

**OBSERVING THE APPLICATION
OF RESTORATIVE JUSTICE
IN COURTS OF NEW ZEALAND**

(A BRIEF SURVEY OF CASES OVER 10 YEARS)

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This paper is an attempt to answer the call for information about the development of Restorative Justice in the Courts of New Zealand since it has been practised, albeit in a beginning way over the past 10 years. In particular it is of interest to look at the some court decisions since its language has been imported by Parliament into statutes, particularly the Sentencing Act 2002. Readers of this paper would be assisted if they could gain access to the author's earlier paper entitled "*The Arrival of Restorative Justice in the Courts: a brief outline of the New Zealand experience*" presented at the Symposium sponsored by the Institute of Crime Prevention and Control at Nanjing University, 16-17 December 2003. That paper provides a background to the New Zealand community and culture out of which restorative justice grew.

The scope of this paper is intentionally limited to a survey of only some cases, and mainly where the outcome has been imprisonment, and is not intended to encompass other developments in the restorative justice movement in New Zealand.

Cases referred to are taken from the District Court, the High Court, and the Court of Appeal, and are not offered by the author as an authoritative or complete survey of all cases of relevance. Unfortunately there is no capture system that enables that and so the presentation is an appraisal only by reference to cases that are known to the author and in loose chronological order. Only some of the decisions cited are officially reported.

The "bullet points" appearing after the case details are the author's suggestions of significant developments that the case demonstrates and of factors that seem to have played a part in the exercise of the discretion of the judge.

There will be many District Court decisions (being the Court of first instance) that are not included. High Court decisions (mainly appeals) are less in number and likely to be known, and for the Court of Appeal (solely appeals), there is at this stage only the one guiding decision of *R v Clotworthy* (1998) 15 CRNZ 651 (CA). That decision will be referred to first because in a formative way it addressed issues of the relevance, value and applicability of restorative justice that soon become conundrums raising debate and discussion. For example, there can be uneasy tension between the retributive theory of sentencing which would exemplify punishment as a main purpose, and the restorative

theory which would exemplify repair and restoration as a main purpose. The former has a compelling logic that the punishment should fit the crime, that is, a terrible crime should be dealt with by a terrible punishment, and any approach that changes that emphasis could be regarded as flawed or wrong. Also flowing from that is a view that if restorative justice has a place, it will be only for minor offending and not for serious criminal acts (not a view held by proponents of restorative justice), because lenience can be more readily accepted where there has been less harm.

In 1998, the New Zealand Court of Appeal in *Clotworthy* provided some guidance about this tension. The offender was a young family man who had had a day drinking and in an inexplicable display of aggression (entirely out of character) whilst staggering down the footpath he stabbed another man. There was no explanation available....perhaps the victim had made a derogatory remark. The wound was perilously near the heart and but millimetres from being fatal. It was a very bad incident. He was charged with *wounding with intent to cause grievous bodily harm*, an offence punishable by maximum of 14 years imprisonment. There was a rich and emotional restorative justice meeting between the two men after the victim's recovery and the victim expressed the view that he didn't see any benefit for society or himself in a sentence of imprisonment. There was an agreement reached between them for quite a substantial monetary payment for cosmetic surgery to deal with the victim's ugly scarring. The sentencing Judge observed that applying orthodox principles following previously decided cases the starting point for working out an appropriate sentence would be between 3½ to 6 years prison. He adopted 3½ years and then reduced the final sentence to two years by giving credit for ready willingness to plead guilty, for the strength of the restorative justice meeting, and the agreement to pay for cosmetic surgery. Settling on a sentence of two years imprisonment enabled the judge (on the law as it then was) to suspend that sentence thus avoiding actual incarceration, and to order community work while the sentence was suspended. On a Crown (prosecution) appeal the Court of Appeal considered that the process by which the Judge worked the sentence down to two years simply did not reflect the proper starting point, the seriousness of the offence or other considerations, and it replaced the sentence with one of three years (not suspended) which of itself could be regarded as a somewhat reduced sentence. The Court said at p 661:

