

Salmon Lecture, 2004
to the
Resource Management Law Association

The role of restorative justice in RMA prosecutions

Judge FWM McElrea
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It was a great surprise but a very great privilege to be invited to give this lecture. The topic is certainly one of real interest to me, and I hope it will prove of value to you. With the agreement of Principal Environment Court Judge Bollard I have been encouraging the use of restorative justice processes in a few RMA cases. Two have been completed and others are in the pipeline either here or in the Waikato. There is the potential for a greatly increased use of this approach.

Definitions of restorative justice

I will assume that many of you know little or nothing about restorative justice, and so the first task is to explain that concept, and to refer to the provisions of the Sentencing Act 2002 that now support it in New Zealand. In this part I draw on material I wrote for an NZLS travelling seminar on that Act in 2003. I commend the seminar booklet for a fuller account.

The term “restorative justice” is not defined in any New Zealand legislation. The omission of a definition from the Sentencing Act 2002 was deliberate, the Select Committee recognising that it is a developing concept and that it could be unhelpful to shackle it to a particular formula.

Galaway and Hudson *Restorative Justice: International Perspectives* (Criminal Justice Press, Monsey, New York, 1996) analyse the essential elements of restorative justice as follows:

Three elements are fundamental to any restorative justice definition and practice. First, crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities, and the offenders themselves, and only secondarily as a violation against the state. Second, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute. Third, the criminal justice process should facilitate active participation by victims, offenders and their communities in order to find solutions to the conflict. (p2)

The Select Committee’s commentary to the Sentencing and Parole Reform Bill included a description of restorative justice provided by the Restorative Justice Network (a New Zealand association) as follows:

Restorative justice involves community-based processes, which offer an inclusive way of dealing with offenders and victims of crime through facilitated meetings. They provide a forum in which offenders can take personal responsibility for their offending. Restorative processes empower victims by inviting them into the heart of the criminal justice process. Victims

are given a positive, safe environment in which key questions can be answered and healing can begin. These processes focus on accountability and seek to repair the damage done by crime by applying a practical response and, where fitting, appropriate sanctions. They also create the possibility of reconciliation through the practice of compassion, healing, mercy and forgiveness.

What restorative justice is not ...

One of the most influential writers on restorative justice, and a frequent visitor to New Zealand, is Professor Howard Zehr, Director of the Conflict Transformation Program of Eastern Mennonite University, Virginia, USA. In *The Little Book of Restorative Justice* (Good Books, Intercourse, Pennsylvania, 2002) Dr Zehr helpfully sets out nine negative propositions about restorative justice. (To these I will add a further two.)

Restorative justice is not primarily about forgiveness or reconciliation

Forgiveness or reconciliation are sometimes outcomes of restorative processes (and commonly are when apologies have been received), but they are not the objective and there should be no expectation of such outcomes in any particular case.

Restorative justice is not mediation

In the New Zealand context restorative processes usually involve a facilitated, face-to-face meeting between victim and offender with their relevant support people and often with one or more community representatives present. Although there are several points of parallel between restorative justice in the criminal context and mediation or alternative dispute resolution in the civil context, victim and offender are not involved in settling a “dispute”. As Dr Zehr points out, the neutral language of mediation may be misleading and even offensive in many cases.

Restorative justice is not primarily designed to reduce recidivism (repeat offending)

Although there are good reasons to believe that restorative justice approaches will reduce offending rates, and there is some helpful research to this effect, this is not the reason for operating restorative justice programmes. As Dr Zehr puts it:

Reduced recidivism is a byproduct, but restorative justice is done first of all because it is the right thing to do. Victims’ needs **should** be addressed, offenders **should** be encouraged to take responsibility, those affected by an offense **should** be involved in the process, regardless of whether offenders catch on and reduce their re-offending. (p10)

Restorative justice is not a particular programme or a blueprint

Restorative justice is an **approach** to dealing with the effects of crime, and not a specific programme. As will be seen, restorative processes can result in a variety of outcomes and make use of different programmes. All models are to some extent culture-bound, so

restorative justice needs to be built from the bottom up, by communities in dialogue assessing their needs and resources and applying the principles to their own situations. As Dr Zehr expresses it, “restorative justice is **not a map**, but the principles of restorative justice can be seen as a **compass** pointing a direction” (p10).

Restorative justice is not primarily intended for comparatively minor offences or for first-time offenders

In some places overseas restorative justice has been introduced only for minor offences or as a form of diversion for first-time offenders. New Zealand has a longer experience of restorative justice than most countries and experience has shown that restorative approaches may have the greatest impact in more severe cases. The greater the harm done, the greater the need for healing for all those affected. A type of restorative conferencing (family group conferences) has operated for young people in New Zealand since 1989. All crimes except murder and manslaughter can be referred to family group conferences. The first restorative conference for adults was held in 1994 and since then a number of initiatives for adults have been undertaken, by no means limited to minor offending. The current Ministry of Justice pilot operating in four district courts covers moderately serious offending, including eg aggravated robbery. (Domestic violence is excluded from the pilot, primarily because of concerns about victims being coerced into reaching agreement.)

