

CURRENT DEVELOPMENTS IN YOUTH CONFERENCING, AND IN RESTORATIVE JUSTICE IN NORTHERN IRELAND

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INTRODUCTION

I hope to give you a brief idea of what I want to try to achieve in the next 30 minutes or so and I also trust that time will be left for questions. First, questions are much more likely to throw up aspects of this which interest you and which will result in more interesting answers. Second, although we live on the same island, I have little idea of either what you know about restorative justice (which may well be a lot more than I do) or about what we are trying to achieve in Northern Ireland. I also hope those of you who know a lot about the concept of restorative justice, its history and its different applications, will forgive me if you find what I have to say about its origins is either too basic or too trite.

I hope to outline:

- The basic concept.
- Its history in Northern Ireland.
- The current Youth Conferencing Scheme (YCS) in Northern Ireland; and
- Some criticisms I have of it.

I. THE BASIC CONCEPT

As I said, I am sure this will be a bit simplistic for those of you familiar with the concept. Before I attempt this could I tell you that I am, by no means, an evangelist. Both by my experience and by my nature I react against theories that are sold by their advocates as being panaceas for all our ills and in respect of which claims are made that they will be so much better than what went before.

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Was it Benjamin Franklin who said, “In this world nothing can be said to be certain, but death and taxes”? In my view crime could be added. The fact that the number of burglaries has reduced in the UK and, possibly, in Northern Ireland, may be more due to the reducing value of portable electrical goods such as DVDs and to fuller employment as to any impact made by policing or to restorative justice initiatives.

Recently, I listened to an Oxford academic who had done research into the cautioning plus system developed by Thames Valley. In his analysis, fetchingly called “How Green was Thames Valley”, he searchingly appraised the evaluation and statistics that had been put forward. All was not, perhaps, as clear as it seemed or as had been claimed. This is a technical area in which judges (as in many other areas on which they tread) can claim no expertise but he made a clear case for the need for re-appraisal of the statistical evaluations and, in particular, the extent to which the new system had affected recidivism.

Let me give you a simple definition:

Restorative justice seeks to balance the concerns of the victim and the community with the need to re-integrate the offender into society. It seeks to assist the recovery of the victim and enable all parties with a stake in the justice process to participate usefully in it.

Well, who could really disagree with that? Let me give you a more complicated definition that comes from New Zealand:

Restorative justice is a generic term for all those approaches to wrongdoing that seek to move beyond condemnation and punishment to address both the causes and the consequences – personal, relational and societal – of offending in ways that promote accountability, healing and justice. Restorative justice is a collaborative and peacemaking approach to conflict resolution, and can be applied in a variety of settings (home, business, school, the judicial system, prison). It can also use several

different fronts to achieve its goals, including victim/offender dialogue, community or family group conferences, sentencing circles, community panels and so on.¹

Four examples of these, respectively, are Northern Ireland, New Zealand, Canada and the State of Jersey. What has led up to this could be said to be a questioning of traditional concepts of criminal justice, greater recognition of the harm done to victims and a perceived need to consider their interests. This all had an impact on the idea that a crime is a wrong against society that should be prosecuted by the State.²

There are terms not greatly popular with judges:

- Marginalising of victims.
- Democratisation of the process.
- Empowerment of communities; and
- Holistic approaches should include spiritual and emotional values.

We instinctively react against these words and these concepts. Sometimes, we take an approach like that of Wellington, who was supposed to have said about the advocacy for the Great Reform Act, “Reform? Reform? Are things not bad enough as they are?”

The reality is, however, that the concept of restorative justice has moved us towards a greater emphasis on producing outcomes that are both fair and also closer to meeting the needs of society. There has been a shift from the emphasis on procedural justice towards a more substantive justice in which judges have to realise that justice is not just about following fair procedures like due process and rules of natural justice but also about achieving a fair and lasting result that will work to the community’s benefit. Five years ago Dr Nigel Bigger of Oriel College summed up this dilemma when he said in an essay entitled “Can we reconcile peace with justice?”: “[J]ustice is primarily not about the punishment of the

¹ “Restorative Justice Values and Processes”, Restorative Justice Network, New Zealand, June 2003, Dr C. Marshall. Available at: www.restorativejustice.org/resources/docs/rjvalues/download.

