

## CHAPTER 9

# Restorative Justice—A New Zealand Perspective

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Progress is the law of life,  
Man is not man as yet.

Robert Browning, *One Word More*, V.

This chapter brings together some old and some new strands of my writings about restorative justice. My involvement has been principally as a youth court judge for 12 years, and a District Court judge for 16 years, but one with some academic qualifications from my own country and from the United Kingdom, and with an eye to reform of our justice structures.

I agree on the need for a culture of change, but it is not just in the legal profession that this is necessary. I support restorative justice as a means of providing a better deal for victims, of holding offenders accountable in a meaningful way, and increasing the involvement of the community in the process of conflict resolution. By these means I believe also that confidence in the law will be restored and our communities made safer.

For historical reasons, New Zealand's interest in restorative justice has been driven primarily by practitioners, and not by policy makers or academics. Three or four years before the term 'restorative justice' had become known in New Zealand, the Children, Young Persons and Their Families Act 1989 introduced the idea of the family group conference. The 1989 Act applied to youth court proceedings dealing with offenders aged 14 to 17 years, and one of the primary objectives of the legislation was to strengthen the ability of families to hold their young people accountable and encourage them to develop in law-abiding and socially productive ways.

Those like myself working with the Act soon saw it, talked about it and wrote about the family group conference concept as a new model of justice. When I later returned to Cambridge on sabbatical leave and read Zehr's (1990) *Changing Lenses* it seemed he was describing a very similar approach. In early 1994 I wrote two papers (McElrea, 1994a and b), the first assessing our youth justice model as a restorative model, and the second arguing for the application of its central principles to adults through community group conferences. From later in that year these adult conferences have been held on an informal, non-statutory basis (mostly, but not entirely in Auckland) encouraged by a number of like-minded judges with the blessing of the chief District Court judge. There are currently some 20 restorative justice schemes in different parts of the country receiving some government funding, mostly set up by the Crime Prevention

Unit, but also including a court-based pilot operating in four courts including my own. I will refer shortly to the Sentencing Act 2002, our latest development.

I have listed elsewhere (see Eaton and McElrea, 2003) three distinctive—indeed revolutionary—elements of the youth court model. First, the transfer of power, principally the court's power, from the state to the community; secondly, the family group conference (FGC) as a mechanism for producing a negotiated, community response; and third, the involvement of victims as key participants, making possible a healing process for both offender and victim<sup>2</sup>. A High court decision in 1995<sup>3</sup> supported this analysis by referring to the youth court model as:

a restorative justice system rather than a retributive or deterrent system. The object of the new provisions was to enable victims and the community, as well as young persons, to participate in a process which would help them all and heal the damage caused by their offences. An essential part of this process is a negotiated community response at a family group conference. It is a system which operates in a vastly different way to that which the Courts are required to use in dealing with adult offenders.

Today the difference is not so vast as is suggested in the judgement of Justice Williamson quoted above. Since that judgement was given, considerable progress has been made with restorative justice for adults, and a new Sentencing Act has been introduced.

A typical restorative conference involves the prior admission of responsibility by the offender, the voluntary attendance of all participants, the assistance of a neutral person as facilitator, and (ideally) the presence of a police officer. It provides the opportunity for explanations to be given, questions answered, apologies given, the drawing up of a plan to address the wrong done, and an agreement as to how that plan will be implemented and monitored. The court is usually but not necessarily involved.

### **Implementing restorative principles**

The Sentencing Act 2002 contains a number of provisions that explicitly endorse restorative justice or the principles upon which it is founded. They are in many ways remarkable and are, as far as I am aware, unprecedented. Section 7 of the Act lists eight purposes of sentencing, and while these are not listed in any order of priority, the first four will be seen to support the restorative approach. The complete list of purposes is as follows:

1. To hold the offender accountable for harm done to the victim and the community by the offending; or,
2. To promote in the offender a sense of responsibility for, and an acknowledgement of, that harm; or,
3. To provide for the interests of the victim of the offence; or,
4. To provide reparation for harm done by the offending; or,
5. To denounce the conduct in which the offender was involved; or,
6. To deter the offender or other persons from committing the same or a similar offence; or,
7. To protect the community from the offender; or,
8. To assist in the offender's rehabilitation and reintegration; or
9. A combination of two or more of the purposes in paragraphs 1 to 8.