[We] would not want this judgement to be seen as any general opposition to the concept of restorative justice (essentially the policies behind ss 11 and 12 of the Criminal Justice Act 1985). Those policies must, however, be balanced against other sentencing policies, particularly in this case those inherent in s 5, dealing with cases of serious violence. Which aspect should predominate will depend on an assessment of where the balance should lie in the individual case. Even if the balance is found, as in this case, to lie in favour of s 5 policies, the restorative aspects can have, as here, a significant impact on the length of the term of imprisonment which the Court is directed to impose. They find their place in the ultimate outcome that way.

It must be remembered when this decision was given, for it was well before the statutory endorsement of restorative justice given in the Sentencing Act 2002 and came at a time when there was need for an appeal decision to provide some guidance. So *Clotworthy* at least cemented confidence that restorative justice was a recognised concept and that its principles could be validated. The following observations may be made:

- *restorative justice concepts were not opposed and thus not negated by the court*
- *the principles could be applied to serious offences*
- *tension between retributive and restorative principles can be blended*
- *application of the principles can be reflected in a reduced sentence*

A few years later in *Police v Stretch* (unreported Nelson High Court AP 9/01 9:10:01 Durie, J), the High Court wrestled with the *Clotworthy* “balance finding” challenge. In another Crown appeal against an 18 month prison sentence for multiple driving offences (the most serious being driving with excess breath alcohol causing death), the Court increased the sentence to 2½ years by following the strength of orthodox sentencing principles and previously decided cases. It concluded that whilst there were restorative elements that ought to be recognised in the light of *Clotworthy*, they were not enough to sustain the original sentence which was far too light. The Court began by assessing the starting point at 3¼ years and did bring the actual sentence down. It is of interest that in this case there was no independent formal restorative justice referral. The families of the offender and the deceased had undertaken their own meetings. The tension perceived between retributive and restorative theories of sentencing was keenly felt (perhaps always to be so) but nevertheless the Court said at para 44:

[44] In this context, the most compelling part of the material available to the sentencing Judge, was the clear statement of the dead girl's father that for him, and his family, a lenient sentence would most assist them in the healing process.....

And at para 45:

[45] It appears the principles of restorative justice may stand in conflict with principles of deterrence which represent the norm, but if the recognition of restorative justice in *Clotworthy* is to have practical effect, then I think a balance must be sought, no matter how difficult it might be to find that balance. That is what the sentencing Judge sought to do.

Well before *Clotworthy* though, judges had been stepping out into the uncharted field as can be seen in the High Court decision of *R v Symon* (unreported, High Court, Auckland S64/95 16/6 &17/7:95 Tompkins, J). This case might be the earliest known from which indications can be detected that courts were toying with the attractions of restorative concepts. The offender had committed a street robbery and had pleaded guilty thus inferring acceptance of responsibility. The judge was impressed by the offender's contrition and remorse and accepted a suggestion for a restorative justice referral although this did not take place because the victim was unwilling.

Making the decision for the referral though, the judge said:

I will invite the meeting, if it takes place, and the victims having seen you and you having seen them, to express some view of what the victims believe should be the appropriate punishment. I emphasise both to you and to those who may participate in the meeting that the decision on sentence is mine and will remain mine. But I may well be influenced by the views expressed by the victims. ... This course should be followed in case I am persuaded that any views expressed by the victims would be sufficient to justify my reducing the sentence of imprisonment below that which the Court would otherwise impose.

And from the sentencing decision sometime after the referral decision, the Judge said, in respect to his reason for making the referral:

The reason for adopting this course, which is generally described as restorative justice, is to enable the victims to have an active role in the sentencing process, and to give you an opportunity to show to the victims what is your present attitude towards what you have done. The process that I had hoped to follow was in recognition that victims in the community should be actively involved in the criminal justice process and in recognition also of the fact that a crime such as this results in injuries to victims and indirectly to the whole community, so that the victims should properly be active players in responding to and resolving the issue of the proper sentence for criminal conduct.

