

Notes for address to Criminal Bar Association 2nd Dec 2010

What I am expressing tonight are entirely personal views. However successive Chief District Court Judges have supported all restorative justice initiatives in which I have been involved for the last 16 years. Indeed they have been very supportive.

It is about 15 years since I spoke to a meeting of this Association about restorative justice, and that was with Howard Zehr, the American “guru”. Much has happened since – the advent of the judge-led initiative for a court pilot, conducted in four District Courts, the passing of the Sentencing Act 2002 which required Judges to take restorative justice outcomes into account, provision of restorative justice in prisons (by amendment to the Corrections Act) and other specific reforms. The term “restorative justice” has entered the common person’s language, and is heard at all sorts of times and places, both in and out of the media. Many ordinary folk understand and embrace it.

I want to offer a personal view of the importance of restorative justice for the law at this particular stage of our history.

First, the law is under huge attack, and is losing public support, for the way in which it has failed to make proper provision for the interests of complainants – called by most of the media, and politicians, “victims”. In large part this is the consequence of the adversary system as it has evolved over the last 200 – 250 years. Before lawyers became involved, complainants prosecuted their own cases and had plenty of say in the matter. It was primitive in one sense, but it recognised that a complainant was a party to the case in a real sense. That got lost sight of when the State took over prosecutions.

Secondly, in recent times we have seen politicians of all parties, and not just in New Zealand, (a) wanting to reshape the justice system, and (b) seeing a “hard” stance on offenders as being politically popular. This popularism did not hold sway when I started out in the law, in the days when Ralph Hanan was Minister of Justice and JL Robson was Secretary for Justice. It was a golden era of enlightened thinking and real leadership in New Zealand.

Thirdly, of equal concern is the way in which politicians and groups like the Sensible Sentencing Trust try and align hard-line political policies as being “pro-victim”. This involves the mistaken view that what is good for victims is bad for offenders, and vice versa. The adversary system feeds this view because it pits the two sides of a case against each other in a win-lose battle. Restorative justice knows and teaches otherwise.

Next, the adversary system is also a problem because it appears to favour the avoidance of responsibility – a perfectly sound principle (the presumption of innocence) can easily be twisted to become “Deny it and see if you can get off.” That is fairly being seen as dysfunctional, and for my part I would favour a change to that attitude, not by changing the presumption of innocence but by changing the Code of Ethics of lawyers so as to reflect the first two purposes of sentencing as found in section 7 of our Sentencing Act – eg an acceptance that the purpose of the law we all serve is to “hold offenders accountable for the harm done to the victim and the community by the offending”, and “to promote in the offender a sense of responsibility for ...that harm”.

Incidentally, none of the higher courts appear to have recognised or accepted that those two new principles of sentencing came straight from restorative justice principles; many cases

proceed as though sentencing is simply about punishment - even the Supreme Court in *R v Hessell* (para 43) – which (because it makes for good drama) also fuels the “winner/loser” dichotomy that politicians and the media so love.

Restorative justice offers a quite different view of victims’ interests, one that is not necessarily opposed to that of offenders – and can produce “win-win” outcomes. They are actually what is aimed at every time. If the Courts could more consistently show that victims’ interests can be catered for in meaningful ways (not token ways like victim impact statements), and that their needs are better addressed in this way, much of the pressure for tougher sentences would fall away.

I have always seen restorative justice as complementing and improving the adversary system, not as replacing it. It is not necessary to look for inquisitorial solutions from overseas when New Zealand has a platform for a much better criminal justice system on its doorstep – one to which overseas people look with admiration, even if local support from within the criminal justice system has been patchy.

[....]

The decisions of the Court of Appeal and the Supreme Court in *R v Hessell*

You may not have thought of it before but I suggest that restorative justice has become even more important since the Supreme Court issued its decision in *Hessell* on 16 Nov 2010. I offer these personal comments:

- Most Judges I know welcome the greater flexibility given by the Supreme Court as to how discounts for Guilty pleas are worked out. However many Judges would be like me in having usually given a one-third discount for a Guilty plea at a reasonably early opportunity, and more where real remorse is clearly evident. The Supreme Court has now said (para 75) that “the reduction for a Guilty plea component should not exceed 25%.” As a result I believe there will be even longer prison sentences being imposed than at present.
- The Supreme Court’s reasoning was that “remorse is dealt with separately”. The problem with remorse is that irresponsible counsel can easily say “My client feels remorseful” when the client may only express remorse when told that it will help his/her case, or the “remorse” means the defendant is sorry he was caught. Most District Court Judges regard that sort of statement as practically meaningless. There should be some *evidence* of remorse if the Court is expected to act on it. Not evidence in the sense of sworn testimony, but something tangible. Now, here is the connection:
- Restorative justice is one of the most powerful tools for (a) experiencing remorse and (b) expressing it, that I have ever come across. People do not have to be remorseful to be eligible – they simply have to accept responsibility for (ie, admit) wrongdoing, and in Government-funded programmes, enter a plea of Guilty. But once an offender experiences the real hurt and pain of the victim, and can see in personal terms what their crime has done to someone’s life, they nearly always feel small, or Yuk, or awful, or however they put it. That is remorse. It is the foundation of a true apology – not the weasel words commonly used in public apologies as we hear them today. The report of a conference should make it clear by its account of the proceedings whether and how that sentiment was experienced and expressed.

- In theological terms it is akin to repentance. It is usually followed by some form of forgiveness, although that can never be something expected of victims, and it is not a word they commonly use. But it is the point at which some forward movement, some healing of the wrong, can start.
- Remorse is also made tangible by the offers that are made by offenders – and they can be incredibly thoughtful and helpful to victims. They will be evident in the outcome plan that is part of the restorative justice report to the Court.

No court has yet tried to limit the way in which Judges may take into account restorative justice processes, and I am very glad about that. It can make the difference between types of sentence, between components in a sentence, and the length or financial cost of sentences. It is not a fixed quantum, and can only be assessed by the sort of judgment process that the Supreme Court alluded to in dealing with some of the cases. It may be worth much more than just an allowance for remorse – and many of the cases that I have been involved in spell out just how a restorative process can, out of court, deal to a large extent with the purposes of sentencing relevant in a particular case. Cases in the environmental area, and others, have shown how a restorative justice conference has enabled an offender to be held accountable in a most direct and personal way, and to be encouraged to take responsibility for what they have done, and to look to the interests of victims, and even to reflect older purposes like denunciation, and deterrence – eg the Canadian case *R v Hollingsky*¹:

The Court of Appeal of Manitoba dismissed the Crown's appeal against the sentence of community work, with one of the appellate judges asking, "How is the principle of general deterrence better served than by speaking to 8,200 students about the tragedy of drinking and driving?" (The Court was right - the resulting reduction in road deaths for young people the next summer was very significant.)

So when you have a client who has experienced these things, bring it home to the Court in the most clear language you can. It can count for a lot!!

It is noted that the decision in *Hessell* treats a discount at sentencing as being the only institutional incentive for pleading Guilty. Restorative justice offers a whole set of incentives that can supplement that approach, but these are not referred to in either the Court of Appeal or Supreme Court decisions.

Before leaving *Hessell*, I offer another personal view. The 25% fixed maximum for a Guilty plea, coming at the end of the judgment, seemed to me out of kilter with much of the reasoning for disagreeing with the Court of Appeal – with its reference to a complex of inter-related considerations that require synthesis in an act of judgment [my paraphrase]. I am heartened that the Court seems to be turning away from formulaic approaches to judgment – some of which in recent years has been furthered by comments suggesting that the area of discretion in judging is really quite small.

This has two consequences – it makes it much easier for an appellate court to substitute its own view of the matter, and to control errant judges. But – and this is my warning – it makes it much easier for politicians to intervene and say “Ah!! – So that is how you work it out! This is our job – we will tell you how to exercise your discretion, and what formulas to apply.” That is happening right now in various areas, eg with the “three strikes” legislation,

¹ (1995) 103 CCC (3d) 472

and I suggest that the responsibility for judging is being whittled away by the removal of discretion – whether by the courts or by parliament. Surely we appoint Judges to exercise judgment. We need to choose them wisely, not least because we want them to have good judgment - of people, of situations, of complex issues such as occur in sentencing, and in the way they conduct themselves in and out of court.

So I leave you with the hope that the justice system will deliver justice for all, not just for defendants, and that the courts will be left to get on with the job of judging according to the law and applying principles of respect and compassion for all.