Likewise the section dealing with principles of sentencing (section 8) requires the court to 'take into account any outcomes of restorative processes that have occurred'.

Section 10 is a key section. It requires the court to take into account any offer of amends made to the victim, any agreement between the offender and victim as to how the wrong or loss may be remedied or to ensure it will not recur, any measures taken by the offender or his family to compensate the victim, make an apology, or 'otherwise make good the harm that has occurred', and the extent to which such matters have been accepted as 'expiating or mitigating the wrong'. (This last aspect was also present in the previous legislation.) The section also allows the court to adjourn sentencing until any such measure has been implemented.

Other principles of the new Act are also relevant but are not new, for example, the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community (section 16(1).) While some provisions of the Act are overtly designed to produce longer prison sentences for very serious offences, the sections mentioned here should allow restorative justice principles to be reflected in sentencing decisions to a much greater extent than before.

The involvement of families in the youth justice process has been one of its remarkable features. They have become key players in formulating proposals for dealing with their young offenders—and even in the implementation and monitoring of those proposals. In others words, families have been encouraged to take responsibility for their own young people and have been given encouragement and sometimes financial assistance to achieve this end.

Family members are involved as support persons on both sides, that is to say, for offender and for victim. The roles of family members in such a process (whether for young offenders or for adults) are diverse. These include providing moral support and encouragement; helping offenders or victims to express themselves; providing input to suggestions for resolution of the conflict; monitoring outcome proposals designed to prevent re-offending or deal with victims needs; or helping the family of victims or offenders to look at the wider implications of the offending for them.

One of the appealing aspects of restorative processes is that they are inclusive of lay people—whether family members or members of the wider community. Lay people will not claim something as their own if it is run by the professionals, be they lawyers, social workers, judges or police. Good practice requires that these people play their parts in an unobtrusive but supportive way. One should be able to find, or create, a theory about the innate sense of justice and the ingenuity of ordinary people, which can so easily be stifled by 'experts'. The most creative outcomes result from the collective imagination of victims and others working together. Wonderful examples I recall are of the boy who had to take a bunch of flowers to the victim along with his apology letter; of the youth whose eight victims asked him to write out a list of his goals in life and how he would achieve them; and of the shop-owner victim who accepted an offender's offer of unpaid work in lieu of financial reparation, and later gave him a paid job. Courts are inherently unlikely to come up with such imaginative outcomes,

mainly because their sentences are based on statutes that offer a few standard (and often stale) alternatives.

Much of our western criminal justice culture is based on a philosophy that emphasises the rights of the individual, but this usually means the rights of the *defendant*. Because we have used a two-party system, the state versus the defendant, the victim has been the forgotten party. The key person in the community chemistry is probably the victim. Under a restorative model, victims are not just faceless, nameless people. Their anger and hurt is witnessed in a face-to-face encounter. The de-personalising defence mechanisms of offenders – ‘They can afford it’, ‘It’s only a car’, and so on – tend to break down when the victim is experienced as a living, hurting, human being. While restorative conferences are not ‘shaming conferences’, shame can lead to apology and an expression of remorse, which in turn can lead to acceptance of the apology and a release for the victim from the trauma of the past.

In all of this there is a role for forgiveness but it should never be something *expected* of victims. It is theirs to give if they feel it appropriate at the time. It will often be a natural response and one that benefits both parties. Restorative justice allows a place for this but also a place for grace, that unearned generosity of spirit and its transforming power that can enable both sides to let go of the hurt of the past and start building for the future. There is of course a spiritual element there for those who wish to explore it. It is not exclusively a Christian viewpoint, but Christians would say that only the transforming power of love can break the cycle of violence, anger and revenge.

Victims are also entitled to put their questions to offenders and to expect honest answers: ‘Why did you do it?’; ‘Why me?’; ‘Did you think about how I might feel?’; ‘Were you planning to do it again?’; ‘What are you going to do to fix my problem?’; ‘What are you going to do about your own life, so there won’t be other victims?’

