

RESTORATIVE JUSTICE - A PEACE MAKING PROCESS

A paper presented at a LEADR International Conference

Perth, Australia May 1997

Judge FWM (Fred) McElrea

District Court and Youth Court Judge

Auckland District Court, Private Bag 92-020, Auckland, New Zealand

INTRODUCTORY

I am delighted to be invited to speak about restorative justice at a conference on ADR, because for some time now I have been noticing strong similarities between these two approaches to dispute resolution. They are in fact close cousins, if not siblings, one operating in the world of criminal justice and the other in the realm of civil disputes. And both concepts in turn have blood links with recent developments in other spheres of human endeavour - such as industrial relations, or in politics - where proportional representation (at least in New Zealand) was intended to reduce the adversary element and enhance co-operative procedures.

Although I have some academic qualifications from the 1960s*, I am not an academic but a practitioner of justice with an eye for form, and reform. About two-thirds of my 30 years' practice of law has been civil litigation and the balance criminal - mostly since my appointment as a District Court Judge. However it has been primarily my work as a Youth Court Judge in the last seven years that has fired my interest in restorative justice.

THREE MODELS OF RESTORATIVE JUSTICE

A Definition of Restorative Justice

What is restorative justice? Numerous definitions are available but the following from Galaway and Hudson (1996) p2 is as good as any:

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

I am familiar with (and will describe) three working models of restorative justice, having worked for seven years in one of them, and talked and corresponded at length with practitioners in the other two. These three are the Youth Justice system in NZ, sentencing circles used in some aboriginal communities in Canada, and victim-offender reconciliation programmes (“VORP”) - more recently called victim-offender mediation (“VOM”) - in North America and the UK. The first two models are compared by LaPrairie (1995). In all three instances restorative justice has so far has been applied only in the area of sentencing, not in resolving “guilt” ie disputed criminal liability. However Zehr (1990) pp217-220 shows that Japan has a dominant but informal restorative process operating at every level (not just sentencing) alongside and complementing its largely western-based formal criminal justice system.

The New Zealand Youth Justice System

For a description of the NZ Youth Justice system I propose to repeat what I have earlier written, in McElrea (1994) pp35-36. Section references are to the Children, Young Persons, and Their Families Act 1989:

1 There is a division of function between the Family Court, which handles "care and protection" cases, the focus there being on family dysfunction, and the Youth Court which handles offending by young persons (over 14 years but not over 17 years of age).

2 A sharp separation is to be found between (a) adjudication upon liability, ie deciding whether a disputed charge is proved, and (b) the disposition of admitted or proved offences. The adversary system is maintained in full for the former, including the right to trial by jury of all indictable offences, the appointment of a Youth Advocate in all cases, and the use of traditional rules concerning the onus and standard of proof (- beyond reasonable doubt) and the admissibility of evidence.

3 For really serious offences ("purely indictable") the young person is dealt with in the adult court unless a Youth Court judge decides to allow him to remain in the Youth Court - ss 275 and 276.

4 At the other end of the scale a diversion system operates to keep young persons away from the Youth Court. Both of the traditional means of obtaining a suspect's attendance before the court - arrest and summons - are carefully restricted. Thus no arrest can be made unless it is necessary to prevent further offending, or the absconding of the young person, or the interference with evidence or witnesses (s 214). And no summons can be issued without first referring the matter to a Youth Justice Co-ordinator who then convenes a Family Group Conference ("FGC") - s 245. If the members of the FGC all agree, including the police officer present, the matter is handled as decided by the FGC and will not go to court.

5 The FGC is attended by the young person, members of his family (in the wider sense), the victim, a youth advocate (if requested by the young person), a police officer (usually a member of the specialist Youth Aid division), a social worker (in certain cases only), and anyone else the family wish to be there: s 251. This last category could include a representative of a community organisation, eg drug addiction agency or community work sponsor potentially helpful to the young person.

6 The Youth Justice Co-ordinator (an employee of the Department of Social Welfare) arranges the meeting and of course attends as well, in most cases facilitating the meeting.