With there being no conference, the sentence that the court imposed could not take into account any special circumstances that the judge envisioned. The sentence was 3½ years prison.

The following observations can be made:

- *the conference was seen as an important means of giving the victim a voice in the process.*
- *the conference could be an environment for an offender's remorse to be directed to the victim in person rather than notionally.*
- *the Judge would retain control of outcomes.*
- *a reduced sentence could be envisaged.*

Shortly after, there was a referral to conferencing made by the Auckland District Court in ***R v Taparau*** [1996] DCR 774. Some young men had been found guilty after trial of serious violence against police officers acting in the course of duty. The referral was a courageous step, because the young men had evident hostility against the police and so there was no acceptance of guilt let alone remorse or contrition. The judge had recently become aware of ***Symon*** and his hope was that a referral to conferencing might result in the offenders' attitudes being penetrated in the personal encounter. That is what happened for at least one of the offenders because the conference triggered a significant attitudinal shift, and to a lesser degree also for the others. Foreshadowing ***Clotworthy*** the judge struck a balance between the clear and powerful need for a denunciating sentence for such offending, with the restorative impact of the conference, and sentenced to a reduced term of imprisonment followed by a community based programme. The judge said at p 779:

I repeat that with, as here, the wider interests of effectively dealing with serious violence and the protection, including by real deterrence, of police officers, it would, however, be a mistake unduly to narrow the focus down to the victims, the prisoners and their extended families or groups. A very weighty consideration must be the fundamental public interest in ensuring that police officers are able to safely perform their duties.

And of the conference process he said at p 782:

What I do find in all that I have learnt and heard is that there is sufficient to impose a sentence quite different from my original contemplation. It had initially seemed to me that no fewer than two years imprisonment were called for for each of the prisoners.

The following further observations may be made:

- *when facing one's victim in a conference an offender's attitude can change.*
- *such change can be reflected in penalty.*

Pressing the experiment of referring cases where there had not been a guilty plea, produced the appeal decision of *Konig v Police* (unreported High Court Auckland AP 12/97 18:4:97 Morris, J). The offender had been found guilty after a defended hearing, of careless use of a vehicle causing death. The hearing Judge was assured after delivering the decision that the offender would respect that and accept responsibility, so the matter was referred to a conference where those attitudes were again reiterated to the deceased's next of kin. The conference was regarded as a success. The sentence passed reflected this, but then the defendant lodged an appeal against conviction and sentence the irony of which did not escape the judge on appeal who cryptically observed at p 4:

Virtually every finding of the District Court Judge was attacked. So much for the acknowledgement of responsibility.

The original sentence was set aside and a more severe one substituted.

It is of interest to note that now, consistent with what the author believes to be the view of most commentators and academics in the field of restorative justice of the need for a clear acknowledgement of offending, at a national conference in Rotorua in 2003 District Court Judges adopted as a key point for referrals, the prerequisite of a guilty plea. So too has the Ministry in its public information brochures and documents.

One further observation can therefore be made:

- *before any referral to conference there must be a guilty plea.*

The case of *D v Police* (Unreported, High Court, Auckland, AP 161/99, 5:11:99, Nicholson J) is of interest. It is an appeal against a sentence of four years' imprisonment for sexual violations by rape of a father upon two of his teenage daughters. The offender, after a few years of struggling with guilt, confessed his offending and presented himself to the police to be charged. The police were not able to obtain evidence from his daughters, one of whom refused to speak to them. However, the sentencing Court made a referral for restorative justice conferencing, which took place. The appeal alleged that the sentencing Judge failed to give adequate credit for the fact that the offender reported the offences, showed genuine remorse, was forgiven by his victims and the family, and participated in a restorative justice conference. The appeal decision addressed the issue of credit for self reporting and restorative justice elements saying at para 20:

... Credit should be given in appropriate cases to rape offenders who report their own offending and thereby assist the police and the courts in achieving the goals of dealing with past offending and helping the victims of that offending and also preventing further offending and thereby sparing further victims. Restorative justice philosophy and practices can make a major contribution to attaining these highly desirable goals.

