Second International Conference on Restorative Justice for Juveniles

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Paper by Judge Fred McElrea for the session

on

“Restorative Process and Outcome: Emerging Theories of Restorative Interventions”

It was explained to me that this session will ask what alternative theories can account for the impact of restorative interventions and how these are illustrated in different conferencing models and reparative obligations. When I protested that I was primarily a practitioner who did not presume to know about “emerging theories” and all the “different conferencing models” Gordon Bazemore assured me that I should simply address the question, Why do you think it works? That I can do.

For historical reasons, New Zealand interest in restorative justice has been driven primarily by practitioners, not by theorists. Three or four years before the term “restorative justice” had become known in New Zealand we had the Children, Young Persons and their Families Act 1989 introducing the family group conference. Those like myself working with the Act soon saw it, talked about it and wrote about it as a new model of justice. When I later returned to Cambridge on sabbatical leave and read Howard Zehr’s Changing Lenses it seemed he was describing a very similar approach. In early 1994 I wrote two papers, 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 that year (as I will describe more fully in the Part III panel session tomorrow) 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. More recently they have come to be organised independently of the courts.

My involvement therefore has been principally as a Youth Court judge and a District Court judge, but one with some academic qualifications and an eye to reform of our justice structures.

From that perspective, Why do I think restorative justice works? For eight reasons:

- Because it is inclusive and respectful.
- Because it is not dominated by professionals.
- Because it is much more satisfying to victims.
- Because it is the way most families work and so we readily understand it.
- Because it acknowledges the whole person.
- Because it lacks the paternalism of welfare models of youth justice.
- Because it does not presuppose a monolithic and all-knowing State.
- Because it is positive and hopeful in its outlook.

1. Because it is inclusive and respectful.

Last week I attended an invigorating three day conference in Wellington, New Zealand entitled Youth Justice in Focus. That title is significant. It picks up Howard Zehr's notion of the camera lens and his emphasis on the need for respect which he spoke about in New Zealand in 1995, and it upholds the idea of "treasuring" our youth, our young people, as one speaker put it last week. At that conference Mike Dolan, one of the draftsmen of our youth justice legislation, the Children, Young Persons and their Families Act 1989, made a plea for the continued use of the term "youth justice" instead of the more common term in this hemisphere, "juvenile justice". Mr Dolan's point was that for young people and their families and communities, the term "juvenile" is usually a disrespectful term, a put-down. It does not appear anywhere in our statute and he suggests that it be reserved for young fish and young birds. I agree - partly for his reasons, but also because as a Youth Court judge I feel that we have to throw off the language of professionals and use the more inclusive language of the people we serve, if we are serious about operating a new model of justice built on principles of respect.

(So I prefer also "youth crime" to "juvenile delinquency" which has the connotations of a science through which an inner circle enlightens "the rest" about what is best for them. But having made that plea I will also "do as the Romans do" while in Rome.)

Respect raises the issue of shame. In New Zealand shame is not seen as an objective of the conference, it is not used as a selling point with politicians, and FGCs are never called "shaming conferences" as the Australian media sometimes call them. John Braithwaite's seminal work on reintegrative shaming has taught us all much, but I feel that the public will always think of shame in the stigmatising sense and will misunderstand what is being said. I was interested to learn last week from Gabrielle Maxwell's research that persistent reoffending was associated with a lack of remorse and with feeling shamed at the conference. Remorse is what we should hope for, and young persons can be respected for showing remorse. Making them feel ashamed does not seem to help.

2. Because it is not dominated by professionals.

This is really the reverse side of being inclusive of lay people. They 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. Underlying this answer you 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". Most creative outcomes result from the collective imagination of victims and families working together. Wonderful examples I recall are the boy who had to take a bunch of flowers to the victim along with his apology letter, and the youth last week whose eight victims asked him to write out a list of his goals in life and how he would achieve them. Courts are inherently unlikely to come up with such imaginative outcomes, mainly because their sentences are based on statutes which offer a few standard (and often stale) alternatives.

One practical manifestation of this issue is the debate within Australia as to whether police should run conferences. This is an issue I raised in Kingston, Ontario in March this year. 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 the Department of Social Welfare. 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.