7 Where the young person has not been arrested, the FGC recommends whether the young person should be prosecuted and if not so recommended, how the matter should be dealt with (s 258(b)), with a presumption in favour of diversion (s 208(a)). All members of the FGC (including the young person) must agree as to the proposed diversionary program, and its implementation is essentially consensual. Where the young person has been arrested the court must refer all matters not denied by the young person to a FGC which recommends to the court how the matter should be dealt with. Occasionally a FGC recommends a sanction to be imposed by the court. Usually it puts forward a plan of action, eg apology, reparation (in money or work for victim), community work, curfew and/or undertaking to attend school or not to associate with co-offenders. The plan is supervised by the persons nominated in the plan, with the court usually being asked to adjourn proceedings, say for 3-4 months, to allow the plan to be implemented.

8 The Youth Court nearly always accepts such plans, recognising that the scheme of the Act places the primary power of disposition with the FGC. However, in serious cases the court can use a wide range of court-imposed sanctions, the most severe being three months residence in a social welfare institution followed by six months supervision; or the court may convict and refer the young person to the District Court for sentence under the Criminal Justice Act 1985 (s 283(o)), which can include imprisonment for up to three [now five] years.

9 As with other diversion schemes, if the plan is carried out as agreed the proceedings are usually withdrawn; if the plan breaks down the court can impose its own sanctions. Thus the court acts as both a back stop (where FGC plans break down) and a filter (for patently unsatisfactory recommendations).

It should be added that the proposal which I made in the 1994 paper for a system of Community Group Conferences for adults has been implemented

informally on a voluntary basis in Auckland by the Te Oritenga Restorative Justice Group and is currently being considered by the Ministry of Justice with a view to establishing some pilot projects. I am hopeful that before long the benefits of restorative justice will not be limited to the Youth Court part of our justice system.

Sentencing Circles

Judge Barry Stuart of the Yukon Territorial Court, who has extensive experience of sentencing circles, describes their operation in Stuart (1996). However I offer you this extraordinary instance of the Hollow Water community from a laptop diary record which I made in Canada in September/October 1995:

Berna Bushie Coordinator, Community Holistic Circle Healing, 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 Berna 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.

Victim Offender Mediation

The VORP or VOM process has been extensively described in the restorative justice literature. Essentially there is a face-to-face meeting or series of meetings between victim and offender facilitated by a mediator. I wish to let you see it through the eyes of the rape victim speaking on video - Mennonite Central Committee U.S. (1994). Her words are more eloquent than mine.

All three of these models of restorative justice conform to the definition offered above by Galaway and Hudson, and all three seek to achieve three basic objectives - (i) to give the victim a central role in the process, (ii) to reduce the role of the State while increasing the participation of the community, and (iii) to promote negotiated solutions as preferable to imposed solutions.

PARALLELS BETWEEN ADR AND RESTORATIVE JUSTICE

Measured against this account of restorative justice the parallels to be drawn with ADR are, I suggest, remarkable.

Reduced Role of the State

First, there is the reduced role of the State. Many VOM programs have no State involvement at all while others operate on court referrals as an adjunct to the sentencing process. The NZ Youth Justice system encourages diversionary FGCs without referral to the Youth Court, although they are convened at the request of the police by a Youth Justice Co-ordinator in the Dept of Social Welfare, so there is some State involvement. However even those cases that go to the Youth Court nearly always result in the Court accepting the negotiated recommendation of an FGC, and usually at the end of the negotiated programme the police seek leave to withdraw the charges from Court. One restorative justice process in NZ operated for a while entirely free of the courts and that was the Waikato marae-based programme for Maori sex-offenders run by Aroha Terry but since discontinued. The Canadian model usually operates in conjunction with the formal Court system but again largely with the Court as a back-up and overseer of the process. ADR of course has a similar range of models, some integrated into the State system and some entirely independent of it, but the emphasis is certainly on private initiative, not State-based solutions.

There is no law requiring citizens to report crime to the police so there is nothing stopping victims and offenders submitting voluntarily to some community-based alternative to the formal justice system. The more difficult question is whether, in the absence of a statutory framework, the offender could prevent the victim from later laying a complaint with the police, as happened at the instigation of a counsellor in one case in Auckland recently. An agreement not to report crime to the State's law enforcement agencies, even for the best of motives, would probably be held to be void as against public policy. Under the heading "Stifling a prosecution" Foskett (1991) pp60-61 cites five nineteenth century cases in support of the proposition that "a purported compromise of the civil aspects of a dispute will be void if it contains an express or implied term to the effect that no prosecution will be launched or that the appropriate authorities will not be notified."