Restorative justice is not a new or North American (or New Zealand) development

Dr Zehr notes (page 11) that the modern field of restorative justice developed in the 1970s in North America but the movement owes a great deal to earlier experiences and to a variety of cultural and religious traditions. He acknowledges a special debt to the indigenous peoples of North America and New Zealand. His earlier work *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, Scottsdale, Pennsylvania, 1990) emphasised the Old Testament roots of restorative justice, particularly the concept of *shalom*.

Restorative justice is neither a panacea nor a replacement for the legal system

To adapt and amplify what Dr Zehr says under this heading, it should be stressed that restorative justice does not do away with the adversary system, which is needed for resolving disputed charges. Even in the context of sentencing, restorative justice could not apply in all situations. It requires willing participants, for a start. It requires a clear acknowledgement of responsibility on the part of the offender. It requires a legal system to be able to implement many restorative justice outcomes. A sound, central legal system is also needed as a backup and guardian of basic human rights.

Restorative justice is not necessarily an alternative to prison

Western society, and especially the United States [with New Zealand second in the statistics], greatly overuses prisons. If restorative justice were taken seriously, our reliance on prisons would be reduced and the nature of prisons would change significantly. However, restorative justice approaches may also be used in conjunction with, or parallel to, prison sentences. They are not

necessarily an alternative to incarceration. (12, 13)

New Zealand's experience with custodial sentences bears out this view of Dr Zehr. The Children, Young Persons and Their Families Act 1989 has from the outset greatly reduced our reliance upon custodial sentences for young people. In the adult context, restorative processes have sometimes:

- assisted the courts in finding alternatives to prison sentences which would otherwise have been imposed (as in *Kalim v Police* unreported, High Court, Auckland, A198/01, 4 December 2001, Glazebrook J);
- been accepted as special reasons under s 5 of the Criminal Justice Act 1985 (as in *R v C* unreported, Court of Appeal, Wellington, CA332/95, 28 September 1995);
- resulted in suspended sentences of imprisonment when those were available, as in *Police v Walker* unreported, Auckland District Court, CRN 0004019057 and 9059, 12 June 2000, Thorburn DCJ;
- resulted in leave to apply for home detention being granted when it might otherwise have been refused (see *Feng v Police* unreported, High Court, Auckland, A1127/02, 4 September 2002, Salmon J) – a case to which I return later by way of example; and
- resulted in a reduced term of imprisonment, as in *R v Clotworthy* (1998) 15 CRNZ 651 (CA), when the following important guidance was given by the court per Tipping J:

We would not wish this judgment to be seen as expressing any general opposition to the concept of restorative justice (essentially the policies behind ss 11 and 12 of the Criminal Justice Act 1985). Those policies must, however, be balanced against other sentencing policies, particularly in this case those inherent in s 5, dealing with cases of serious violence. Which aspect should predominate will depend on an assessment of where the balance should lie in the individual case. Even if the balance is found, as in this case, to lie in favour of s 5 policies, the restorative aspects can have, as here, a significant impact on the length of the term of imprisonment which the Court is directed to impose. They find their place in the ultimate outcome in that way. (661)

Finally, even if a restorative conference should make no difference at all to the type and length of sentence imposed, or if the conference is held after sentencing has taken place, it should still have real value to the participants by helping them resolve issues and deal with unanswered questions from the past, and so to move forward in their own lives.

Restorative justice is not necessarily the opposite of retribution

When writing *Changing Lenses* in 1990 Dr Zehr portrayed restoration as the polar opposite of retribution. This is no longer his view, and I agree with his later position. Retribution can be one way of righting the balance that has been disturbed by wrongdoing. Indeed in New Zealand experience, punishment (in the retributive sense) plays some part in most restorative justice agreements. The difference is that punishment is not the overriding objective. Instead that objective is putting right the wrong, encouraging accountability, acknowledging the harm done to (and the needs of) victims, and finding positive solutions that will make the community safer.

To these nine “negative” propositions of Dr Zehr can be added two others.

Restorative justice is not a “soft option”

So long as the court retains ultimate control over sentencing no offender can expect a light sentence. In any event, the outcomes of restorative conferences may well be more demanding than what a court would have required. Offenders will often agree to such outcomes, knowing that a court may impose something less, because they want to put things right with the victim.

More importantly, taking part in a restorative conference itself makes heavy demands on offenders.