² Here I gratefully acknowledge the assistance I have had from Judge Fred McElrea of New Zealand, a long time proponent of the application of principles of restorative justice by and outside courts.

perpetrator but rather about the vindication of the victim”³.

Northern Ireland might not have seemed the most fruitful place for the application, let alone the development, of this concept. A fractured community with deep political, religious and cultural divisions would be bound to throw up some obstacles for restorative justice. Indeed that has happened but this would only be one part of an otherwise successful scheme, certainly from what we can see at this stage.

I do not intend to shy away from these problems, essentially the problems of applying community restorative justice schemes in Northern Ireland, but I will go into the history of the concept in Northern Ireland first.

II. THE HISTORY OF RESTORATIVE JUSTICE IN NORTHERN IRELAND

In 1994 the Ulster Quaker Public Service Committee (UQPSC) hosted a conference at Porballentrae on restorative justice. This was chaired by Mary McAleese, who then headed the Institute of Legal Professional Studies at Queen's. It was attended by persons from a wide range of statutory and community groupings who were perceived to be interested in developing this concept.

This was followed by the UQPSC setting up the Restorative Justice Working Group (RJWG). Initially the Group attracted membership from the statutory sector (such as the judiciary, probation, DPP and the police), from NGO's such as Extern and NIACRO and also representatives of incipient community projects such as the loyalist Greater Shankill Alternatives and the republican Community Restorative Justice (Ireland).

Very quickly the attendance of the representatives of the local community groups fell away. In part this was due to a feeling that the RJWG was too “establishment” orientated to be useful to community groups. Partly it was because of intense political pressure and worries on the part of all concerned and partly because of perceived worries about human and private rights. Despite the efforts

³ “Can we reconcile peace with justice?”, in *Community forgiveness and restorative justice: Essays from the criminal justice system and the peace movement*, Robert D. Enright (ed.), *The World of Forgiveness* vol. 2 no. 4 (1999), International Forgiveness Institute, p. 27.

of the Mediation Network to address these difficulties nothing happened that really brought the community representatives back. Informal contact was however maintained with both.

This, essentially ad hoc, group met regularly and attempted to promote the concept in Northern Ireland. Meanwhile the community groups were also developing their local schemes. The RJWG sponsored talks and visits and attempted to interest those responsible for criminal justice.

Persons whose names some of you might recognise were Professor Harry Mika and Howard Zehr. The Group published a paper entitled "Proposals for Restorative Justice in Northern Ireland" which concluded that properly targeted restorative justice initiatives had an important role to play alongside the existing criminal justice system and that these would bring benefits to victims, offenders and to the community. After a visit to the RJWG by Murray Power of the Criminal Justice Policy Division of the Northern Ireland Office (NIO), the NIO set up a restorative justice steering group to develop practical proposals through the development of existing laws and by piloting appropriate projects.

By this stage I think I could safely say we had separate and parallel development, the statutory side and the community side.

In 1997 the NIO promoted a Criminal Justice Conference one of whose themes was restorative justice. The RUC commenced a pilot project in East Belfast using the concept of "caution plus" and that attempted to involve victims. In certain areas the community projects were also going full steam ahead and seemed to represent a community-based attempt to replace more barbaric responses to alleged wrongdoing. The lack of contact, however, with the police and the scale of ignorance which resulted made it difficult for others to know to what extent these projects were accountable, transparent and respected individual rights, both of offender and of victim.

Also in 1997 the NIO produced a positioning paper on restorative justice and, when it was published in 2000, the Criminal Justice Review (CJR)⁴ made a number of significant recommendations relating to restorative justice. It would not be an overestimate to say that the concept of restorative justice, at least as

⁴ "Review of the Criminal Justice System in Northern Ireland", Report No. 10: *Restorative Justice options for Northern Ireland: A Comparative Review*, Belfast, March 2000.

regards youth justice, was to assume centre stage.

Whether understandable or not, the authors of the CJR were very cautious about official endorsement of community projects. What was proposed was a system very closely modelled on that of New Zealand but without the scope for community involvement that the New Zealand scheme permitted and even envisaged as fundamental.