Enhanced Role of the Community

Linked with the reduced role of the State is the greater role of the community. This is probably more marked in the case of restorative justice than with ADR but it may be a direction in which ADR will grow. Interestingly enough, VOM originally had little or no element of community involvement but was much more like a

two party mediation between victim and offender. Partly as the result of the example of FGCs and sentencing circles, some North American writers are now seeing the community as an important element in restorative justice. See for example Umbreit and Zehr (1996). In the case of sentencing circles the whole aboriginal community can be involved. With FGCs the young person's family are involved along with the Youth Justice Co-ordinator, the victim (possibly with supporters), the police Youth Aid officer and quite often other members of the community such as a school teacher or a drug and alcohol counsellor. Ideally there are several people representing the community that is meaningful to the young offender.

Judge Barry Stuart emphasises the value of sentencing circles in terms of community building - Stuart (1996). It is clearly a two-way process with the community contributing to and benefitting from its involvement in the criminal justice process.

Negotiated Outcomes

Also going hand in hand with limited State involvement is the objective of a negotiated (rather than imposed) solution. This is probably the essence of ADR. An outcome which all parties see as acceptable is a "win-win" outcome, whether in the civil or the criminal context. The traditional court processes rarely produce such outcomes, usually resulting in "win-lose" outcomes and sometimes even "lose-lose" outcomes. Again on both sides of the civil/criminal divide, the negotiated outcome may depend on the State for its enforcement, but this requires that the State recognise the alternative process as legitimate - as in the case of arbitrations, for example, or FGC plans that can be followed up by Court orders if the plan breaks down.

The Role of Lawyers

Next, in both cases the role of lawyers is very different from that in the traditional model. In both the civil and criminal courts lawyers tend to be highly specialised professionals operating with conceptual armoury and language that takes years to acquire and once acquired is jealously guarded. Lay people are both bemused and excluded by the jargon (pleading, interrogatories, jurats, depositions), the Latin and Norman French phrases (*voir dire*, *res judicata*, *autrefois acquit*, *prima facie*), and the genteel English expressions hallowed by the passage of time ("As Your Honour pleases", "my learned friend", and so on). All of such language tends to underline the distinction between the initiated and the those on the outer. Lay people tend to perceive the power in court to lie within a triangle with the judge at the apex and counsel (or prosecutor and counsel) at the base. This in turn promotes the idea of gamesmanship and enables a party to leave the court asking counsel "Did we win?" By contrast ADR and restorative justice require that lawyers are there as facilitators, assisting the parties to resolve their problem to their satisfaction by their participation in the process. Our Youth Court legislation expressly requires the Court and counsel to explain proceedings in a way that can be understood by young people, and to encourage and assist them to participate: ss 10 and 11. Playing legal games is the last thing lawyers should be doing in restorative justice. They have a very important role in ensuring that their clients understand their legal rights and how the process works, encouraging them to participate personally, ensuring they are not overborne by family or other pressures, and suggesting particular outcomes if others seem bereft of ideas. Where there is an interface with the Court the lawyer may have to argue and persuade the Court to a particular outcome - eg the granting of bail, the acceptance of the FGC plan, and so on. But always they have to realise that the process belongs to the parties, not to the professionals, and to act accordingly.

Reduced use of Adversary Procedures

A further parallel between restorative justice and ADR is connected with the fourth one and it is the limited use, and sometimes a distinct distrust, of adversary processes. Technical rules of evidence are put aside. Frankness and openness are encouraged at FGCs by requirements of confidentiality, just as they are at judicial mediation conferences in the civil courts. Systems of pleading are absent or are much simplified. It is I believe one of the great strengths of our Youth Courts that there is virtually no atmosphere of denying the charge and “putting the prosecution to the proof” in the hope of “getting off”. (I have elsewhere suggested a change to the attitude to pleading in the adult courts, building on the Youth Court experience, to encourage adults to take responsibility for what they have done rather than hiding behind the “you prove it” concept of the Not Guilty plea: McElrea (1995) pp67-71.) Accepting responsibility for, and learning from, one’s mistakes is a major objective of restorative justice. This is the antithesis of the idea that you admit as little as possible and see what you can get away with. In restorative justice, as presumably in ADR, parties are encouraged to focus on and deal with the real issues underlying the dispute, whether they have been anticipated or are uncovered at the conference.