Interestingly, victims were *not* given a central focus in our 1989 youth justice legislation. It is questionable whether on paper it was a restorative justice model at all. Victims were entitled to attend family group conferences, and the Act required ‘due regard to [be had to] the interests of any victims’ of youth offending (Section 208(h)) – a pretty feeble expression. A 1994 amendment allowed victims to be accompanied at conferences by supporters and required that they be consulted about the arrangements for the conference, but overall the Act itself still does not give victims a central role. One reason why in practice victims were seen as important at conferences (despite an insipid statute) was that our first principal youth court judge, M.J.A. (Mick) Brown, was part-Maori and intuitively understood their key role in achieving justice. He insisted from the start that ours was a *victim-centred process*, and his influence was crucial in the development of a restorative approach.

It is not difficult for ordinary folk to understand restorative justice because it is essentially the way most families work. They do not operate like courts and yet they grapple with very basic issues of justice: fair hearing, punishment, reparation and reconciliation. Most importantly families seek to keep the peace, and to find positive outcomes to conflict. The former Deputy Minister of Justice of Saskatchewan, Brent Cotter Q.C., once complained that the criminal justice

system encourages offenders to deny responsibility and hope that they might get off. In a family, he said, such behaviour would be considered dysfunctional, and in a community it is the same.

When I studied the traditional theories of punishment as a law and philosophy student in the 1960s they seemed to make sense, but since 1988 as a judge I have found them profoundly unsatisfactory—especially the deterrence theory. Levels of crime do not seem to drop when levels of punishment increase, and yet they should do if people acted rationally. One would expect people to value their life and their liberty, but they often do not respond as expected when life or liberty is threatened by way of punishment. New Zealand's experience of the death penalty is one case in point. Through all phases of abolition, reinstatement and further abolition the murder rate was not affected. More punitive sentencing for crimes of violence was introduced in New Zealand in 1985. Over the following seven years violent offending increased by 41 per cent and yet the average length of prison sentences for such offences had increased by 58 per cent.

The problem with the deterrence theory is that it presupposes it is dealing with rational creatures who respond to threats of punishment. But force is not always the answer, or is not the whole answer. Restorative justice processes can and should operate at the cognitive or rational level, but they can also build on normal and vital human emotions. These become evident when hurt and anger are expressed by victims to offenders in a palpable way, when offenders feel remorse and empathy for their victims, when elements of forgiveness are present, when a shared optimism for the future emerges; and when dignity and respect are restored to victim and offender.

Restorative conferences are not *just* a decision-making process; they need to be able to draw on worthwhile programs. But they are also an experience, an opportunity for human encounter. This is one reason why the victim's presence is so essential. Without a victim present it is almost impossible to get that essential element of encounter and confrontation that challenges an offender's perception of their actions and shows them the human face of crime. In the experience of such an encounter a change of heart is possible. Courts hardly ever see that occur.

As well as giving proper rein to the emotions, restorative processes can express deep spiritual values of Christianity and other faiths, like repentance, forgiveness, renewal, healing, reconciliation and growth. Father Henare Tate (1990) in New Zealand writes of those spiritual values that find expression in a Maori approach to justice. First Nations people of North America apply spiritual values, as Rupert Ross (1995; 1996) has shown. The Hebrew people saw justice as flowing from the Creator like a river that waters the land.

And so restorative justice can acknowledge and work with the whole person: heart, mind and spirit. The offender is not just a theoretical construct from a narrow, utilitarian model of human behaviour.

It needs to be stressed that restorative justice is not simply the old argument for 'rehabilitation rather than punishment', dressed up in new language. That type of paternalistic approach has had its day and has failed. To treat offenders as simply being sick people requiring treatment rather than punishment is not a credible



approach. Amongst other faults it ignores the desire of others to see justice done and it can interfere with important rights of offenders, for example, to an outcome that is not disproportionate to the offence and which terminates within a limited period. Just as significantly, this approach has failed because it left intact—indeed, reinforced—the central role of the state, and it ignored the plight of victims. Consequently the liberalism of much of the latter part of the twentieth century did not alter the basic model of justice entrenched in New Zealand with its heavy emphasis upon prisons. (New Zealand imprisons people at a higher rate than does the United Kingdom, though not at United States levels.)