And at para 23:

In this case, where it, in addition to the factor of self referral of offending which would otherwise not have been detected, there were the factors of a very positive outcome from a restorative justice group conference and the help that gave to the victims in healing the hurt which the offending had caused them, particularly by helping with family difficulties to be healed for the benefit of all.

The sentence was reduced from four years to three years.

The following observations can be made:

- *the conference might be particularly appropriate where there has been offending within a family.*
- *the conference might provide an environment in which an otherwise unwilling victim could be willing to participate.*

In a District Court decision of *R v Fletcher* (Auckland District Court T 990070 29:3:00 Judge Gittos) the offender was sentenced to 2 years prison (suspended), two years'

probationary supervision, and ordered to pay \$25,000 reparation, for an offence such as in *Clotworthy* of wounding with intent to cause grievous bodily harm. There was a late night bar room altercation and the offender bit out a large portion of the victim's ear. This required extensive surgical repair. There was a guilty plea. The offender had a bad record for violent behaviour and was not long out of prison. The judge observed that he "was heading for a substantial sentence of imprisonment" but also that he had had a "frighteningly violent and dysfunctional upbringing" but now had gained "insight (and was) prepared to take some steps". He had participated in a restorative justice conference and had satisfactorily passed through a residential drug rehabilitation programme. The judge said at p 5:

The victim...has spoken eloquently on your behalf. He said that his first reaction was that he sought a punitive sanction against you but having been drawn into the restorative justice process and having met you as a person, he was able to put his own pain and resentment behind him and to advocate what was best for you.

And further at p 6:

So this is a success story as it confronts me at the moment and I am satisfied that it is in your best interests that I do not impose a sentence of imprisonment immediately effective.....

There is however, another aspect to sentencing which you have heard of course, articulated by the prosecutor today and that is the public expectation that violent offending will be dealt with in a certain way.

Although *Clotworthy* was not mentioned, these remarks are firmly consistent with the balancing approach it spoke of.

The following observations can be made:

- *public expectation is to be considered when determining the balance.*
- *a victim's views can be a powerful consideration in determining the balance.*
- *the conference can be a place of freedom for victim expression and even mind change.*

The following year in *Kalim v Police* (unreported Auckland High Court A198/01 4:12:01 Glazebrook, J) the High Court allowed an appeal against sentence for an offence of

assault with intent to injure. The incident was described by the sentencing judge as “unprovoked senseless violence” by punches to the head when the offender alighted from his car to remonstrate with the victim. The judge determined that it was an offence of serious violence warranting imprisonment, and imposed 4 months. The offender had no previous convictions, had pleaded guilty, and had participated in a restorative justice conference. The judge acknowledged that whilst there had been “some remorse”, the conference “did not achieve a great deal”. On appeal the Court set aside the prison term and substituted a community service order of 150 hours, taking the view that the violence involved was “on the cusp of being serious rather than being quite clearly in that category”. As for the restorative justice experience, the Court appeared to accept Counsel’s submission that the sentencing judge was wrong about remorse, it having pre-existed the conference and that the offender wanted to put things right for the victim. Apparently too, the offender had self-referred to anger management. He was described in the appeal decision as “showing extreme remorse”.

The following observation may be made:

- *the conference could be a valuable source to evaluate the depth and quality of remorse*

The importance of the quality of remorse was a factor that the District Court in ***R v Hayes*** (Auckland District Court T 011962 12:3:02 Judge McElrea) appears to have taken into account in another case of wounding with intent to cause grievous bodily harm. The offender had pleaded guilty. Others were involved and played more serious roles, but the victim suffered a fractured skull. It was accepted that the offender’s role was not likely to have caused that. However he pleaded guilty and was putting forward special circumstances to avert a prison sentence. He had attended a restorative justice conference, and in a careful outline of six factors that the judge took into account to find special circumstances, he said of the conference, it being one of those factors, at p 3:

Sixthly he has made fulsome apologies to the victim at a Restorative Justice conference in the presence of the family representatives of both sides, and those apologies have been accepted on the basis he will be serious about remedying his alcohol abuse. Part of the conference outcome was an agreement that \$150 reparation be paid to clothing, and I am told that that has already been paid.