- They must accept responsibility for what they have done, which does not always occur with a guilty plea.
- They have to be prepared to face their victim and be accountable in a very personal way. They will experience the hurt and even anger of their victim. They will be asked questions about what they did and why they did it. They cannot hide behind the usual weak excuses - “it wasn’t my idea”, “it’s just property”, “an insurance company will pay”, “I was drunk”, or “I couldn’t afford to buy one”.
- When given an opportunity to respond to the victim they will probably feel the need to make some form of apology (however inarticulate), something they may never have done to a victim before.
- They are likely to be asked what they are going to do about changing their lives to make sure that others do not become victims of their offending.

Anecdotal evidence confirms that most offenders attending a restorative conference find this much harder than the court sentencing process where they can leave it to their lawyer to talk, take refuge in silence, and change nothing about the way they conduct their lives or view others.

Restorative justice is not community justice

Restorative justice requires a strong community base, and in turn helps build a sense of community, but it is not a way of handing the courts’ responsibility over the community. In some adult diversion schemes funded by our Crime Prevention Unit, restorative justice principles and practices are applied using a panel of community members. However their role is not to decide penalties but to offer ideas and to suggest resources within the community that might be brought to bear in a problem-solving way.

The wider context

Although New Zealand has a prominent and respected leadership role in the area of restorative justice, this topic is a truly international one which has United Nations support and the backing of legislation in different countries. In July 2002 the Economic and Social Council of the United Nations adopted the recommendations of the Commission on Crime Prevention and Criminal Justice concerning restorative justice. This document acknowledged a world-wide and significant growth in restorative justice initiatives. Member states are

encouraged to form national strategies and policies aimed at developing restorative justice and promoting a culture favourable to its use among law enforcement, judicial and social authorities as well as local communities.

More specifically, under Articles 10 and 17 of the European Union Council Framework Decision of 15 March 2001, each EU Member State must “put in place laws, regulations and administrative provisions” to promote the use of restorative justice in appropriate cases within their national law by March 2006.

It is important also to realise that developments in restorative justice are not occurring in isolation from other influences at work in western societies. Elsewhere I have suggested that restorative justice is part of four wider transitions that are currently underway. (“Restorative Corrections?”, a paper presented to the fourth annual conference of the International Corrections and Prisons Association, 19-23 October 2002, Noodwijkerhout, Netherlands):

First, there is a world-wide movement towards the **recognition of victims’ rights**, and - associated with that - the need to see criminal justice as something more than a two-party process of State versus Defendant. Victims, so long excluded from the western model of justice, lie at the very heart of restorative justice.

Secondly, there is an international trend towards **the democratisation of process** and the empowerment of the community. This is part of the tendency to reduce the size and function of State institutions, and to ensure that in our emphasis on professionalism, professionals do not end up owning the processes they are employed to serve. Restorative conferencing insists that solutions cannot be imposed “from above” - that we must listen to the voices of those most closely affected by conflict and enable them to influence outcomes.

Thirdly, there is a recent and noticeable tendency towards **holistic approaches to problems**, allowing spiritual and emotional values to be expressed, especially (but not only) where indigenous peoples are involved. Restorative justice allows a wide range of values and needs to be expressed, and culturally appropriate procedures to be followed.

Finally, we are I believe seeing a **move from procedural justice towards substantive justice**. That is, we are increasingly recognising that justice is not just about following fair procedures (eg due process, or the rules of natural justice). Rather, it requires us to produce outcomes that are fair and meet the needs of society.

Perceived inadequacies of the traditional approach to sentencing

These have been well canvassed in the literature but can here be briefly summarised as follows, without necessarily accepting each point.

- The failure to properly acknowledge the place and needs of victims.
- The domination of the process by professionals, so that ordinary people do not feel

engaged at a personal level, eg in a process of apology and reconciliation.

- The removal of the process from the community that is most affected by the offending.
- A reliance on the deterrent effect of imprisonment that is not supported by the evidence.
- The lack of any obligation on defendants to take responsibility for offending – and the encouragement some see in our pleading system to “deny it and see if you can get off”.
- The concentration of resources in State agencies.
- A perceived lack of fairness in procedures and outcomes.
- Inadequate incidence and enforcement of reparation.
- A tendency to destroy rather than restore dignity.

A legal mind shift is needed

From all of the above it will be apparent that for lawyers - most of us!- who have been accustomed to thinking only in the traditional two-party way (State v Defendant) and who have previously regarded victims as little more than complainants and (possibly) witnesses, a different approach will be needed in future.