In particular they recommended a system of youth conferencing. This was to be court-based and to be ordered for offenders aged between 10 and 16 who admitted their guilt. There was to be no, or very little, discretion. Courts would have to order such a conference though not necessarily endorse the result. Although they envisaged later development of diversionary conferences by both police and the Public Prosecution Service (PPS) they did not propose these and were also cautious about community projects.

They saw such projects as having a role only if they received referrals from a criminal justice agency (such as the police), they were accredited, monitored and inspected and they had no role in determining guilt or innocence.

The conference sought to mediate a “safe” meeting between the victim and the offender, the dual purpose of which was to be to enable the victim to receive reparation for the harm caused and to tackle the young person’s offending behaviour, the reasons for it as well as censoring it.

At its heart was to be the concept of acceptance of responsibility by the offender and the involvement of the victim was considered vital. This court-based proposal was to centre on the idea of the conference which required the approval of the prosecutor, the offender and the court. It was intended to be proportionate and re-integrative rather than retributive and to assist in repairing damage and restoring relationships. The plan, if agreed, would come back to the court for approval.

III. MORE RECENT DEVELOPMENTS

The NIO accepted the proposals for a Youth Justice Board for

Northern Ireland and 2002 saw the establishment of the Youth Conference Service and a statutory system that effectively incorporates restorative justice practices into criminal justice in Northern Ireland.⁵

Instead of being purely court-based the Act allows two gateways to the youth conference; diversionary via the new Public Prosecution Service and also via the court. Referral is dependant on admission or finding of guilt and upon consent. Dr Bill Lockhart (formerly of Extern), whom many of you will know, heads the Youth Justice Board and Alice Chapman the new Youth Conferencing Service. Both are based in new offices in Belfast.

The new schemes launched as pilots in Greater Belfast in December 2003. Fermanagh and Tyrone followed in April 2004 and recently these have been rolled out in Armagh and South Down. Over half the population and about half the land area of Northern Ireland is now covered. To date, to 21st October 2005, 458 conferences have been ordered, 134 by the PPS and 324 by courts. Acceptance of plans by the courts has varied greatly, 34% in Belfast and 90% in other youth courts.

What are the time scales for conferences? PPS conferences have to be ordered within 30 days and court-ordered conferences within four weeks. The courts do not have discretion. They, with very few exceptions, *must* order a conference.

Evaluation has been made a central requisite of the whole scheme and a preliminary evaluation was published last January.⁶ These figures, however, that I am going to give you are informed by a recent evaluation the results of which are to be published in January 2006. They are really quite encouraging. For these details credit must be given to David O'Mahony, Professor Jackson and their team at the Institute of Criminology and Criminal Justice at Queen's University.

The range of offences covered in conferences is interesting. The proportion of minor to intermediate to serious offences against persons and property is 21%, 53% and 23%. The most remarkable fact is that the level of victim participation is very high at 69%. The YCS apparently believes this is the highest ratio achieved in any

⁵ Justice (Northern Ireland) Act 2002.

⁶ O'Mahoney and others, Interim Evaluation of the Northern Ireland Youth Conference Service. Northern Ireland Office, Belfast, January 2005.

Restorative Project. Such participation is by victims' representatives or by victims in 87% of cases, and, where there is no individual victim, by representatives in 13% of cases.

Astonishingly, three out of four victims attending said they did so because they wished to help the offender though clearly many victims did not wish a face-to-face meeting. The level of parent involvement is high. The level of both victim and offender satisfaction expressed was extremely high, with both victims and offenders indicating that they would recommend others to undergo it.

The Youth Conference Service believes that the high incidence of shame recorded and felt by offenders and the marked contrast between a formal court where the offender says little and the conference where the offender has to personally account for his behaviour has been registered as a considerable feature.

I am also told that delivery of a conference within the, fairly strict, time limits has been achieved in the vast majority of cases. This has been achieved despite the obvious effort required to secure victim participation. Preparation time for a conference takes about 10 hours and the conference lasts, on average, 70 minutes. Youth conference co-ordinators are skilled and receive specific training with a university course at the University of Ulster now directed specifically at this.