Describing the apology as “fulsome” hints at the confidence of the judge in its genuineness (perhaps comparable to the “extreme remorse” of *Kalim*) as too could the judge’s specific reference to its acceptance.

The following observation may be made:

- *acceptance of apology could be a powerful factor.*

On 30 June 2002 the Sentencing Act 2002 took effect. Therefore all the decisions now to be mentioned were given under its provisions. Given the limited purpose of this paper it is not appropriate to outline all the elements of this legislation that use the language of restorative justice or have a bearing on the concept. Suffice it to say though, that the roamings of the Courts to find principles and establish guidance over the previous years were crystallized into one broad principle for sentencing in section 8(j). It provides as follows (emphasis mine):

In sentencing or otherwise dealing with an offender..... **the Court must take into account any outcomes of restorative justice processes that have occurred**, or that the Court is satisfied are likely to occur, in relation to the case (including, without limitation, anything referred to in s 10)

This wording makes clear that the provision is mandatory and creates an obligation on the court to take outcomes into account in every case where there has been a process, and thus embeds the issue raised in *Clotworthy* of finding “where the balance should lie” as a compulsory act.

Another provision of significance is section 7 which list lists 8 purposes for sentencing, the first 3 of which are reflective of restorative principles and which are of some assistance to the court in its obligation to take into account outcomes. These are listed later.

Decisions since the enactment if analysed, would probably not show any major change in the way the courts express and articulate features of note coming from conferences. The

change that the Sentencing Act brought though, in particular with section 8(j), is an acknowledgement that what the courts had already been doing was a legitimate and lawful process and that restorative justice was indeed a recognised concept. Thus for the future, the courts could continue on the journey with judges being confident that looking for ways to take into account the significance of a restorative justice outcome would now be precisely what was expected.

It might be noted too, that now judges were tending to explain in more detail their particular perceptions of the relevance of the restorative justice aspect of cases so that judgments contained more elaborate statements. It had to be shown that section 8(j) has been applied, and paths of reasoning are now being carefully laid to demonstrate how conference outcomes have been taken into account, and why.

There are 14 other provisions in the Act that have some connection with restorative principles and so it is fair to assume that the Legislature of New Zealand was intending to pave the way for a cohesive and meaningful future development of jurisprudence and practices for restorative justice in New Zealand.

Section 93(2)(b) & (3) is one of the array of 14 provisions, and it was soon used to impose a special condition on release after a prison term for an arsonist in the case of *R v Edwards* (Auckland District Court T 013561 28:8:02 Judge McElrea). The provision says (emphasis mine):

- 93 (2) If a court sentences an offender to a term of imprisonment of more than 12 months but not more than 24 months,—
 - (a) the standard conditions apply to the offender until the sentence expiry date, unless the court specifies otherwise; and sections 94, 95, and 96 apply as if the standard conditions had been imposed by order of the court; and
 - (b) **the court may at the same time impose any special conditions on the offender** and, if it does so, must specify when the conditions expire.
- (3) A special condition must not be imposed unless it is designed to—
 - (a) reduce the risk of reoffending by the offender; or
 - (b) **facilitate or promote the rehabilitation and reintegration of the offender**; or

- (c) provide for the reasonable concerns of victims of the offender.

