

Restorative Justice in Resource Management Prosecutions – a Facilitator’s Perspective

I have been puzzled for some time about the reasons for the slow uptake in the use of restorative justice in resource management prosecutions. The judiciary advocates its use, Judge McElrea in particular publishes regularly on its value, there is a statutory obligation under the Victims Rights Act 2002 for defence counsel and prosecutors to consider its use and conference participants enthuse about it. Yet despite the fact that over 80% of defendants in resource management prosecutions plead guilty, nationally there were only six restorative justice conferences in the period July 2001 to April 2005 and thirteen in the period May 2005 to June 2008. During these two periods there were a total of 377 resource management prosecutions where the defendants pleaded guilty.¹

It occurs to me that whilst there has been considerable discussion of its value for victims, perhaps its potential benefits for defendants are not well understood. I note that David Grinlinton in his excellent recent article² on sentencing under the RMA discusses the effect on sentencing of restorative justice efforts, but his focus is largely on concessions given for remediation or reparation rather than the overall impact of restorative justice on sentencing or the range of benefits for defendants.

My observations on the benefits are offered as a resource management prosecution restorative justice facilitator with previous experience as resource management litigator (at Russell McVeagh and Simpson Grierson). I have facilitated 12 resource management restorative justice conferences since 2003 and I firmly believe they should be a first consideration for a defendant (after considerations of plea) in a resource management prosecution.

¹ <http://www.mfe.govt.nz/publications/rma/rma-prosecutions-2008html/page1.html>

² David Grinlinton Sentencing under the RMA Resource Management Bulletin June 2009.33. He suggests that the Sentencing Act provides a restorative justice approach through its reparation provisions but there are other important provisions promoting the use of restorative justice including Sections 7, 8(j), 10, 25, 27 and 32(6). He also suggests that offenders can be required to use restorative justice and meet with their victims in a face to face setting but restorative justice is voluntary and cannot be required.

What are the Benefits for Defendant Clients?

In summary, the benefits from a defendant client's perspective are the opportunity:

- (a) To consider the appropriate charges to remain before the Court.
- (b) To "hear" the concerns of victims in a proper forum and begin the process of rebuilding relationship with the prosecuting authority and "victims".
- (c) To agree on the steps which the defendant needs to take to restore its reputation in the community.
- (d) To tailor-make a solution to deal with the effects of the offending.
- (e) To agree on the overall outcome plan to be put before the sentencing judge.

1.The Opportunity to Consider the Appropriate Charges to Remain Before the Court

One of the preconditions to the use of restorative justice is a guilty plea, so there may need to be some "bargaining" to ensure that the informations are accurate before a guilty plea is entered. However, the conference itself offers an opportunity for the parties to discuss the summary of facts clarifying the details of the offending. This occurs as a collaborative process with the prosecuting authority and defendant working together to determine the factual basis to the charges to be put before the judge. In practice, the differences or misunderstandings between these two parties in relation to the facts are often ironed out in this process.

One consequence of this can be an agreement that the leave of the court should be sought at sentencing for the charges to be withdrawn (see for example, *Auckland City Council v Treescape Limited and Akarana Golf Course* (DC Auckland CRN 07004502567, 14 June 2008, Judge McElrea)).

2. The Opportunity to Rebuild Relationship

Most resource management defendants face prosecution following a long period of engagement with the local authority and their neighbours or local community that suffered adverse effects from their business operation. A breach of resource consent conditions is rarely a one-off event and prosecutions are usually the end product of a long history of issues around compliance. They are usually preceded by abatement and enforcement notices and a range of complaints or overtures from neighbours, depending on the nature of the issue.

Following the prosecution, the defendant continues in relationship with the local authority and its neighbours. That ongoing relationship can be enhanced by a restorative justice conference which involves all those parties and enables them to be heard and their concerns acknowledged.

Rebuilding of relationship is arguably essential for New Zealand businesses operating within small communities and in a relatively small commercial world of demand and supply.

In cases where there has been a discharge of contaminants, odour, dust or fumes and where there have been impacts on health and the enjoyment of life, the opportunity for neighbours to articulate those concerns in a proper forum and agree on appropriate measures to prevent a recurrence of them, creates the conditions for rebuilding the relationship. (*ARC v Times Media Group Limited and Anthony Cooke* (DC Auckland CRN 20084004885/889, 16 June 2003, Judge McElrea), *ARC v PVL Proteins Limited* (DC Auckland CRN 2006069001093, 13 August 2007, Judge McElrea) and *Waikato Regional Council v Hamilton City Council and Perry Environmental Limited* (DC Hamilton, CRN 4019500677/686, 1 March 2005, Judge Whiting) are good examples of this).

3. The Opportunity to Restore the Reputation of the Defendant

This benefit is closely linked to the relationship rebuilding benefit but can be particularly important where the defendant is an individual. In *ARC v Times Media Group Limited*

and Anthony Cooke (DC Auckland CRN 20084004885/889, 16 June 2003, Judge McElrea) the Company Director defendant lived in the community. Fronting the community in the conference and making a formal apology both in person and in the local newspaper was very important in restoring his mana within the local community.