Sentencing Act

The court is now **required** to take into account the outcome of restorative processes – see ss 8 and 10 of the Sentencing Act 2002. When dealing with s 10 the Select Committee made this mandatory (substituting “must” for “may”), observing that this was essential “if restorative justice is to be a central consideration in sentencing”. Further, as we shall see, a number of the statutory purposes of sentencing reflect restorative justice principles and are themselves therefore an encouragement to restorative justice practitioners to take a different approach. Parliament obviously did not regard restorative justice as some peripheral issue.

The procedural provisions of the Act allow for adjournments for options such as restorative justice to be considered or a conference to be held, adjournments for restorative justice outcomes to be implemented, and most importantly the requirement in s 10 for any “offer of amends” to be taken into account in sentencing. These are all more fully explained in the NZLS material.

Victims’ Rights Act

I will shortly point out that many individual persons are now required to be treated as victims under RMA prosecutions. Section 9 of the Victims’ Rights Act 2002 reinforced Parliament’s intentions as expressed in the Sentencing Act, by requiring all judicial officers, defence lawyers and prosecutors, court staff and probation officers to encourage the holding of a meeting between victim and offender “to resolve issues relating to the offence” – provided that the victim and offender agree, the resources are available for holding such a meeting and a meeting of that kind is practicable and appropriate. Whilst s 10 provides that such a responsibility (to encourage the holding of victim-offender meetings) is not legally enforceable, it is nevertheless amongst the principles that should guide the treatment of victims.

Vindication of the victim

Additionally, lawyers and others involved in sentencing need to understand the fundamental nature of the ground shift upon which restorative justice is built. This may be best summed up in one sentence written five years ago by Dr Nigel Biggar of Oriel College, Oxford in his essay “Can we reconcile peace with justice?”: “... **justice is primarily not about the punishment of the perpetrator but rather about the vindication of the victim.**”

As Dr Zehr puts it in *The Little Book of Restorative Justice*:

A primary goal of both retributive theory and restorative theory is to vindicate through reciprocity, by evening the score. Where they differ is in what each suggests will effectively right the balance ...

Retributive theory believes that pain will vindicate, but in practice that is often counterproductive for both victim and offender. Restorative justice theory, on the other hand, argues that what truly vindicates is acknowledgment of victims’ harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behaviour. By addressing this need for vindication in a positive way, restorative justice has the potential to affirm both victim and offender and to help them transform their lives. (58,59)

The term “vindication” is an interesting one. According to *The New Shorter Oxford English Dictionary* it can refer to the action of avenging or revenging a person or wrong, or it can refer to clearing someone of blame, criticism or doubt, justifying a person, defending against encroachment or interference. The ambiguity is helpful because all of those aspects can be part of a proper response to criminal offending. What is new is the emphasis on the victim’s perspective – the “vindication of the victim”. Dr Zehr has an interesting comment on this in his chapter in “Journey to Belonging” in ed Elmar GM Weitekamp and Hans-Jurgen Kerner, *Restorative Justice: Theoretical Perspectives* (Willan, Devon, UK, 2002):

My work with victims suggests that the need for vindication is indeed one of the most basic needs that victims experience; it is one of the central demands that they make of a justice system. I’ll go out on a limb, in fact, and argue that this need for vindication is more basic and instinctual than the need for revenge; revenge, rather, is but one among a number of ways that one can seek vindication.

What the victimizer has done, in effect, is to take his or her own shame and transfer it to the one victimized, lowering them in the process. When victims seek vindication from justice, in part they are seeking reciprocity through the removal of this shame and humiliation. By denouncing the wrong and establishing appropriate responsibility, the justice process should contribute to this. However, if we vindicate the victim by simply transferring that shame back to the offender, we are repeating and intensifying the cycle. In order to progress on their journeys, both victim and offender need ways to replace their humiliation with honor and respect. Shame and humiliation must at least be removed and ideally be transformed. This does not easily happen within the

retributive framework of our criminal justice systems. (28,29)

Undoubtedly a punitive sentence is one form of vindication of the victim. Some people may not have thought there was any other. However victim researchers like Dr Zehr and Dr Shirley Julich support a wider view. The Massey University November 2002 hui series referred to above, in which both participated, established that:

- Very powerful vindication for a victim is hearing an offender acknowledge that they have wronged the victim. That personal acceptance of responsibility is of greater value to a victim than a court finding which the offender disputes or does not acknowledge.
- However, regardless of the offender's attitude, public acknowledgement of injury is a basic form of vindication. Dr Biggar, now Professor of Theology at the University of Leeds, puts it well in more recent writing (Nigel Biggar, ed, *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Georgetown University Press, Washington DC, 2nd & revised edition, forthcoming in 2004).