The fact of the matter is that punishment hardly ever seems to reform (in the sense of reshape) anyone. Leaving aside a few outstanding programs like those for paedophiles operating in some New Zealand prisons, no-one seems to believe that people are improved by going to prison—quite the contrary. Similarly locking up young persons in social welfare homes does not attract a lot of support as a way to reform them.

Mike Doolan's (1993) illuminating Legal Research Foundation article on the origins of New Zealand's youth justice system explained that 60 years of paternalistic welfare legislation had had little impact on levels of offending behaviour:

Youth justice reform in New Zealand, then, beckons the practitioner away from the excessive pursuit of rehabilitation, from attempts to explain criminality in the contexts of individual and family pathology, from dispositions which are frequently more intrusive, coercive and inherently unjust, and from an approach which provides little opportunity for the viewpoints of victims, and even of offenders themselves, to be recognised.

Doolan, 1993, p.19.

The move towards a more communitarian approach to justice has both encouraged restorative justice and been encouraged by it. At the same time the western world has undergone some radical rethinking of the role of the state. No longer is it assumed to be the only vehicle for delivering solutions in a variety of areas that were traditionally its preserve, such as public utilities, transport, price and wage controls. There are now different views about the nature of justice and the role of the state in delivering justice.

Canada's sentencing circles and New Zealand's family group conferences have jointly helped to add to the restorative justice model a community element that was not present in the North American VORP<sup>5</sup> or VOM<sup>6</sup> model. In fact sentencing circles are a more thorough-going community-based model than family group conferences and I have nothing but admiration for them and for people like Yukon's former judge Barry Stuart, who has emphasised the community-building potential of restorative justice. The United Kingdom's evolution of youth offender panels provided another valuable means of involving members of the community in a restorative process.

Finally on the topic of sentencing theory, the 'just deserts' viewpoint presupposes that the deserved amount of punishment can be objectively known and delivered by the state through the courts. It is unlikely to have any truck

with notions that a suitable outcome might depend upon the input of family, victim and community, that judges might not always know what is right for others, and that punishment might be one factor only in a balanced sentencing approach. In any event, this theory is based on a distorted notion of accountability.

### Accountability

The most relevant and helpful statement on accountability that I have come across is what Howard Zehr (1994) stated in a video presentation about restorative justice entitled *Restorative Justice: Making Things Right*:

From a structural justice standpoint, one of the more fundamental needs is to hold offenders accountable in a meaningful way. I have conversations with judges sometimes and they say, 'Well, but I need to hold the offender accountable' – and I agree absolutely, but the difference is as to how we understand accountability. What they're understanding by it, and the usual understanding is 'you take your punishment'. Well, that's a very abstract thing. You do your time in prison and you're paying your debt to society, but it doesn't feel like you're paying a debt to anybody – basically, you're living off people while you are doing that. You *never* in that process come to understand what you did, and what I'm saying 'accountability' means is understanding what you did and, then taking responsibility for it; and taking responsibility for it means doing something to make it right, but also helping to be part of that process.

Zehr, 1994.

I support Zehr in that statement. The traditional western model of criminal justice does not in my view hold offenders accountable in a meaningful way. We may think that the traditional court system holds offenders accountable but it has become too ritualised, too de-personalised, and too much like a game to succeed in many cases. The problem lies in the very model of justice that we use.

At the heart of the usual western concept of criminal justice is the idea of a contest between the state and the accused, conducted according to well-defined rules of fair play and leading to a verdict of guilty or not guilty. One of the most important of these rules is the presumption of innocence – the accused is to be found 'not guilty' unless the state can prove otherwise. Those found guilty are punished by the state, and of course the more punitive the sentencing regime the greater is the incentive for a guilty person to rely on the presumption of innocence and put the state to the proof: in other words, to plead not guilty.

The concept of a fair trial has been described as the apotheosis of the adversarial system – its highest ideal. It has come to be seen in procedural terms, formulated by complex rules of evidence (for example, excluding hearsay evidence), the judges' rules for the conduct of police interviews, and other settled principles of 'due process'. Important though these are in themselves, they have preoccupied our thinking in criminal justice for too long. The over-riding issue is whether *fair procedures* are followed: not whether they produce a just result, a fair outcome for the accused, satisfaction for the victim or harmony in the community to which both victim and offender belong. We are stuck in a mould, formed mostly in the nineteenth century, which measures justice by its own

procedures. Instead of justice being the measuring rod of law, law has become the definition of justice.

