Address to inter-disciplinary conference

RAPE: Ten Years' Progress?

Wellington, 29 March 1996

Judge FWM McElrea*

What relevance might restorative justice have in cases of rape?

I will take it as established by this stage of your conference that our present system is generally regarded as a humiliating, traumatic and re-victimising experience from the rape victim's point of view, to the point where most prefer not to go to the police with a complaint. Having presided over rape trials in the District Court I can understand that assessment. Arising from the Chief Justice's address and the panel discussion this morning it is clear that the extensive changes of the last 10 or 11 years have produced some real improvement but leave little room for further change to the present model.

There are two parts to every prosecution for rape - the use of the adversary system to try (or prove) the guilt of the defendant, and the sentencing of those found guilty. In our system the sentencing phase occupies only a very small proportion of the total, both in terms of court time and the commitment of resources. The predominant focus is on proving guilt, rather than making things right. This is because the present system sees punishment of the guilty as the end objective, instead of putting right the wrong for the victim and the community.

Thus we come at once to the heart of restorative justice, which I define as involving three radical changes to the mainstream western model of justice:-

1.) The transfer of power (principally the courts' power) from the State to the community;

2.) The use of FGC or some other mechanism to produce a negotiated community response; and

3.) The involvement of victims as key participants thereby enabling a healing process to occur.

Elsewhere I have described our Youth Court model as a restorative system of justice[1] and I have argued in favour of a similar system for adults, using CGCs[2]. Last week I advanced an argument for applying similar techniques to suspensions and expulsions in schools.[3] The point is that restorative justice is not a single technique but rather an approach to conflict resolution which seeks win-win outcomes (some call it "healing justice"), and locates the recipe for successful outcomes primarily in the community rather than in the apparatus of the State.

Under the present system the victim is little more than a witness in the trial, despite the Victims of Offences Act 1987. It is in essence a two-party system, and those two parties are the State and the defendant. Perhaps it is time we applied the logic of MMP to the criminal law? I will describe shortly a Canadian model of the restorative type, working with sexual abuse within families, which has at least four parties. For the moment I want to stress that it is the model of justice itself that is at fault, not the attitude of individuals or the effect of particular rules.

Part of the difficulty in changing public attitudes to the model is that the media thrive on the adversary system. Crime news is prime news and television cameras in court are part of the attempt to capture it. The adversary model has live drama, deep conflict, winners and losers, black and white issues, where righteous indignation is thought to be satisfied by the clanging of the prison gates. Often the media purport to act in the name of victims but I believe they do not help the cause of victims - they merely perpetuate the public's belief that justice is done under the present model and hence the politicians' reluctance to change it. Victims need to say loudly and clearly to the media and to politicians that victims will never get the justice they want under the two-party regime.

The main reason that the adversary system is failing to deliver justice in rape cases is that the focus of the process is not on addressing the wrong done and "making things right" - indeed this is impossible when the over-riding emphasis on proving guilt makes it such a harrowing process for all concerned. The trauma of the trial process can even be used by sick defendants as a reason why they should not face trial - see the article "A cry in pain" by Pamela Stirling in this week's Listener. (Can I however dissociate myself from the incredible claim attributed there to Marie Dyhrberg, "past president of the Criminal Bar Association", that judges might grant such stays of proceedings because they are scared of being sued for damages. No judge has yet been sued for damages and her suggestion that such a factor would influence a judge is insulting and ignorant. Also Ms Dyhrberg is no longer "past president", if we want to be accurate.)

In the context of the criminal law our "rights" orientated approach has focussed on the rights of the defendant to a fair trial. When approximately 90% of defendants plead guilty, and about half of the rest are found guilty, there does not seem to be a major problem with the existing model. Society can accept 5% acquittals. But when so few rape victims go to the police[4], and (when they do) only about half of their complaints result in police decisions to prosecute,[5] and of those defendants prosecuted so few plead guilty[6], and only about half of those going to trial are found guilty, we have a different story. If 95% of victims across the board are proved to have been telling the truth, why should the percentage be any lower in rape complaints? In fact, given the horrors of trial for a complainant the risk of false complaints should be much lower in sexual violation cases.

What does this tell us? I suggest that (i) an extremely high proportion of rapists are never convicted of their crimes, and (ii) the harsher the penalties imposed on the few who are convicted the less incentive there is for the others to plead guilty and accept responsibility for the crime.

Further, there is a conflict between the "presumption of innocence" applying to every individual defendant, and the statistical fact that most persons accused of a crime in New Zealand are guilty. This conflict is heightened for a particular type of crime when so few plead guilty. What can be done about the low level of guilty pleas?