To suffer an injury and have it ignored is to be told, effectively, "what happens to you doesn't matter, because you don't matter". Therefore, to have it acknowledged is to have one's dignity as an equal member of a human community affirmed. (20)

- Victims also feel vindicated when **their needs** are addressed; but they feel an injustice when they are used merely as a means of finding the right outcome for offenders and addressing offenders' needs. Treating victims' needs as important in their own right is part of their vindication through restoration to dignity.
- Victims are often made to feel they are at fault for allowing themselves to have been offended against, or for continuing to suffer the effects of crime; therefore they are vindicated when it is acknowledged that they were not at fault, that their questions are fair ones and that their needs deserve attention - some would say, **prior** attention. As Dr Biggar puts it, "victims, not their oppressors, have first claim upon the attention and resources of succour". (26)
- Victims have their own needs to discover the truth – about "what happened, why it happened, and who was responsible" (Dr Biggar, 20). Getting answers directly from offenders helps serve this purpose and the process of vindication, especially where offenders possess unique information. Other sources of information are also valuable. The parents of Bali bombing victim New Zealander Mark Parker spoke to a bystander who was the first person to help their son, tending to him after he lost his lower limbs. Mark's mother was quoted in *New Zealand Herald* on 23 January 2003 as saying, "We have been fortunate to find out what has happened ...A lot of families will never know what happened to their loved ones, which is pretty gut-wrenching stuff." (A9)
- Dr Julich stresses that victims also feel vindicated when their community hears the truth about the offending and the offender, especially when this is a community which has allowed the offending to occur and to which both offender and victim must return.

And so ...

It is becoming clear that we lawyers have for too long tended to overlook the primary need of victims for vindication, or we have felt that they are vindicated by the sentence that is imposed. Victims themselves do not see it so narrowly. They feel that the traditional system

has largely ignored their interests or used them as a tool in finding the right outcome for the offender. Our pre-occupation with the punishment of the offender has blinded us to the position of victims and created a serious imbalance in the justice system. It is time to move beyond our nineteenth century procedures and attitudes and restore the balance. The new legislation requires no less.

An example of the way in which a restorative conference can assist a court in sentencing

It is often difficult for a court to assess things like the degree of remorse experienced by a defendant or the sincerity of an apology, or to understand a victim's feelings about the case. The report of a restorative conference can make such aspects real to the court in a way that other means, eg victim impact statements, simply cannot. As one illustration take this extract from the decision on appeal in *Feng v Police* (High Court, Auckland, A1127/02, 4 September 2002, Salmon J):

[17] In the present case a factor telling against the appellant is his driving record. However, that is, in my view, not sufficient on its own to justify a refusal of leave [to apply for home detention]. There is no doubt that the appellant has displayed extreme remorse for his actions. He attended a restorative justice conference. The facilitator of that conference records in his report the appellant's expressions of remorse. The report records that the appellant missed his friend and that every night he cried in bed and that he felt it was unfair that he was still alive when his friend was gone. He said that he was very, very sorry and was willing to receive whatever punishment was coming.

[18] In response to that, the mother of the dead young man said:

We are not here to punish you or judge you. That is for the law to decide.

She said she hoped that the appellant would have a good future.

[19] The facilitator records, under the head of Conference Outcomes, that the family of the deceased acknowledged the appellant's remorse and accepted his apology. The family said they were open to future visits by the appellant to their home, especially to see the album that they had compiled on their son's life. The appellant made arrangements to contribute to a trust which the parents have set up in memory of their son.

Applying these principles to the RMA

I suggest that restorative justice is fundamentally compatible with the RMA and can have at least equal application there. In its civil jurisdiction the RMA has wide rights of participation, extensive community involvement especially through District and Regional Councils, a structure which is partly inquisitorial, an emphasis on achieving positive outcomes for the future, and an acceptance of the place of mediation. The problem is that little of that has so

far been translated in to the prosecution side. The Sentencing Act 2002 now makes that possible where restorative justice processes are used.

There is now an excellent High Court decision that deals with the Sentencing Act in an RMA context and shows how the old *Machinery Movers* factors are now largely subsumed within the purposes and principles of the Act. The decision is *Selwyn Mews Ltd v Auckland City Council* (High Court, Auckland, CRI-2003-404-159, 30 April 2004, Randerson J). However restorative justice aspects of the Act are not covered and did not arise in that case.

Who is the victim?

The first instinct may be to say that in RMA cases the victim is the environment that has been damaged, and the Act has ample provision for “reparation” to be able to be ordered, by way of “remediation” enforcement orders under s 314. This much is very true, at least in the sense that the injury at the forefront of the prosecution process is the injury to the environment that we are enjoined to sustain. This is the basis of *Machinery Movers*.