By contrast, the early Australian "Wagga Wagga" model supports the police for this central role. It is also the model used in the RISE project for adults in Canberra. Those who are tempted to follow this suggestion might read Harry Blagg's analysis as one with several years experience of the West Australian scene. He suggests (British Journal of Criminology, 1997) that the "Wagga" model promises to intensify rather than reduce police controls over Aboriginal people. I can also pass on 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:

As Police are bringing the prosecution, it would be seen as inappropriate for them to be organising 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?

I support those views and would add that the police in a very real sense represent the public interest at FGCs and must be free to speak and act in the public interest if the system is to have credibility with the public. I also feel that the police are the law and order arm of the State and for that reason should not be running conferences.

3. Because it is much more satisfying to victims.

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 it has been a two-party system, the State versus the Defendant, the victim has been the forgotten party. This is well documented and will no doubt be covered in other sessions.

Interestingly, victims were not given a central focus in our 1989 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 [s 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. Some time ago I suggested an amendment so as to include in the Act "the principle that victims have a central role in family group conferences, and that apologising to persons who have been wronged and addressing their needs is an integral part of being accountable for wrongdoing." I think that suggestion, like others made at the time, got lost in an inter-departmental committee. Fortunately practitioners believe it and act on it anyway.

One reason why in practice victims were seen as important at conferences despite an insipid statute is that our first Principal Youth Court Judge, MJA (Mick) Brown, was a Maori and intuitively understood their key role in achieving justice. He insisted from the start that ours was a victim-centred process, and his victim-centred diagram features in my first published paper on the Youth Court in 1993. Given the inadequacy of the legislation in this area, Judge Brown's emphasis on the victim's role was crucial in the development of a restorative approach.

4. Because it is the way most families work and so we readily understand it.

Families 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 novel I am reading at the moment, Icefields by Canadian author Thomas Wharton, provides a lovely example. Elspeth is asked about her father.

Oh, he's a fierce man. When my brother and I would fight, he had a truly horrible punishment for us.
What was it?
He made us hold hands and sing.

The former Deputy Minister of Justice of Saskatchewan, Brent Cotter QC, once complained that the criminal justice system encourages you to deny responsibility and hope you might get off. In a family, he said, such behaviour would be considered dysfunctional, and in a community it is the same. I return to

this issue tomorrow.

Obviously a chapter on the role of families would fit in to the potential (or now emerging?) theory about the innate sense of justice of ordinary people.

5. Because it acknowledges the whole person.

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 deterrent theory. Levels of crime do not seem to drop when levels of punishment increase, and yet they should do if people acted rationally. More punitive sentencing for crimes of violence was introduced in New Zealand in 1985. Over the following seven years violent offending increased by 41% and yet the average length of prison sentences for such offences had increased by 58%. Every country will have such statistics, and I am hoping that the newly formed International Corrections and Prisons Association will promote some definitive research in this area.

The problem with the deterrent theory is that it presupposes it is dealing with rational creatures who respond to threats of punishment. Restorative justice processes can and should operate at the cognitive or rational level but they can also build on normal and vital human emotions, as 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 is restored to victim and offender.

Family group 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 a young person'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 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 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.

6. Because it lacks the paternalism of welfare models of youth justice.

The reform theories of punishment have also lacked credibility because punishment hardly ever seems to reform, in the sense of reshape, anyone. Leaving aside a few outstanding programs like those for paedophiles now 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 supporters claiming it is the way to reform them.

Mike Dolan's illuminating Legal Research Foundation article on the origins of New Zealand's youth justice system explains 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.

7. Because it does not presuppose a monolithic and all-knowing state.

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 best vehicle for delivering solutions in a variety of areas that were traditionally its preserve. The variable roles of government and the community will be explored tomorrow, but obviously one's view on that issue will be influenced by one's theory 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 add to the restorative justice model a community element that was not present in the North American VORP or VOM model. In fact sentencing circles are a more thorough-going community-based model than FGCs and I have nothing but admiration for them and for people like Yukon's Judge Barry Stuart who has emphasised the community-building potential of restorative justice.

Finally under this heading, “just deserts” theory 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 know what is right for others, and that punishment might be one factor only in a balanced sentencing approach.

8. Because it is constructive and hopeful in its outlook.

This is a good note to end on. Daniel Van Ness concluded a lecture last month in New Zealand 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.

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 are 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.