It is important that we understand this 'positivist' basis of our thinking about criminal justice or we will be ruled by it unawares. As Dowrick indicates, referring back to medieval jurists: 'This contemporary version of justice as fair trial is the culmination of a long development within the English legal system' (Dowrick, 1961, pp.32-3). Dowrick also quotes John Austin, the first Professor of Jurisprudence in England, who around 1830 was expounding the positivist view of justice as conformity to the established laws of the land. Austin proclaimed that 'in truth, law [the positive law of the land] is itself the standard of justice' (Austin quoted by Dowrick, 1961, op. cit., p.177). This thinking was part of the colonial heritage of New Zealand and of England's other colonies. It is not a matter of mere legal philosophy. Rather it is an intensely practical matter that underlies much of our thinking and practice about criminal justice.

It is time to challenge the Austinian attitude. It has led to the portrayal of criminal justice as a game, with the lawyers playing the system (the rules) while the court acts as umpire, and justice too often becomes the loser. It has, I believe, come to serve society and the law (and lawyers) poorly.

To return to Zehr's challenge about accountability, the plain fact is that our nineteenth century model does not promote accountability. To start with, much of the language used is from a bygone era. Following the taking of 'depositions' the accused is 'arraigned' upon an 'indictment'. The accused stands in 'the dock', almost like an exhibit on display: 'You are charged that on or about [date] you did [crime]. How do you plead?' The whole trial is conducted very publicly, with accompanying rituals that serve to dramatise and hence de-personalise the experience. Any shaming is of the ostracising type which the Australian John Braithwaite argues does not promote a change in attitudes (Braithwaite, 1989). New Zealand's Julie Leibrich refers to this as the 'public humiliation' of the courtroom where, in an adversarial system, the person is literally made to stand apart, and contrasts it with personal disgrace and private remorse. She found that public humiliation was counter-productive in the process of 'going straight'. (Leibrich, 1996.) More recent New Zealand research has established the same point (see Maxwell, 2003).

It is not surprising then that, increasingly, the news media treat crime as prime news, and criminal trials as free drama or live entertainment that they are keen to televise. The media thrive on conflict, on public contests, on finding winners and losers. If the victim features at all in court reports, it is usually as a 'loser', even where the accused has also 'lost', so the only 'winner' is the prosecution, or the impersonal state. Feelings of antagonism, fear, anger and general negativity are fuelled, both amongst the trial participants and the viewing public alike. There is scarcely ever good news reported from the courts.

I suggest that one of the key defects in the criminal process today relates to pleading, and that the very word 'plead' should be abolished. It suggests the prostrate supplicant offering up a prayer for relief to a kingly presence. The fact of the matter is that a 'plea' of not guilty does not necessarily mean that the defendant denies guilt. It may mean only that the defendant wishes to 'put the prosecution to the proof', or to see if the prosecution can prove its case. This can



operate as an incentive *not* to accept responsibility but instead to deny all responsibility that the defendant or his lawyer thinks cannot be proved. As things stand this is not only permissible but encouraged. Further, with proceedings laid indictably (or intended for trial by jury) the defendant is not even *asked* to plead until after a preliminary hearing involving the taking of ‘depositions’.

Of course if a key element of an offence does not exist then the defendant should indeed be found not guilty. But if, instead, the prosecution should fail to prove an ingredient of the offence through the absence (or faded memory) of an important witness, or because a witness lies, or through failure to correctly recite the breath-alcohol litany in the witness box, or by simple oversight of the prosecutor, or because relevant evidence is ruled inadmissible – is justice served by a not guilty finding? The role of the criminal justice system must include both convicting offenders and acquitting the innocent. Where the guilty are found not guilty by this process an injustice is done which the positivist approach does not recognise.

I therefore propose that we should do away with the concept of putting the prosecution to the proof, except where the defendant denies the charge or has no means of knowing what happened at the time. Why should not defendants be told the charge against them and asked whether that charge is admitted or denied? If it is admitted then the prosecution should not have to prove it. This would mean that lawyers would have an important role to perform in ensuring that accused persons understand what it is they are admitting to, and what defences might be available to them. If denied it should be proved using the adversarial system.