Convenience of the Parties

Both ADR and restorative justice have immense advantages for the parties directly affected. Undoubtedly this has been the driving force behind the development of ADR, but it has also played its part in restorative justice. By avoiding the formal court process parties to civil disputes hope to save time, costs, publicity, stress or worry, and damage to on-going relationships. The traditional court system for dealing even with admitted criminal offending is likewise expensive (except much of the expense is for the taxpayer funding prosecutors and legal aid counsel), drawn out, highly public, very stressful and often damaging to ongoing relationships. Perhaps the biggest problem is the way in which victims are largely excluded from the formal court process and yet they are more directly affected than anyone else apart from the offender. The problem is a structural one for which there is no parallel in ADR- the State has taken over from the victim the prosecution of the claim or charge, relegating the victim to the position of witness, and has also largely taken over the collection of money (fines) off the offender. This has caused immense distortion to the process from the victim’s point of view. Under restorative justice initiatives victim satisfaction should be and usually is much higher than in traditional procedures.

The subject of publicity deserves separate mention. It is not suggested that criminal justice should suddenly become a private affair. There is undoubtedly a very real public interest in the punishment and resolution of criminal offences. VOM (unless on referral from a court) is generally a purely private process and not open to the public. In New Zealand there is a compromise. What happens at a FGC is confidential except to the extent that it is reported to the Court. The news media are entitled to be present in the Youth Court but may report proceedings only with the permission of the Judge. In practice this permission is nearly always given but with the proviso that the young person may not be identified. The sentencing circle approach is entirely public, because the whole community can be involved and there are no secrets. This degree of openness is, in my view, admirable and should cause us to re-think our attitudes to privacy and to the suppression of information purportedly for the benefit of victims. The more the community knows about the offending the more it can be involved to prevent its recurrence, eg by keeping an eye on both victim and offender.

Peace Making

Another parallel between the two activities we are considering is their historical antecedents. Both processes are in fact very old exercises in peace making. They are not the inventions of today's academics, although much academic activity now surrounds them. The real reason that they are fairly ancient forms of dispute resolution is that modern, western-style formal justice requires the existence of a centralised State - which did not evolve in England for example until after the Norman Conquest of 1066. In societies without a State structure - eg in tribal societies like Old Testament Israel or pre-European Maori in New Zealand - justice necessarily resided in the community, and it was an essential part of maintaining the cohesion of society that justice performed a peace making role. It is therefore no coincidence that Zehr (1990) devotes a solid chapter to biblical justice, and it is no coincidence that the FGC concept first emerged in New Zealand in response (in large part) to the concerns of Maori and Pacific Island people. The FGC is not itself a Maori technique but it draws heavily on different Maori values, including the importance of reconciling victim and offender and the central role of the relevant community - especially the whanau (extended family), hapu (sub-tribe) and iwi (tribe) - in deciding on an acceptable outcome. It also makes possible a due recognition of the importance of apologies, which are so central to Pacific Island culture. Likewise Consedine (1995) pp133-135 claims that Ireland's Brehon laws, which held sway under the prevailing federal clan system until the 16th century, were based on a philosophy of restorative justice. They were replaced only when centralised English rule was established. The Jubilee Policy Group (1992) pp 10-11, referring to the Norman invasion of England as the beginning of the change in Britain, has some interesting observations on the reasons for the demise of local justice:

"William the Conqueror and his descendants had to struggle with the barons and other authorities for political power. They found the legal process a highly effective instrument in asserting their dominance over secular matters and, through their control of the courts, in increasing their political authority. To this end, William's son, Henry I, issued in 1116 the Leges Henrici, creating the idea of the 'King's Peace' and asserting royal jurisdiction over certain offences by which it was deemed to be violated. These included arson, robbery, murder, false coinage, and crimes of violence. A violation of the King's Peace was an offence against his person, and thus the King became the primary victim in such offences, taking the place of the victim before the law. The actual victim lost his position in the process, and the State and the offender were left as the sole concerned parties."