Last year I argued for a different approach to pleading so as to encourage people to take responsibility for what they had done rather than hide behind the "right" to put the prosecution to the proof. I used rape as an illustration.[7]

In support of Zehr, we have to ask: What does it do to the person who is in fact guilty to be found "not guilty"? And what does it do to the victim, to victim-offender (and other) relationships, and to the respect for justice in the community? In each case the answer is, I believe, that it does untold damage - to the respect for the law and for the courts, and to the measure of justice in the community. May I illustrate with an example.

A man rapes a woman. He does not deny it to the police but nor does he admit it. He simply keeps silent. He is charged with rape. In court he is never asked whether he admits the charge and so he pleads Not Guilty in order to put the prosecution to the proof, in the hope that they will fail to prove the case. The woman gives evidence. The defence lawyer alleges that the woman had dressed "provocatively"; he puts it to her that she encouraged his client's advances and consented to the indecencies inflicted upon her. When she denies this he puts it to her that she is lying. The woman breaks down and cries. The jury is not sure where the truth lies. They have a reasonable doubt and therefore must find the man Not Guilty.

Even though the man may later admit his guilt he cannot be tried again for that rape. As he has not given evidence he has not committed perjury. He is free for ever. Does he think justice has been done? The woman knows that he raped her and feels that she has been branded by the verdict as a slut and a liar. Does she think that justice has been done? The woman's mother has given "recent complaint" evidence for the prosecution. She knows what her daughter has gone through. Does she think that justice has been done? The officer in charge of the case felt that his witnesses had been telling the truth. Does he think that justice has been done? The woman tells her friends and others in her community of her experience of the law. Will they think that justice has been done? Are all these people going to be satisfied with the legalistic answer that because there was a reasonable doubt and the defendant did not admit guilt he must be presumed innocent? Of course not - and to expect otherwise is to fail to understand the community's sense of justice. The problem is that he was never asked whether he admitted the charge.

Is it not time for us to treat every wrong trial result, including the acquittal of those who are in fact guilty, as an injustice? The most promising way of reducing the incidence of such injustices is by encouraging offenders to accept responsibility for what they have done under a different regime altogether.

Justice EW Thomas, now of our Court of Appeal, argued in an article published in New Zealand Law Journal in 1994 that we should go to an inquisitorial system for sexual violation cases. The problem with this is that it would still be a two-party system of the defendant and the State. Less radical surgery may be available if restorative justice techniques are applied to pleading and to sentencing, leaving the adversary system intact for those charges that really are disputed.

I read with interest the Listener article by Pamela Stirling but I do not believe civil claims are the answer. Certainly they are a response to the parsimony of an Accident Compensation system without lump sum payments and to the inadequacies of the criminal law. But to have to go through another adversary process, controlled by professionals, with considerable expense and inherent delays, is not likely to produce justice for victims.[8]

My real interest in the Listener article was the attitude of the victim herself:

"This is not a justice system. This is a legal system. My intention was never to have sent him to jail, because he is an elderly person and he is ill. My intention was only ever to get validation. It's important that you stop the eating away inside you of the big secret."

It struck me how similar this theme was to that of a sexual abuse victim who recently wrote to me and gave me permission to quote her experience.

Throughout the [criminal justice] process I constantly felt that the offender's rights and those of his immediate family were more important than mine: an innocent victim. I slowly realised that the results of my actions would not assist with any healing processes, mine or my abuser's, and in fact my contact with the criminal justice system was contributing to my experience of inequality and I felt it was validating my abuser, not me. I really wanted to stand in a public place and hear a respected person within our society acknowledge that what had happened to me was a most terrible thing. I never got to hear that [because of a successful argument for abuse of process based on delay]. I needed to have that recognition to validate the injustice of my experience. (my emphasis in italics)

At Massey University's Albany Campus that woman is doing important research into this sort of experience and the real needs of adult survivors of child sexual abuse. She uses her maiden name, Shirley Dawson, and has asked me to provide you with her printed invitation for other survivors to contribute to her research.

I can now turn to the Canadian example of a restorative solution to such problems. The following is a laptop diary record I made in Canada in September/October last year of this indigenous solution to a deep-seated problem.