A 2 year prison sentence was imposed and thus the Court could determine any special conditions for re-integration of the offender. Obviously the judge believed that there could be value in a conference upon the offender's return to the community and this provision afforded an opportunity to put that in place. The judge said at para 22(v):

...he is to undertake such restorative justice processes as may be arranged by or through the probation service, with his consent and the consent of the victims of his arsons. (This condition is specifically aimed at enhancing the prisoner's awareness of the impact of and harm done by his offending to his community and to assist the victims in dealing with the consequences of that in their own lives).

The following observation may be made:

- *restorative justice conferencing could now become a re-integrative programme upon release from prison.*

An early case making reference to s 8(j) is *Glenie v Police* (unreported, High Court, Hamilton, AP 79/02, 12:11:02, Gendall J), an appeal against a prison sentence for offences of fraud. The main thrust of the appeal was given the fairly low level of monetary loss in this case, and that such offending is regarded as property offending, a prison sentence is relatively uncommon. There had been a guilty plea followed by a restorative justice referral. The sentencing Judge noted lack of remorse and that the offender needed to be deterred from repeat dishonest offending. The Judge on appeal said, at para 11:

This offending was repetitive, deliberate, premeditated and incurred over a significant period of time. It involved a serious breach of trust towards the appellant's employer and their customers..... The probation officer's report and information about matters dealt with at the restorative justice conference did not inspire confidence in the Court that a non-custodial sentence would provide sufficient deterrence to this appellant. The effect of the offending on the victim was significant and the poor outcome of the restorative justice processes which had to be taken into account in terms of s 8(j) were features which influenced the Judge in her sentencing the appellant to imprisonment.

The obligation to take into account the outcome was naturally interpreted as applicable whether the outcome is positive or negative. In this case the poor outcome as reported would no doubt have had something to do with the offender's attitude and perceived lack of remorse, and accordingly the sentence was not reduced.

The following observation may be made:

- *the Court must to take into account both negative and positive results.*

A contrasting case is *R v Cassidy* (unreported, New Plymouth High Court, T 2/03, 10:7:03, Paterson J). This is not an appeal case. The offender was charged with manslaughter. There had been a bar room scuffle and the victim assaulted the bar manager. The offender, who was a member of the staff, confronted the victim outside and struck him in the mouth with a blow that caused him to lose his balance, fall backwards and strike his head on the footpath, causing his death. There was a restorative justice conference for the offender and the deceased's partner. The judge said at para 10:

You recently attended a restorative justice conference with members of Mr Kendall's family, their support persons and your family and support persons. At it, it is to your credit that you accepted full responsibility for what happened and expressed your sorrow and deep remorse. You acknowledged the Kendall family's right to their anger towards you and apologised on several occasions. A facilitator of the conference noted that the goodwill displayed by both families during the highly charged emotional atmosphere experienced at the conference would be a starting point of the healing process for all involved. It is to your credit that you took part in the process and it is to be hoped that you have been a contributor to some extent in reducing the ongoing stress and effects on Mr Kendall's family. You will be aware, however, from that conference, of the ongoing anguish of those he left behind.

And at para 16:

I intend to give you credit for attending the restorative justice process. I know you have said it is the hardest thing you have done and I can understand that. You did not need to do it, and you will be given credit for that. I accept there has been genuine remorse and a genuine attempt by you to assist the victim's family.

And at para 18:

Mr Cassidy, because of the remorse you have expressed, and the other mitigating factors and your attendance at the restorative justice conference, you will be given a larger discount than would be normal.

The offender was sentenced to two years' imprisonment.

The following observations may be made:

- *the conference was an appropriate place for victims to express anger*

- *offender attendance at a conference is voluntary and credit can be noted for that.*
- *confronting ones victim can be a hard thing to do.*
- *an offender who meets with a victim can be performing a role of help and assistance for a victim's recovery*
- *in any event a conference could be the beginning of a healing process*