The same source goes on to note (p11) that a second consequence of the King's jurisdiction in the matter of offending was a movement away from restitution (to the victim) and towards fines (payable to the State). Fines became a source of revenue, and were consistent with the idea of paying a debt to society. This consequence reinforced the first, ie the displacement of the victim by the State as central protagonist in the dispute with the offender.

The fact that centralised justice was linked to the rise of the nation state is of more than historical interest today. In many aspects of western society people are looking to cut back the role and power of the State. Privatisation of state functions has been going on apace in New Zealand for over a decade and Australia has had its share. The current climate is therefore one in which a more community-based and consensual model of justice can be rationally considered.

A POSSIBLE DEVELOPMENT FOR ADR

Given the similarity between the two processes, I am hoping to take home from Perth some ADR thinking of value to restorative justice. Is it possible that ADR might take a leaf out of the restorative justice book by focusing on the community involvement aspect? Restorative justice is both a peace making and community-based model that encourages the acceptance of responsibility by all concerned and draws on the strengths of the community to find and implement a solution.

Would it be possible in ADR to take selected cases where the dispute has affected a wider group and include representatives of that group in at least part of the mediation process? (Perhaps you may tell me this is already being done.) I have proposed such an approach in schools, suggesting school community conferences as a prerequisite to expulsions or suspensions of more than a few days - McElrea (1996). In principle it would seem that whenever others are directly affected there could be benefits in their inclusion - they may have insights to offer concerning causes and solutions to the principal conflict, they may be able to have their own needs addressed as regards secondary conflicts, and they may be an important resource in implementing and/or monitoring the outcome of the mediation. In brief, where the principal conflict has wider ramifications it may be beneficial to allow those to be addressed by including representatives of the affected community.

In a commercial dispute concerning, say, the sale and purchase of a business, those present in addition to the vendor and purchaser could include by consent one or more of the following: representatives of the staff, customers and/or suppliers of the business; the landlord of the premises (if rental is at risk), the franchiser (if applicable), and representative of the relevant trade or business association. In short I am suggesting that there is often likely to be in ADR a relevant commercial community which could perform a helpful role in producing a lasting solution of all related aspects of the dispute. Why not try a Commercial Community Conference?

REFERENCES

Consedine, J.

1995 Restorative Justice. Healing the Effects of Crime. Lyttelton, NZ: Ploughshares Publications.

Foskett, D.

1991 The Law and Practice of Compromise. London: Sweet & Maxwell

Galaway, B. and Hudson J. (Ed.)

1996 Restorative Justice: International Perspectives. Monsey, NY, USA: Criminal Justice Press.

Jubilee Policy Group

1992 Relational Justice: a new approach to penal reform. Cambridge, UK: Jubilee Centre.

LaPrairie, C.

1995 "Altering Course: New Directions in Criminal Justice. Sentencing Circles and Family Group Conferences." in The Australian And New Zealand Journal of Criminology Special supplementary issue "Crime, Criminology and Public Policy" (Ed. Dixon, D.) 78-99.

McElrea, FWM

1994 "Restorative Justice - The New Zealand Youth Court: A Model for Development in Other Courts?" in Journal of Judicial Administration 4(1):33-54.

1995 "Accountability in the Community: Taking Responsibility for Offending." in McElrea, FWM (Ed.) Re-Thinking Criminal Justice Vol I, Auckland, NZ: Legal Research Foundation. 61-82

1996 "School Discipline and Restorative Justice." in School Discipline and Students' Rights. Auckland, NZ: Legal Research Foundation.

Mennonite Central Committee U.S.

1994 video "Restorative Justice: Making Things Right". Akron, Pennsylvania, USA

Stuart, B.

1996 "Circle Sentencing: Turning Swords into Ploughshares." in Galaway and Hudson (Ed.) (1996) (above) pp193-206.

Umbreit, M. and Zehr, H.

1996 "Family Group Conferences: A Challenge to Victim Offender Mediation?" in Bits 'N Pieces II 15(2):1-6

Zehr, H.

1990 Changing Lenses. Scottdale, Pennsylvania: Herald Press.

* MA (1st class Hons) LLB (Otago), LLM (London), Dip Crim (Cantab).