However, we are now required by the Victims’ Rights Act 2002 to have regard to individual persons as victims. This was not previously so, for the earlier legislation (Victims of Offences Act 1987) related to the victims of “criminal” offences – see its long title and the definition of victim in s 2. Few seem to have noticed that the new Act is concerned with the treatment and rights of the “victims of offences” – it is not limited to criminal offences. Further the definition of “victim” in s 4 includes not just a person against whom an offence is committed, but

“... a person who, through, or by means of, an offence committed by another person, suffers physical injury, or loss of, or damage to property; ...

In *Auckland City Council v North Power Ltd* (Auckland District Court, CRN 3004510188, 27 May 2004, McElrea DCJ) the defendant cut down bush on private property without a necessary resource consent. The owners of that land suffered both loss of and damage to property, namely their trees. They were therefore “victims” and the obligation was on the prosecutor under ss 17-22 of the Victims’ Rights Act to obtain and submit to the court a victim impact statement for each victim. (All prosecuting bodies need to take note of this obligation.)

Apart from those who suffer loss of or damage to property, there are two other categories of victims whose rights are relevant in an RMA context. First, the definition above includes those who suffer “physical injury”. This I read as distinct from “emotional harm” – see part (b) of the definition – and would include effects sometimes complained of from odours, such as headaches and watery eyes, provided such effects are not trifling or transitory. For a long time the criminal law has defined “injury” (eg for assault with intent to injure) as meaning actual bodily harm, and this can be any harm that interferes with the health or comfort of a person. It does not need to be serious or permanent but it must be more than trifling or transitory. I see no reason why the term “physical injury” in the present legislation should be interpreted any differently.

Secondly, under s 20 the prosecutor has a discretion to treat as a victim (for the purposes of victim impact statements) persons who are “disadvantaged by an offence” – a very wide

phrase, which could include those who claim to have suffered a loss of value in their property. (For myself I doubt that such persons come within the “damage to property” option.)

The result is that restorative justice processes are supported now in non-criminal offending by a fairly wide definition of “victim”, and by virtue of s 9 of the Act, as noted above, “all judicial officers, defence lawyers and prosecutors (and some others) should encourage the holding of a meeting between victim and offender “to resolve issues relating to the offence” – in suitable cases and provided the facilities are available. So restorative justice is something more than an optional extra as far as the legislation is concerned.

Setting up a restorative justice conference

Who initiates a restorative justice conference?

The short answer to this question is that almost anyone can do so. The Court may raise it, counsel may do so, an informant may have already discussed it with the defendant, or the defendant or a victim may ask for a conference to be held. The Court’s assistance is only needed if it is desired to take the outcome into account in sentencing, and that assistance is not some sort of leave, but the chance for an adjournment to allow the process to occur.

The process being entirely voluntary, and requiring the admission of an offence, the only people whose consent is needed are the defendant and the victims. A restorative justice conference could take place without the informant’s participation, and many adult conferences do so in criminal matters – ie no police officer is present, though they are always invited. Police input is via the Summary of Facts prepared for the Court. I would hope that no conferences would take place in RMA matters without informants taking part. The matters under discussion tend to be more complex than in criminal cases and the informant has a real role to play in providing information requested by the meeting, assisting construct a plan that it will be happy with as a territorial authority, and possibly also in monitoring outcomes.

Restorative justice facilitators

The obligation to encourage such meetings created by s 9 of the Victims’ Rights Act arises only if “a suitable person is available to arrange and facilitate” the meeting. There are now within New Zealand hundreds of trained restorative justice facilitators. I am sure many of the provider groups would be keen to take on RMA cases. Their charges are generally under \$1,000. The person who has facilitated both of the completed RMA cases is Deborah Clapshaw, who was approached because of her qualifications in both environment law and mediation. Being a practicing lawyer her fee structure is higher than that of the restorative justice provider groups who rely largely on voluntary labour. I have been most impressed by Ms Clapshaw’s reports to the Court and hope that she will be here to contribute to the discussion the benefit of her experience.

The responsibility for paying the facilitator’s fees falls on those who engage the facilitator, and usually by agreement on the defendant. There is no courts pilot funding for RMA cases. Legal aid is sometimes granted to pick up a facilitator’s fee as a disbursement. However, provided the fee is paid by the defendant and is a reasonable one there is no reason why it should not be taken into account as part of the overall penalty, in the same way that the court takes into account cleanup costs and costs of the prosecution under the principles provided by

the High Court in *ARC v Interclean Industrial Services Ltd*. This I have done in both of the completed cases next mentioned.

Who should be invited to attend a restorative conference?

Apart from the defendants and the informant, the key people are the victims - in the wider sense now used in the legislation. If some wish to take part and others do not, it can still proceed, but with the recognition that it may have less value. Community groups or representatives are also very relevant, and can contribute in many ways – local knowledge, suggesting solutions that would be workable, and possibly as monitors. Counsel are entitled to be present but must understand the different role they play. (See Chapter 7 of the NZLS seminar booklet.) It is up to the facilitator to consult with the three main parties about who else might be invited, and to issue those invitations. A good conference is likely to have 5-10 people present and if the local community has an interest in the topic there may be several more, so a suitable venue needs to be arranged.

