deceased's family, in addition to a \$100,000 insurance payment. The judge noted these acts as concrete evidence of the defendant company taking a "humane, thoughtful and commendable approach to its responsibilities towards the deceased's immediate family and that is a matter of very substantial significance in this case." (para [19]). He convicted and discharged the defendant company.

In *Department of Labour v Waimarino* (Taraunga District Court, CRN 04070501048, 11 October 2004, Judge Rollo), the defendant company breached the Health and Safety in Employment Act of 1992, failing to inspect its "Flying Fox" amusement contraption for full safety requirements. A man used the contraption and died of a brain injury from a 5.5 metre fall. During the restorative justice conference, the participants were not able to devise a satisfactory outcome agreement. However, the presiding judge was careful to note, this did not negate the importance and value of the conference.

He said at para [18]:

I have read carefully the report from the convenors of [the conference]. It was obviously an extremely emotional experience for all concerned, and emphasises the considerable benefit for victims, and alleged perpetrators of offences, including OSH prosecutions, in meeting to

endeavour to assist each other to understand what has happened, to accept responsibility and to come to terms with the enormity of the loss that such accidents often occasion.

Indeed, for some judges, the benefits of a restorative justice conference for regulatory offences are so obvious that a defendant's lack of desire to take part in such a conference indicates a lack of remorse in the judge's eyes. *Eno (Chief Investigator of Accidents, Maritime Safety Authority) v Geoffrey Eastham Faulkner and Anor* (Blenheim District Court, CRN 04006500392, 10 January 2005, Judge Tuohy) is an example. The defendant in that case, a Punga Cove resort, failed to protect its employees who were instructed to retrieve a runaway Niad boat by kayaking out to it and jumping from kayak to boat. The victim fell off and seriously wounded his ankle in the propeller. In addressing the issue of the defendant's remorse, Judge Tuohy remarked in para [22]:

As far as remorse is concerned, I have to say that there are not the indications of remorse in this case that the Courts often see...In particular, it was an indicator that Mr Faulkner [the defendant] apparently could not find the time to attend a restorative justice conference...and that does not indicate to me a high degree of remorse and I do need to say that.

Mr Faulkner was sentenced to a \$15,000 fine and an additional \$7,000 to be paid to the family of the deceased.

VI. CONCLUSION

The flexible and variable nature of restorative justice has enabled judges to take the process outcome into account in a number of different ways. It is seen as carrying weight in the sentencing balancing act. It is used as a lens through which offenders' remorse and victims' wishes can be ascertained. It is a route down the thorny path of intra-community and intra-familial crime, and it is a new horizon for handling regulatory offences.

Judges are also beginning to see restorative justice as a way to synthesise seemingly opposing sentencing values within these different areas. Accountability, responsibility, healing, denunciation and the opportunity for restitution are all being recognised to co-exist within one successful restorative justice conference, lessening the very difficult task of judges to ensure these goals and requirements are met through sentencing.

Finally, the restorative justice case law examined above highlight the tension involved when judges attempt to balance the goals of a *consistent* criminal justice system with a *contextual* one. As the restorative justice movement continues to build momentum in justice systems across the world, New Zealand judges' struggles with these elemental questions of justice will undoubtedly be of interest and the resulting jurisprudence is likely to be of great use in other jurisdictions.