Berma Bushie Coordinator, Community Holistic Circle Healing [chch], Hollow Water First Nation, Manitoba, a community of 600 people to the east of Lake Winnipeg - gave a most impressive account at the Awasis Conference of using healing and sentencing circles for victims of sexual abuse and their victimisers. About 10 years ago after five years of research 24 people representing most families in the community decided to change the way we were. "We couldn't pass on this horror to the next generation." There had been two or three generations of hidden sexual abuse. This was just a surface problem - along with

alcoholism, suicides, and violence the abuse was linked with massive unemployment and loss of their traditional way of life. It has not been pleasant to deal with as "your community turns on you" - denial is still there. However the program has reduced the incidence of abuse from approximately 80% to about 30%, partly through its educative effect in the community. Only two of the 48 worked with have re-offended in the 10 years they have been operating.
Existing systems had not been protecting the children, including the criminal justice system which required them to give evidence in court, a terrible experience. By contrast "children felt safe to talk when they knew that the abuser wouldn't be sent away." They always believe the children - why should they lie, when they are in such a dependant position?
There are two teams, one working with the victim and one with the offender. They deal only with victims aged 0-18 and only with first offenders. (As Berma said, unlike the prisons, we are only given one chance with them.) When the offender is confronted the workers talk about the help that can be given (from elders, psychologists, etc) and the success of prior cases, using other victimisers as a resource. They are told that if they want to take part they must acknowledge their responsibility and agree to a psychological assessment. Most have denial mechanisms but 90% admit their offending when they know they will be helped too. Of the 10% (5 cases) tried in court, all but one were convicted. They were then sentenced to imprisonment - the sentencing circle is not available to such an offender, although help is offered to his family and of course to the victim and his/her family.
The child is not moved out of the family unless it is a case of incest or there is insufficient support within the family for the child.
The alternative to the program is to be handed over to the police. Nearly all admit the abuse at the first intervention and without using the five days offered to think it over. Once admitted they make a statement to the police and (to protect the child) have to plead Guilty in court. A four month adjournment is obtained and monthly reports are made to the court (Judge Murray Sinclair). The victimiser is placed on bail with special conditions that he has no alcohol, does not associate with the victim, etc.
During the adjournment period four types of circles are held. This is because all affected groups must be worked with and also the process must be handled in stages - you could never put victim and offender together at the first stage because of the power imbalance.
1. our workers with the victimiser, for him/her to acknowledge in detail what they have done and its implications; there may be several circles like this.
2. the victimiser with his family - for the offending to be acknowledged to the family, and for the family to see that the victim is not to blame (as is usually implied).
3. victim and victimiser are brought together, to begin repairing the damage especially the guilt and shame always felt by the victim
4. for the victim to face his community, and to begin to restore him to a place of respect

A pre-sentence report is prepared for the court. The court comes to the community and is set up in a circular fashion, with chairs all round. (The circle enables all to be equal and is symbolic of life and nature and much else.) Those attending include victim and victimiser and their families and their support groups, as well as Crown and defence lawyers. Former clients also attend and political leadership is invited.
An eagle feather (signifying honesty, speaking from the heart) travels round the circle four times, each person holding it while speaking.
First time - each states why they are there.
Second time - each speaks directly to the victim - to absolve them of guilt and blame, and applaud them for their courage in making disclosure.
Third time - each speaks to the offender, so they can understand that these crimes affect families and the community
Fourth time - we give recommendations to the Judge. We don't believe in jails and never recommend them - horrible places, no healing, our people only come out with anger, rage and fear. So far our recommendations have always been accepted by Judge Sinclair.
We do a lot of lobbying (with prosecutor and others) for the acceptance of our recommendations. We ask the court to accept that we have a system that works. Each case is taken back to the community for review every six months.

At the Winnipeg conference Berma's co-worker Marcel spoke about the spiritual values underlying their work. There are seven principles applied, which in their entirety amount to love. They are: respect, kindness, sharing, caring, honesty, strength, and humility. They see a sacred relationship with nature, with human beings being totally dependant on creation and on the practice of these principles for their survival. It is necessary to bring balance back into the community and into individuals. These teachings of the elders are seen as being true for all people.

An article by Rupert Ross in Justice as Healing (Spring 1995) quotes some most insightful comments from a 1993 position paper by the CHCH people, with a

persuasive account as to why it is essential for all concerned that the offender remains in the community.

I suggest that the four parties to their process are the victim, the abuser, their community and (through the Court) the State. It contains the three essential elements of restorative justice as I have described them.

One of the interesting issues raised by the Hollow Water experience is the attitude to privacy. Our concern about privacy is, I suspect, a relatively recent western phenomenon. Matt Hakiaha has commented that there is no such thing as confidentiality in Maori communities. This has caused me again to question whether our emphasis on the rights of the individual in criminal justice is the right one. In Hollow Water the whole community is involved and knows what is happening. The victim is encouraged not to feel guilt or shame. By contrast we may be reinforcing the guilt and shame of victims by insisting that no-one should know about their terrible experiences, and therefore suppressing publication of their details and (often) of offenders. A comment to me by Shirley Dawson supports my growing scepticism about the wisdom of this legal interference with telling the truth:

A name suppression was granted to my abuser to protect me, despite the fact that my surname and that of my immediate family is nothing like his. I don't believe I need this protection. I feel no need to hide my abuse, neither do I feel a sense of shame. The person who should feel ashamed is my abuser. Name suppression has provided my abuser with anonymity and the freedom to continue his abusing. No one is watching to ensure other children are safe from this particular abuser, and why should they, no one knows anything about him.