First case study

I refer now to the two completed cases to illustrate the application of restorative justice principles in the RMA context.

ARC v Times Media Ltd (Auckland District Court, CRN 2084004885, 16 June 2003, McElrea DCJ) This case involved fumes from a printing works at Warkworth. The conference outcome included these elements:

- apology (including a published apology that was sought because the defendant had refused to publish letters to the editor complaining about the offending behaviour)
- a donation to the local college for a native tree planting project
- payment for ARC testing of health factors
- a planted barrier around part of the site
- a new entrapment device (previously agreed to) within two months
- payment of ARC costs

What did this case demonstrate?

Sentencing purposes already met

Before imposing sentence I acknowledged (para 20) that the defendants had been prepared to meet their victims face to face, to make an apology, and to be accountable for their actions; they had acknowledged their victims' concerns and agreed to a range of measures to try and meet those concerns; and I said that while the Court is here to see that justice is done, some crucial elements of justice had already been fulfilled. I did not specify those in the judgment but one could consider that the purposes of holding offenders accountable for harm done, encouraging them to take responsibility for that harm, furthering the interests of victims, protection of the community, deterrence and denunciation – all purposes of sentencing under s 7 – were to some degree already dealt with through the conference process. That is the great strength of the defendant after a successful restorative justice conference.

Other sentencing factors referred to in ss 8 and 9 including a plea of guilty and remorse, were also important to the conference.

More imaginative outcomes

It is the combined input of many people, especially those most affected, that produces the sort of outcomes the court could not impose and yet are very meaningful to those involved. I suggest that only some of these outcomes could have been ordered under s 314, and certainly not the first two or three, and yet it was this combination that was meaningful to the parties and helpful to the Court.

Increased emphasis on discharges with or without conviction.

Section 11 of the Act requires the Court in every case before sentencing to consider whether the defendant might be more appropriately dealt with by a discharge with or without conviction, or an order to come up for sentence if called on. In *Times Media Ltd* I indicated that but for the fact that the offending odours had continued after the restorative justice conference, the second defendant (a director of the company) would have been discharged without a conviction. As it was both he and the company were fined and ordered to pay other costs to give a total penalty of \$9,000 after making an allowance of \$4000 on account of the restorative justice conference itself.

A wider focus of responsibility can be considered

Although there were no previous convictions against either defendant there was a long history of infringements against the Act and part of the residents' concerns expressed at the conference were directed at the perceived failure of the ARC to properly enforce the requirements of the law. Indeed the judgment comments at para 44 that the defendants' lack of previous convictions "may be more a reflection on the slowness of the ARC to prosecute and its willingness to continue dealing with a persistent offender by way of infringement notices and abatement notices."

It is not uncommon at restorative justice conferences for the spotlight to go on "officials" who the victims feel have let them down, and I suggest that this is a very healthy and democratic feature, and makes for a more accountable enforcement regime.

Greater victim participation

A large number of local residents turned up for the conference – more than could be accommodated in the room booked for the occasion. It was significant that some of the residents also attended both parts of the sentencing hearing – there having been an indication of likely sentence, and then an adjournment to allow the plan to be carried out before sentencing occurred.

Importance of monitoring of outcomes

The adjournment just mentioned proved of real value for several reasons. First, it allowed the defendant to show that it meant what it had said, and to complete the process voluntarily. Secondly, it transpired that some of the costs that had earlier been estimated were in fact over-estimated – by about \$13,000. If credit had been given at sentencing based on those estimates, no fine at all may have been imposed. (Conversely, underestimates would work against a defendant.) It is best to avoid estimates altogether.) Thirdly, it provided an opportunity to see whether the solutions put in place were as good as they were expected to be.

Every restorative justice conference plan should make provision for monitoring of the plan. In this case the Court was supplied with a report from the ARC as to the completion of the plan.

Second case study

The second completed case is *Waikato Regional Council v Huntly Quarries Ltd* (Auckland District Court, CRN 2024011394, 30 October 2003, McElrea DCJ). This involved discharges of dirty water from a quarry into the Waikato River after heavy rain. The conference outcome included these elements:

- a donation to the Lower Waikato River Enhancement Society in lieu of a fine
- the informant supported this outcome subject to a concern that 90% of a fine would normally be paid to it to help cover its costs
- nothing else seemed to be considered at the conference as remedial steps had already been put in place

The sentence imposed was a discharge without conviction for the second defendant (a director) and the company was fined on one charge \$5,000. On the other charges I indicated that a fine of \$10,000 would be appropriate but the defendant was convicted and ordered to come up for sentence if called on within 6 months; if the defendant made a contribution of \$7,500 to the Lower Waikato River Enhancement Society in that time there would be no further action, otherwise the procedures for recalling a defendant under s 111 were expected to be used and the defendant would be re-sentenced. I gather the donation was duly made.