4.The Opportunity to Tailor-Make the Solution

A restorative justice conference also provides an opportunity for the defendant and the affected parties to collaborate to tailor make a solution, known as the outcome plan, which will ameliorate the impacts of the offence. These impacts can be on the environment, the local neighbourhood or community and those felt by the local authority. The types of outcome plan which can be designed are wide ranging and the components can be novel. To give you some examples:

- a. In *ARC v Times Media Group Limited*, the neighbours complained of an offensive odour and substantial health effects from a printing plant. In addition to a private and public apology the conference outcome included a payment to ARC for the testing of health factors, tree planting around the site, a donation to the local college for a native tree planting project and a new entrapment device within two months.
- b. In *Waikato Regional Council v PIC New Zealand Limited* (DC Auckland, CRN 405750082/79, 29 November 2004, Judge McElrea) there were two charges for the discharge of pig effluent. The defendant paid cleanup costs and installed new systems. As part of the restorative justice process it also made an apology, paid \$15,000 towards a tree planting project and met the costs of the facilitator and the council. At court it was convicted and discharged.
- c. *Auckland City Council v G B Shaw and B & C Shaw Limited* (DC Auckland, CRN 20050040131612, 2 March 2006, Judge McElrea) involved the felling of a protected pohutukawa tree by a developer for gain. At the conference where the defendant apologised publicly, it was agreed that the defendant would plant a new pohutukawa tree on the

property, pay for an arborist to maintain it for five years under an enforcement order, make a donation of \$20,000 to the community for the purchase of 200 trees for planting in the neighbourhood and contribute to Council's costs. At sentencing the outcome plan was accepted by the judge as a starting point and the recidivist defendant avoided three months imprisonment (in part because of the restorative justice process) but was fined \$80,000. Although the restorative justice conference in this case attracted some adverse publicity and lively public debate the individual defendant was satisfied with the conference where most of the benefits identified in this paper were realised. (It should be noted that whilst restorative justice conferences in this area are not confidential, the level of public interest in this case was both unusual and unprecedented).

5. The Opportunity to Agree on the Outcome for Sentencing

Perhaps from a defendant's perspective the ability to significantly influence sentencing through the outcome plan achieved in a restorative justice conference is the most far reaching benefit. In many of the cases the outcome plan is accepted as the appropriate basis for sentencing without the need for a further fine or other reparation. In several of the cases in which I have been involved, the circumstances of the offending combined with the steps taken by a defendant following a restorative justice conference have been sufficient to enable the defendant to be discharged without conviction (*Manukau City Council v Claxton Tree Services Limited* (DC Auckland, CRN 20006092012322, 3 September 2007, Judge McElrea), *Waikato Regional Council v PIC New Zealand Limited* (DC Auckland, CRN 4057500082/79, 29 November 2004, Judge McElrea), *Waikato Regional Council v Huntly Quarries Ltd* (DC Auckland CRN 2024011394, 30 October 2003, Judge McElrea) and *Auckland City Council v L & L Company* (DC Auckland, CRN 04004502283, 11 April 2005, Judge McElrea)).

In the most recent case in which I have been involved (*Manukau City Council v Specialised Container Services (Auckland) Limited* (DC Auckland, CRN 08092501579, 16 February 2009, Judge McElrea) the defendant used the conference as an opportunity to explain all the steps it had taken and to be taken to deal with dust nuisance on the subject property and another property under its management. It listened to neighbours'

specific concerns and was able to take additional measures such as ongoing consultation and payment of \$1500 compensation for additional car cleaning costs to two neighbouring businesses. The judge commended the defendant for its approach and a discount of 50% from a starting point of a \$40,000 fine was given on the strength of the guilty plea and the restorative justice conference outcome plan. Credit was also given for the cost of the conference.

The way in which restorative conferences can influence sentencing has been set out by Judge McElrea in a recent article for the Criminal Bar Association's magazine, "Acquitalk".³ In essence, the conference process and outcome can show that some of the statutory purposes of sentencing – accountability, deterrence, victims' interests etc - have already been met, and often in a more satisfactory way than traditional court sentences can achieve.⁴

Conclusions

These potential benefits are available to a defendant in each case. Preparation for a restorative justice conference and early consideration of what might be included in an outcome plan is essential to maximise the benefits. A restorative justice conference provides the opportunity for a positive outcome from the offending for all of the parties involved. Especially for corporate defendants, the ability to improve relationships with local Councils, neighbours or community can be just as valuable as the less punitive sentences that usually follow restorative conferences.

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³ Judge McElrea Acquitalk July 2009.

⁴ I would like to acknowledge the encouragement and assistance Judge McElrea gave me with writing this article which he kindly read as a draft and offered feedback on.

⁵ Barrister and Mediator: For further information on restorative justice conferences and a review of some of the cases see <http://www.deborahclapshaw.co.nz>