IV. CONFERENCE PLANS

At present I do not have sufficient information to be able to assess the outcome of plans accepted by the court. Clearly there is a need for the "creative imagining" that is necessary for these plans to work and to both have impact and to earn public confidence. Current evaluation strongly suggests good levels of victim participation at the conference and the benefits of this. There is also a clear indication that issues such as substance abuse, parental and social difficulties are addressed in the conference. Less clear is the way in which this is addressed in the actual plan that is agreed by the conference and which may be accepted by the court.

The need for plans to be proportionate, consistent and effective

goes without saying. Monitoring of performance, as well as outcome evaluation, will be absolutely essential to the success of the scheme. The allocation and the availability of sufficient resources to permit not only the timely holding of conferences but also the kind of creative imagining in the performance of plans mentioned above will be equally essential. This leaves a number of questions:

V. DOES IT ALL WORK?

It is too early to say. The litmus test as they say is the impact on re-offending rates. Clearly it is too early to say much about Northern Ireland. Some research suggests that recidivism rates reduce. In a useful compendium of research by David Bowes there appears to be clear evidence of a significant reduction in both juvenile and in adult re-offending when compared with control samples. This is both in numbers and in seriousness of re-offending.⁷

A notable exception was that of seven surveys carried out by David Miers of Cardiff, for the Home Office.⁸ The exception he found was in one scheme where, notably, victim participation was routinely involved, whether direct or indirect. Another cautionary note was struck by those who assessed Thames Valley's initiative.⁹ It seems likely that those schemes most likely to have some impact on reducing recidivism rates are those that routinely involve the participation of victims.

A. What is the likely impact of the inclusion of 17-year olds?

These have just been included in our youth courts. The impact on conferences, as yet, is minimal but it is estimated to increase conference work by 40%. This age group is going to bring problems, not just in the increase in numbers but also in how the conference system is going to respond to the greater incidence of road traffic offences and sexual assault offences that will inevitably arise.

B. What is the effect on morale (of all involved) of repeat offenders and repeat offences?

This was the single most frequent concern expressed by all

⁷ David Bowes, "Restorative Justice: The Evidence", Justice of the Peace 168, 13th November 2004.

⁸ David Miers et al, "An Exploratory Evaluation of Restorative Justice Schemes", London Home Office, Crime Reduction Research Series Paper 9, 2001.

⁹ Hoyle, Young and Hill, "Proceed with Caution: An Evaluation of Thames Valley Police in Restorative Cautioning". York: Joseph Rowntree Foundation 2002.

involved in New Zealand. It can frustrate victims, co-ordinators, police, the public and, not least, the offender.

C. What is going to happen to the Community Projects in Northern Ireland?

This is our, peculiarly intense, local problem. In his third Report¹⁰ the Justice Oversight Commissioner, Lord Clyde said:

The implementation of this recommendation remains one of unacceptable delay. Reference should be made to the comments made in the second Report. Discussion and negotiation on the draft guidelines will be the next important step forward.

It is unfortunate that the name “restorative justice” is liable to be misunderstood. It is certainly desirable that efforts be made to achieve a greater understanding on the part of the public about the substance and the advantages of restorative justice and in particular community restorative justice. But that is only one element behind the difficulties that presently exist. Among other factors the political situation and an element of mistrust may also be contributing to the slow rate of progress. The problem may require to be resolved at all levels. All those involved may need to be flexible in their approach and ready to move forward.

The schemes provide an opportunity for engagement with the community and should not be seen as a threat but a possible advantage for the whole system. It would be unfortunate if the present opportunity for dialogue was missed and the whole range of possible methods for dealing with problems at a community level in a manner which is consistent with human rights and which supplements the work of the statutory agencies was lost to Northern Ireland.

¹⁰ Third Report of the Justice Oversight Commissioner, Belfast, December 2004.

Six months later he said:

All those concerned in the progressing of this recommendation are to be congratulated on the positive steps that they have been taking and in particular the readiness of all of them to engage in discussion. All that gives room for hope. Now that the opportunities have been grasped for serious discussion both in principle and in detail, the momentum should not be lost. But all parties must recognise the sensitivities in this area and the necessity for flexibility. However, in the progressing of this recommendation, points of difference may be open to resolution as matters of practice rather than principle.¹¹

The difference that six months makes is obvious. One can only hope that this will continue. There are signs in both a forward and backward direction but I feel, that as a judge, this is an area into which I cannot and should not stray.