The video[9] which I showed you part of illustrates another North American restorative justice approach to helping rape victims. It is a Victim-Offender Reconciliation Program [VORP]. While VORPs are essentially one-to-one mediation experiences, Howard Zehr has recently said of his experience with our more community based model that he thinks VORPs need to involve the community more. But even in its old form victim-offender mediation has much to offer as a healing experience for rape victims, quite independently of the judicial process, provided both parties agree to take part.

How feasible is the idea of a community based, mediated process for rape cases in New Zealand? Can I give you some personal thoughts:

1.) The Hollow Water approach could and should be tried here. All parties have to understand and accept the different ground rules. It applies only if the offence is admitted, but then it offers the possibility of a different outcome to victim and offender. A victim should be able to say at the outset what s/he seeks from the process; this may encourage defendants to agree to take part.

2.) If the victim is unable to meet the offender and a victim representative can attend for the victim then something like a CGC could still be held[10] as a preliminary to sentencing, again with the possibility of a very different type of outcome. That outcome might still include imprisonment as part of a sentencing package. Punishment can still play a part in restorative justice without it being the dominating influence it is today.

3.) Victim-offender mediation should be offered in cases already closed by the courts, to assist in the healing process as soon as the victim is ready to meet her attacker.

4.) Some community resources have already been mobilised to take a role in restorative processes. Both within prisons and in the community the Alternatives to Violence Project Aotearoa of Elaine Dyer and others is laying the seeds of peace-making processes. The Te Oritenga Group to which Naida Pou belongs is already active in facilitating CGCs. In Waihi/Paeroa the Community Corrections office has organised an elected community justice committee which would be ideal for just this sort of work.

5.) If restorative justice is part of mainstream criminal justice in New Zealand the argument and pressure for a separate Maori justice system is radically affected. Restorative justice is culturally sensitive (and not just to Maori culture) but also universally applicable. It also avoids possibly insuperable problems arising for "Marae Justice" where victim and offender are from different races, or even different tribes.

6.) Restorative justice would not be suitable in every rape case by any means but it would have a huge amount to offer in many cases. It is quite wrong to assume that restorative justice is of use only for young persons or for less serious crimes, eg property offences.

7.) What is needed now is to implement some pilot projects and lift the community's expectations of criminal justice - we expect so little of it at present that it is no wonder victims and others do not get satisfaction. When a clear need for reform has been shown this country has often in the past stepped out where others have feared to tread. With a new vision of justice who knows what we could do?

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* MA (1st class Hons) LLB (Otago), LLM (London), Dip Crim (Cantab), District Court Judge and Youth Court Judge, Auckland.

[1] The Intent of the Children, Young Persons and their Families Act 1989 - Restorative Justice? a paper presented at Auckland to the Youth Justice Conference of the New Zealand Youth Court Association (Auckland) Inc on 25 February 1994 and published in Youth Law Review July/August/September 1994 p 4.

[2] Restorative Justice - The New Zealand Youth Court: a model for development in other Courts? a paper presented at Rotorua to the National Conference of District Court Judges, 6-9 April 1994 and later published in Journal of Judicial Administration Vol 4 No. 1 (August 1994) p 33.

[3] "Eduction, Discipline and Restorative Justice", a paper presented to a Legal Research Foundation Conference held at Auckland on 19 March 1996 and soon to be published in the proceedings of that Conference.

[4] About 10%, according to anecdotal evidence quoted today by Toni Allwood of Rape Crisis. If, as we have also been told today sex offenders will probably offend again if they are not caught, every case not reported adds to the number of victims. This reinforces the need for radical change to the way victims see the legal process, ie for a new model of justice.

[5] Again, based on information supplied today by Toni Allwood of Rape Crisis.

[6] Five out of 26, or 19%, in the sample described today by Dr Elisabeth McDonald of the Law Commission.

[7] "Accountability in the Community: Taking Responsibility for Offending", published in Re-Thinking Criminal Justice Vol I, Legal Research Foundation, Auckland, May 1995, p 61 at p 70.

[8] Further, victims are unable to call on police resources such as detectives and police doctors, and the presumed benefit of having to prove the rape only on the balance of probabilities may prove illusory - the courts may well apply the principle seen in civil claims for fraud of fixing a standard of proof commensurate with the seriousness of the allegations, which can be something close to proof beyond reasonable doubt.

[9] Restorative Justice: Making Things Right Mennonite Central Committee US, 1994.

[10] In such cases there could be an obligation on the defendant to meet with the victim at a later time, say within five or seven years, if that was the wish of the victim, but with any outcome of that meeting having voluntary force only.