What did this case demonstrate?

Sentencing purposes already met.

More imaginative outcomes.

Increased emphasis on discharges with or without conviction.

Importance of monitoring.

The same comments as made above under these headings for the first case apply also here, with the difference that one defendant was discharged without conviction and the other ordered to come up for sentence if called upon.

Value of greater community input

In this case there were no individual persons who came forward as individually affected and capable of being treated as victims under the Act, but community bodies represented at the conference were the Huntly Community Board, Waikato Raupatu Trustee Company Ltd (Tainui), the Lake Hakanoa Walkway Trust, and the Lower Waikato River Enhancement Society. It was partly through the acceptance by community representatives of the great contribution made by the second defendant to the community in environmental matters that a discharge without conviction was entered. (See paras 36 and 39).

Informants' concerns about costs

You will have noticed this expression of concern. It is a natural one, because informants do not receive 90% of donations to community groups, or other such expenditure. In this case the informant did not seek costs as it wanted to maximise the deterrent effect of the sentence. However it received under s 342 RMA 90% of the \$5,000 fine, ie \$4,500.

It is inevitable that a decreased use of fines is likely under restorative justice processes, speaking in general terms only. Informants will hopefully see that the corresponding direct benefits to the community are worth such loss, and in addition the informant can be part of a more forward-looking process.

Looking to the future

Greater use of restorative justice at sentencing

Speaking only for myself I would like to see this process used in a lot more cases. It is likely to be most valuable where there has been conflict within a community, but should not be limited to such cases. Indeed it should not be restricted to any particular type of case. We have not even scratched the surface, and so do not have enough evidence on which to suggest what is best suited to the process.

Could restorative conferences be done on a diversionary basis?

New Zealand's Youth Justice legislation allows for both court-directed conferences and diversionary conferences. The latter are initiated by the police Youth Aid section and convened by a Youth Justice Coordinator. No prosecution ensues if the FGC agrees it is not needed and the plan is carried out.

Some adult conferences are held on a similar but non-statutory basis. I believe that some of the Crime Prevention Unit funded schemes run by Safer Community Councils are linked in to police diversion, in which case the defendant appears in court and there is an adjournment for diversion to be completed, with the charges being withdrawn by leave of the court after completion of the agreed tasks. I believe some conference have been held without any charges being laid at all – akin to the Youth Justice diversionary FGCs.

Speaking not as an Alternate Environment Judge but as an academic, I suggest that there is no reason in theory why there should not be diversionary restorative justice conferences in RMA matters. The police have guidelines that rule out diversion for second offences or for serious matters. Similar factors would be relevant to RMA cases. The need for such diversionary processes is perhaps not so great in view of the availability of non-prosecutory options available under the RMA but not in criminal matters – in particular, enforcement orders, abatement notices and infringement notices. I would have thought though that there would be room in a graduated scale of responses for a diversionary conference to be held where there are actual victims involved, and there is value to be had from a community-based solution.

However this may be to try to run before we have walked. Personally I would prefer to see several more restorative conferences for sentencing purposes, so that we can have some assurance of quality control and good practice, before the Court is bypassed. At least with the police diversion model there are charges laid in court, and a Judge can refuse to grant leave to withdraw the charges if s/he is not satisfied that justice has been done. That type of diversion might be a good place to start.

Freedom from old shackles?

I am sufficiently immodest to close with an excerpt about hopefulness from a paper I gave in London in 2002 and which was used by Lord Falconer, Lord Chancellor of England, in a paper he wrote for the Justice Research Consortium Conference on 24 June 2004.

“Restorative justice is a wonderful message of hope to academics, practitioners and a public who alike had become dispirited, weary and wary. ... Part of this hopefulness lies in our experience of breaking some of the stereotypes that permeate criminal justice. In the Australian RISE research, conferences were seen as *fairer than courts* by both victims and offenders. In New Zealand, Police Youth Aid officers are involved in conferences as constructive, helpful participants. Everywhere victims are regularly found *not* to be vengeful people demanding their pound of flesh. Lawyers are well capable of playing non-adversarial roles. Judges can be enablers and servants. What a breath of fresh air it is to be free of those rusty old shackles, to be hopeful, to be inspired by the prospect of a better way of doing justice.”

The Lord Chancellor’s address raises a number of pertinent issues. If you wish to read the whole address it may be found at <http://www.dca.gov.uk/speeches/2004/lc240604.htm>