A further refinement could be a formal mechanism for admitting in part and denying in part, as commonly occurs in civil claims, and in those cases the prosecution need prove only the disputed part. In dealing with Environment Court prosecutions I ask counsel to prepare a Summary of Agreed Facts and Disputed Issues. Those facts that are agreed are admitted under section 369 of our Crimes Act 1961, and the evidence then can focus only on those issues in dispute. The incentive on counsel to agree – and they always have agreed – is the saving in costs for their clients. I have followed the same procedure in a complicated fraud trial, but again only with the co-operation of both sides. Why should this not be standard procedure? I see no reason, other than a desire to keep the cards up one’s sleeve, to favour luck over truthfulness, and to leave lawyers in charge of the process.<sup>4</sup>

In fact I have recently become convinced that the problem with the traditional criminal model is not so much a retributive philosophy as the two-party adversarial system so heavily dominated by professionals, especially lawyers: this has distorted our sense of justice and forced us into the win/lose mentality that, incidentally, so often produces a lose/lose result. For lawyers, attacks on the adversarial system have usually come from those advocating the European inquisitorial system, but both of these systems are state dominated and by their very nature, disempower the victim. I suggest that restorative justice, understood as a revolution in criminal *procedure*, can enable or lead to a victim-

centred *experience* of justice, and with it a reordering of our objectives. If we get the procedures right, the rest is likely to follow.

### The place of punishment

What, then, is the role of punishment? Perhaps because of my background I have always believed that punishment can be part of a restorative justice solution, and I have never seen restorative justice as an *alternative* to punishment. My preference is to say that punishment should not be the overriding objective in dealing with crime, because that is to put the focus on the perpetrator to the exclusion of the victim. As Biggar writes: 'Justice is primarily not about the punishment of the perpetrator but rather about the vindication of the victim' (1999, p27). And as Zehr puts it:

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 counter-productive for both victim and offender. Restorative justice theory, on the other hand, argues that what truly vindicates is acknowledgement 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.

Zehr, 2002b, pp.58-9

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'. Zehr has an interesting comment on this:

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.

Zehr, 2002c, pp.28-9.

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 Howard Zehr and Shirley Julich support a wider view. The Massey University November 2002 *hui* series in which both participated, established a number of important aspects of victim vindication.

First, very powerful vindication for a victim lies in hearing an offender acknowledge that he or she has 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.

Secondly, however, regardless of the offender's attitude, public acknowledgement of injury is a basic form of vindication. Nigel Biggar, now Professor of Theology and Ethics at Trinity College, Dublin, puts it well in more recent writing:

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.

Biggar, 2002, p.20

Third, 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.

Fourthly, 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 Biggar puts it, 'victims, not their oppressors, have first claim upon the attention and resources of succour'. (Biggar, 2002, p.26.)

Fifth, victims have their own needs to discover the truth—about 'what happened, why it happened, and who was responsible' (Biggar, 2002, p.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.

And, finally, Shirley 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.

Most restorative conference plans in New Zealand have one or more punitive elements, such as unpaid community work, curfew (house arrest), or other loss of privileges. These elements may also serve utilitarian functions such as engendering good work habits, or keeping the offender out of trouble, but they are usually seen also as punishment. The real success of our restorative conference process lies, in my view, not in pursuing a non-punitive objective but

in the use of *procedures* that put the victim at the heart of the process and make the community a partner with the state in finding positive solutions.

The point that most often worries lawyers and some other professionals is the question of fairness to different defendants. The concern is that there will be widely differing outcomes resulting from similar offending because of the differing membership of the restorative conferences and in particular the victims' attitudes. The point is an important one and I do not dismiss it. However I believe that it is founded on a concern about fairness that looks entirely to a defendant's viewpoint rather than asking what is fair from the viewpoints of defendant, victim and the community. Western legal systems have traditionally given very little weight to victims' views about sentencing, perhaps in order to avoid subjectivity. While that aim has its justification, it is in my view counterbalanced by the following considerations.