In the case of ***R v Folaumoeloa*** (unreported, Auckland District Court, CR 2004-004-003788, 16.9.04, Judge Thorburn) the offender was a 17 year old who was being sentenced for a serious aggravated robbery in which he, with others, selected a petrol station attended by a lone person in the early hours of the morning, and with threats of violence, by wielding a screwdriver, they robbed the premises. On orthodox sentencing principles and previous cases, the judge regarded the tariff for sentence in the four-year category, with reductions for youthfulness and a guilty plea possible. There was a restorative justice conference about which the judge said at para 19:

In the restorative justice conference the young prisoner and his family met with the victim and his boss or employer. These people are from Pakistan. In the meeting there was prayer, there were tears, there were exchanges of what one might say was rhetoric, but certainly there was communication and verbalisation of regret and remorse, and acceptance of that. There was embarrassment portrayed by the offender and his family and grace and forgiveness portrayed by the victims. And, in what is reported in a remarkable way, there was a genuine human experience taking place.

And later, at paras 24-27:

[24] In this case the restorative justice process revealed that this young offender has deeply committed parents who are ashamed by the behaviour of their young one, shame which will clearly permeate throughout the family dynamics. Some academics have written about reintegrative shaming, the sort of embarrassment and shame that is of a nature that engenders a deep desire to do better and not offend again for the sake of avoiding embarrassment for a family or close community. I think the shame that has been portrayed in this case is in that category. The family bond was demonstrated before the victims – the prisoner and his family held hands.

[25] All of this was an experience of human reality for those in attendance. There would be no-one in this courtroom who is not the person that they are without their actual human experiences, and so it seems to me that the process that has taken place, with all its depth, ought to have been a significant human experience for all concerned, and an experience that one can but hopefully trust, of character building benefit for the young offender.

[26] Restorative justice makes it possible for these sorts of streams of influence to validly feed into the community and enable proper recognition to be given to the generosity of human spirit that can sometimes be revealed – as in this case – by victims and the power of their desire to be forgiving in person-to-person meetings – and in this case, too, one must say, across the boundaries of quite different cultures, that can influence an offender.

[27] Because restorative justice is now in our statutes, it is important that it is seen as a proper process, and as another response to the evil and sadness of crime, - a human response that can stand validly alongside the familiar purely retributive response.

The offender was sentenced to 10 months' imprisonment.

The following observation may be made:

- *restorative justice can provide information that is not usually available or is left untapped about the subjective effects on and needs of the individual victims and perpetrators of crime.*

Finally, there is the case of ***Waikato Regional Council v. PIC New Zealand Limited*** (unreported, Auckland District Court, Crn 4057500079&82, 29:11:04 Judge McElrea). This case is of particular interest because it is not to do with criminal offending. It is a sentencing from the Environment Court which is a division of the District Court with special jurisdiction to deal with matters of resource management, environmental protection, town and country planning, and control of land development. The Defendant company operated a large scale piggery from which a huge quantity of raw pig effluent discharged as a result of a leaking pipeline. The contamination flowed into drains and a tributary of the Waikato River. Penalties for such offences are normally very substantial fines. In this case, when the discharge was discovered, the company took full responsibility. It initiated a restorative justice process with the municipal authority in order to demonstrate apology and effect some repair to the community. As a result of this process, a volunteer tree planting community project was identified to which the company made a payment of \$15,000. It also paid the costs of the informant council, some \$24,500, and the costs of the restorative justice facilitator. The defendant company was convicted and discharged, the Judge saying (paras 4-6):

[4] The result was that an excellent project in the area was identified as being worthy of support. This was the Haka Reserve Project in a nearby part of the Waikato River catchment.....Not only does this benefit the local area where this piggery is situated, so that the local environment and the people living in that area obtain the benefit of this defendant's investment of this type – further, it has enabled the defendant to repair the damage done with relationships in the area because there was little damage done (most of the neighbours did not know anything about these problems), and it has enabled the defendant to show itself as a responsible citizen and neighbour and to develop very good relationships with the local community.

[5] It is very rare that one reads of such a handsome and fulsome apology as Mr McDonald has made on behalf of his company from a very senior level, and I am extremely impressed by the attitude the defendant has taken.....