D. What scope is there for extension?

Take the position of drivers who by their driving cause death or serious injury. This, apart from cases of rape and sexual assault, is what I spend most of my time doing. Very frequently I meet the comment expressed, either in court or by relatives in the press after court, “he never said sorry”. This has not been the way in our courts and is not easy to do in an adversarial system.

I should not talk about individual cases but, when practising at the Bar, I have had personal experience of the difficulties involved where a motorist wished to make contact, apologise and attend the funeral. I felt I had to advise against. The charges of causing death by dangerous driving were later reduced to careless driving. I think the driver made contact many years later. If UK government proposals are introduced this driver would be likely to face a charge of causing death by driving without due care and attention, with the maximum sentence being five years imprisonment.

What is the position as regards those less serious sexual assaults

¹¹ Fourth Report of the Justice Oversight Commissioner, Belfast, June 2005.

that have often riven families apart and where the age and unequal positions of adults and children are involved? The Youth Conferencing Scheme has one such case and naturally this is being very carefully handled. There will be more of these difficult cases and the unequal position of victim and offender presents particularly difficult problems.

Yet, even here, there is some scope. In one New Zealand case two girls confronted their student assailant, who came from the same school, in a family conference. All concerned felt that more was achieved than would have been in court. A suspended sentence was, ultimately, imposed by the youth judge.

E. What is the position about adults generally?

The peculiar problems presented by the very unequal imbalance of power in cases of sexual assault have to be very clearly recognised. As have those presented by cases involving domestic violence. So many of the former do not come to court (perhaps as many as 90%); so many of the latter come to court but do not proceed.

In *R. v. C.*¹² the New Zealand Court of Appeal refused to alter an 18 month long supervision order on a 14-year old who admitted seriously sexually assaulting his four-year old cousin. The Court was influenced by the victim's mother's wishes and the result of a conference. Likewise, in *D. v. New Zealand Police*¹³ a sentence of imprisonment was reduced in a case of adult rape where a combination of admission, victim's wishes and a successful conference came together.

I also can give you some details of cases where deferral has been used in Northern Ireland to allow the application of restorative justice principles.¹⁴ Since these have not been the result of reported cases I will disguise the details. One involved a non-jury trial. In this particular case the charge was one of arson against a Catholic maintained school and a parish hall. The experience for the young men concerned was salutary and contact has been maintained between the priest, who facilitated this throughout, and one of the offenders. An apology, considerable voluntary work and restitution of damage were all involved and permitted suspension of the

¹² *R. v. C.* (28 September 1995) CA332/95.

¹³ High Court of New Zealand, Auckland (29 February 2000) AP161/99, Nicholson J.

¹⁴ "Deferral of Sentence: Principles, Practice and Proposals" (2000) 51

sentence.

In another case, two offenders who had damaged cars whilst on a drunken rampage not only met their victims but also repaid the not inconsiderable damage that they caused. The cars involved were expensive marques but the average damage (about £500) might well have been below the amount likely to result in a claim being made to an insurance company. The police facilitated some 18 meetings. In one they said they had what they described as “the mother of all victims”. The application of restorative principles permitted apology, restitution and, ultimately, the suspension of sentence. This in turn allowed these young adults to remain in their employment.

CONCLUSION

I have little doubt that in some cases there is a place for applying restorative justice. I firmly believe that it is worth taking the risk with juveniles across the board. I, however, also believe that this has its limits and these limits should be recognised. Human nature is such that the power of redemption should never be shut out but we should also recognise the capacity of humans to both manipulate trust and also to abuse systems. I, therefore, am entirely resistant to those who proselytise for restorative justice to be extended to all crimes and all age groups. In this area we should proceed slowly after careful evaluation.

The one thing I would say is that what we appear to be seeing is the thin shoots of a successful harvest and both my own and my colleagues’ collective experience suggests that remarkable fruits can result. What is required is careful selection to identify those cases where such principles might work.