First, defendants take victims as they find them in many respects already. The same piece of careless driving of a motor vehicle can have very different consequences depending upon quite fortuitous events relating to the presence and position of other persons or vehicles on the road. The same driving (viewed objectively) can lead to a charge of careless driving, careless driving causing injury, or careless driving causing death—with three very different sentencing outcomes.

Secondly, many of the elements of a successful restorative conference are already recognised as valid elements in mitigation of penalties—remorse meaningfully expressed, apologies made, restitution offered or paid, and the victim's attitude to these elements. These elements therefore can lead to different outcomes in otherwise similar cases even under the standard western sentencing model. When a lawyer once asked me whether it was fair that an offender's sentence should be affected by the victim's attitude, it occurred to me that for at least a hundred years sentences have been affected by the offender's attitude—so why *not* both?

Third, consistency of outcome is not possible without some injustice. Sentencing grids or minimum mandatory sentences that work on two or three elements (for example, nature of charge, number of previous convictions) can produce consistent outcomes only on those factors and by ignoring others. When considering fairness from all participants' points of view, the restorative process is more likely to produce overall fairness.

Fourthly, traditional court sentences depend in part on the quality of the lawyers and other professionals involved, and the identity of the judge. The appellate structure itself recognises that there are areas of discretion which mean that there will be different outcomes in similar cases depending upon the judge's view of the matter, and what he or she has been told.

Finally, it is not suggested that conference outcomes should not be subject to some form of oversight by the courts. In the adult models operating in New Zealand on a voluntary basis, the courts continue to sentence and can take account of the conference recommendations to whatever extent the judge thinks proper. In the statutory youth court model that we operate, some conferences do not involve court processes (diversionary conferences.) But all conferences require the agreement of all parties including the specialist police 'Youth Aid' officers who, like

all other participants, can veto a particular outcome if they think it is inappropriate. If agreement is not reached the matter goes to the court. Even where the court has referred a matter to a conference, the result is only a recommendation to the court. In this way the court (and the police) are able to filter out inappropriate outcomes or to approve them with adjustments that make the outcome fairer.

### Further considerations

I wish now to stress the manner in which restorative justice can help build stronger communities. Some people ask whether restorative justice can work where there is no sense of community, for example, in large cities or where people are separated by long distances from their natural community. Experience has shown that restorative justice is a *community-building* process. When you bring together people (including a victim) who are asked to devise ways of making things right, you are inevitably putting some measure of support around the victim, the offender and those involved with them. People are asked to take responsibility for each other—and that is what a community is all about.

There is some scope even for officials to be held accountable. Police can be asked why it was necessary to arrest and hold a suspect in the police cells. Social workers can be asked why they have failed to carry out the terms of earlier conference outcomes or court sentences. New Zealand is now using restorative conferencing in schools, and where a school is involved, questions might be asked about the way the school has handled the matter, and so on. Restorative justice can in fact be a form of participatory democracy at a community level, with ordinary people, affected by conflict, taking responsibility for doing something about it. In the process, it becomes possible, to some degree, able to hold accountable not only the offender but also others who have some responsibility for the state of affairs.

This value of the restorative process in building a sense of community is especially important in a multicultural society. When people from different cultures sit down to discuss how best to solve the problems created by and leading to a crime, they learn about each other's viewpoint and can value the contribution the other offers. Here, for example, I recall the conference in New Zealand where the Maori offender's grandmother sat down next to the middle-aged victims who were not Maori and interpreted for them the prayers being offered in Maori by the boy's grandfather.

Restorative justice has recently been introduced also into one of our prisons, again on a pilot scheme basis. A full time restorative justice co-ordinator working in the Hawks Bay Regional Prison organizes meetings between prisoners and victims where both parties wish to have such a meeting. The outcomes have nearly always been very positive. As these meetings occur post-sentence they have no relationship to the sentencing process and are purely for the benefit of the parties themselves. I believe however they do have important benefits for the wider community generally.

The question of whether or not the police should preside over restorative conferences is an issue upon which practices differ. England now has considerable experience of successful police-run restorative conferences, thanks to the initiatives taken by Sir Charles Pollard when he led the Thames Valley Police. (I am glad to know that in his 'retirement' Sir Charles is still providing leadership in restorative



justice.) New Zealand has no such experience as it decided at an early stage that the police had a different, more appropriate role to play.