[6] Putting all things together, I think this is a case where the Court can congratulate both the prosecuting Council and the defendant on the way in which they have handled this, the excellent outcome that has been achieved for all concerned and the long-term benefits that will accrue to the environment in this part of the Waikato.

The following observations may be made:

- *restorative justice can apply where the community is the victim*
- *conferencing can result in measures being found to repair harm and repay loss to a community through symbolic gestures of restoration by an offender*
- *conferencing gives an offender a means by which to re- establish integrity and good reputation*

Section 7(1) of the Sentencing Act 2002 ought now to be mentioned again in order to reflect on the extent to which the foregoing cases and perhaps the author's observations in the "bullet points" align with statutory principles. Section 7(1) sets out 8 specified purposes for sentencing (stated by ss 2 not to be in any particular order of priority or importance). Five of these are re-statements of common oft quoted and well accepted principles but 3 are entirely new and have not had formal recognition before. The 8 are listed below, the first 3 (as emphasised) being the new points.

- (a) **To hold an offender accountable for harm.**
- (b) **To promote a sense of responsibility and acknowledgement of that.**
- (c) **To provide for the interests of the victim.**
- (d) To provide reparation.
- (e) Denunciation.
- (f) Deterrence.

(g) Community protection.

(h) Rehabilitation

How could the 3 new purposes be achieved ? What sources of information would assist in achieving these ? What procedures or processes would best suit the pursuit of them ?

It is suggested that everything about the above cases connects directly to these statutory purposes and that the comments of the judges demonstrate the usefulness of the restorative justice experience in each case for the court.

Restorative Justice will not assist all sentencing purposes, nor should it be expected to apply for all cases, but surely there is no need to look further than the 3 new purposes for it to be validated as a tool for the assistance of the court.

In any event, as Dr Zehr writes "...restorative justice is done first of all because it is the right thing to do" (Zehr, *Little Book of Restorative Justice* : Good Books (2002) p 9) .

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Summary of observations showing features of Restorative Justice emerging from decisions of the Courts

1. General principles

- (a) Restorative justice factors were acknowledged by the Court of Appeal as relevant for sentencing.
- (b) The principles could be applied to serious offences.
- (c) There should be a guilty plea before any referral by the Court to a conference.
- (d) The Judge would retain control of outcomes.
- (e) Tension between retributive and restorative principles can be blended.
- (f) Public expectation is to be considered when determining the balance.
- (g) The Court must take into account both negative and positive results.
- (h) Application of the principles can be reflected in a reduced sentence.
- (i) Restorative justice can apply where the community is the victim.
- (j) Restorative justice conferencing can be used as a re-integrative programme upon release from prison.
- (k) A conference might be particularly appropriate where there has been offending within a family.

2. Values

- (a) The conference can be an important means of giving the victim a voice in the process and can provide an environment in which an otherwise unwilling victim could be willing to participate.
- (b) A victim's views and acceptance of an offender's apology and remorse can be a powerful consideration in determining the balance of issues for the Court.

- (c) Offender attendance at a conference is voluntary and credit can be noted for that.
- (d) The conference can be an environment for an offender's remorse to be directed to the victim in person rather than notionally through submissions in Court.
- (e) An offender who meets with a victim can be performing a role of help and assistance for a victim's recovery and begin a healing process for a victim.
- (f) The conference can be a valuable source to evaluate the depth, quality and genuineness of an offender's remorse and also a victim's acceptance of that.
- (g) Conferencing can result in measures being found to repair harm and repay loss where the community is the victim through symbolic gestures of restoration by an offender.
- (h) Conferencing gives both an offender and victim a means by which to re-establish integrity and good reputation.

3. **Some subjective outcomes**

- (a) The Conference can be a place of freedom for victim expression including anger and even change of attitude and mind.
- (b) Similarly for an offender, when facing one's victim in a conference an offender's attitude can change.
- (c) Confronting one's victim/offender can be a hard thing to do.

S. A. T.