All four of the Australian statutory schemes for young people have followed the New Zealand model in not using the police to convene and facilitate the conference. In New Zealand this job is done by an independent person, the Youth Justice Co-ordinator, employed by Child, Youth and Family Services. The police are present at each New Zealand conference in the person of a Youth Aid officer, and like every person entitled to be present they have a right of veto, but they have no co-ordinating role. They are also invited to most adult restorative conferences. The police in a very real sense represent the public interest at family group conferences, and must be present and free to speak and act in the public interest if the system is to have credibility with the public.

By contrast, the early Australian 'Wagga Wagga' model supported the use of the police for this central role. It was also the model used in the RISE<sup>7</sup> project for adults in Canberra, but it is not without its critics. Harry Blagg, writing with several years experience of the West Australian scene, suggested that the 'Wagga' model promised to intensify rather than reduce police controls over Aboriginal people (Blagg, 1997).<sup>8</sup> I can also attest to the views of the head of the police Youth Aid section in New Zealand, Inspector Chris Graveson, who is strongly against the police taking on this role. Three arguments he has advanced are summarised in the following questions or statements that express the reservations clearly:

As police are bringing the prosecution, it would be seen as inappropriate for them to be organizing and being in control of the process that is to determine the outcome. It would simply be seen that the police are the investigator, the prosecutor and the judge, and how would alleged inappropriate police actions be dealt with at the conference?

If police were in the function of co-ordinator, they would have to be seen to be objective and it would limit the amount of support they could give to the victim ...

If the police are chairing the conference, then it limits what they can and cannot say ... If the offence is outrageous or serious, or there are other serious factors that concern the police or the community, then how can the police express these with vigour when they are meant to be there to facilitate?

McElrea, 2002c, p.15.<sup>9</sup>

## **Conclusion**

By way of a conclusion, and a drawing together of the strands of this discussion, it may be helpful to repeat the words of the American writer Daniel Van Ness. He concluded a lecture in New Zealand in 1997 by reminding us that the many true stories which sound too good to be true can 'vindicate our hopefulness. Offenders can assume responsibility. Harm can be repaired. Enemies can become friends. Justice can bring restoration' (Van Ness, 1977).<sup>10</sup>

Restorative justice is a wonderful message of hope to academics, practitioners and a public who alike had become dispirited, weary and wary. Visitors to New Zealand frequently comment on the obvious enthusiasm of its youth justice practitioners, despite the lack of resources and other problems that often dog their progress.

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, and to be inspired by the prospect of a better way of doing justice.

## ENDNOTES for Chapter 9

1. This perspective is an abridged and augmented version of Judge Fred McElrea's paper presented to the conference 'Modernising Criminal Justice – New World Challenges' in London 16-20 June 2002. It is included here under its original title, and with his expressed permission.
2. See also McElrea (2002b). 'Recognising Victims' Rights', in *Justice Review International*, Issue 1, Winter 2002/3 at pages 16-19 for an expanded account of what he terms a move from procedural justice towards substantive justice.
3. The High Court of New Zealand's decision was recorded in *RE v. police* [unreported], Christchurch Registry, AP 328/94 of 2 March 1995, Williamson J.
4. Here see, for example, Maxwell (2003) below, in relation to the desired outcomes of Youth Justice.
5. The abbreviation VORP stands for Victim-Offender Reconciliation Program.
6. The abbreviation VOM denotes Victim-Offender Mediation.
7. The Canberra RISE Project carries the full title of the Re-Integrative Shaming Experiment.
8. This account is to be found in *The British Journal of Criminology*, Volume 37, Number 3, at pages 481-501. It should be noted that within the same publication (at pages 502-6), Braithwaite wrote a response which is indicated below.
9. McElrea quotes here from his original paper (2002c) delivered in London, June 2002. But see also Graveson (2002) for the background against which the original comments were made.
10. The author took a detailed note of the conclusion of the lecture delivered by Daniel Van Ness in New Zealand in 1997, the extract from which appears here. Much of Van Ness's approach to restorative justice is to be found in Van Ness, D. and Strong, K.H. (2001), *Restoring Justice*, [Second Edition], USA: Anderson.

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