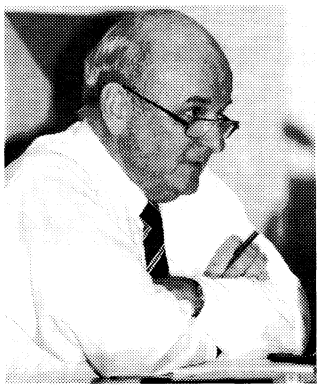
RESTORATIVE JUSTICE

In an address to the AIJA Annual Conference Dinner held in Darwin last month the Chief Justice of the Northern Territory Supreme Court Brian Martin reflected on where the impetus for modern justice originated. He notes that this approach to justice appears to have been working in Aboriginal communities for a long time and suggested to guests, including members of the judicary from Australia and overseas, that it was time we sit up and take notice. His speech is reprinted here in full.

In such a distinguished gathering the question which immediately arises is what could I possibly talk about which would be of even passing interest? But, given where we are, two topics came to mind, the first, mandatory sentencing and the second, recognition of Aboriginal customary law. However, this is hardly the occasion, I think, to dilate upon such controversial matters. I took to surfing the Internet, as I am sure we all do from time to time when stuck for bright ideas, and came across a couple of papers which took my attention. One deals with the theory and practice of sentencing and poses the question as to whether they are on the same wavelength. The author is the honourable E D Bayda, Chief Justice of Saskatchewan and the article is printed in the *Saskatchewan Law Review 1996 Volume 60.* The other is a paper presented at the Restoration for Victims of Crime Conference convened by the Australian Institute of Criminology held in Melbourne in September 1999 by Carmel Benjamin entitled: *Why is victim/offender mediation called restorative justice?* I was then reminded of two fairly recent cases in the Supreme Court of the Northern Territory, one at first instance and the other on appeal. They had to do with sentencing Aboriginal offenders and the role which customary law might play in that undertaking. No, I do not mean spearing in the thigh.

Turning first to Chief Justice Bayda. Included in his wide ranging article is a



Chief Justice Brian Martin

brief description of the background which he asserts needs to be understood if there is to be a change in society's psyche with regard to punishment for criminal offending. Others to whom he refers put it as the infliction of pain as a means of social control. He quotes Professor Zehr (*Changing lenses: A new focus for crime and justice:*) who referred to the long past era when, what we call a crime, was viewed primarily in an interpersonal context much as we would now regard a tort:

> What mattered in the majority of offences was the actual harm done, not the violation of laws or an abstract social or moral order. Such wrongs created obligations and liabilities which had to be made right in some way. The feud was one way of resolving such situations, but so is negotiation, restitution and reconciliation. Victim and offender as well as kin and community played vital roles in this process.

The Chief Justice says that it was only by the 16th century that state justice as opposed to community justice began to establish itself in Europe, with some degree of permanence being encouraged by the Protestant Reformation. It was inclined towards punitive sanctions administered by the state. Reviewing other forms of punishment, including the new mechanisms introduced during the french revolution, his thought turns to why prisons were introduced. Professor Zehr explains:

> Prisons also matched well with evolving sensibilities and needs. Publicity and physical suffering had characterised punishments during the old regime. Absolutist regimes had used brutal, public punishments as a way of making visible their power. New, more popularly based governments had less need for public displays of power as a basis for legitimacy. All over, people were becoming less comfortable with pain and death. Ways of handling death and illness changed, reflecting a need to hide or even deny these hard aspects of life. In that context, prisons provided a way to administer pain in private.

There are striking similarities between the environment in which Chief Justice Bayda works and here. He provides details of the over representation of aboriginal inmates in correctional institutions as a proportion of total population. He poses a practical example. I quote:

> A sentencing judge has before him a 19 year old Aboriginal male convicted of breaking and entering a commercial establishment and committing therein the indictable offence of theft. The offender's record shows three previous B and E convictions, as well as convictions for assault, impaired driving, and breach of probation. It is clear to the judge from the pre sentence report that the young man has no material assets and never has had any. His parents, whom he hardly sees, have no material assets to speak of and have never had any. He has little or no self worth. The terms "honour" and "dignity" somehow seem out of place when applied to him as a possessor of those qualities. His life has been rudderless and totally lacking in motivation. Violence, confrontation, and alcohol predominated his early and later life. He is unemployed and uneducated. His chances of obtaining employment are, frankly speaking, nil or approaching nil. His previous sentences consisted of probation orders and terms of imprisonment.

Now I want to remind you that that is the Chief Justice of Saskatchewan speaking, not me, but the scenario is all too familiar.

The Chief Justice reminds the reader of the factors which shape the public mood about the need for punishment. It holds that offenders are not members of society at all, they need to be dealt with by strict control, infliction of pain is the automatic response; if only the courts would get on with it and sentence offenders to long terms of imprisonment we would end up with a safe and peaceful society. That mood is reflected in other arms of government, and of course in the news media. After all, reporters, sub editors and editors are members of the public and we have all experienced the article written to reinforce a sometimes badly mistaken view taken by some members of the public, and, in effect, to put the judiciary down.

The sentencing guidelines established by statute in that province and the Northern Territory reflect traditional sentencing principles. Amongst them to denounce the conduct, that is to make it clear that the community, acting through the court, does not approve of the sort of conduct in which the offender was involved. It is denounced because those who have worked hard to obtain material goods have the right to have them protected, and the offender who takes goods without consent or damages them must receive a message from the court about our values and how we feel, "when someone stomps on those values".

The message can be sent but will it be received? The offender does not know about work or owning anything, nor do his parents or his friends. He has never experienced the negative feeling of being deprived of ownership and enjoyment of property and thus the question is posed, just how comprehending will the offender be when denounced. If the means of sending the message and ensuring it is received and understood is to punish the offender by putting him in gaol, remember he has spent most of his life in an atmosphere of violence, confrontation and deprivation. Is he likely to receive an affirmative message by the infliction of further pain?

What about deterrence and rehabilitation? As to personal deterrence, what has the offender to lose, nothing. And will sending him to gaol give him any of those things that he has never had, so that when he is discharged he will have something to lose. Not likely.

It is recognised that the law abiding citizen is not the intended target for general deterrence. That message is intended for those who, as we often say, may be inclined to commit offences of that type. But if a term of imprisonment is not the way to persuade a particular offender from committing further offences, does it not follow that sending him to gaol is not going to have much practical effect by persuading others like him not to commit criminal offences of the same type.

By the way, how often have you heard it said that for many offenders gaol is no punishment, but rather a rite of passage, a reward, not as near as painful an experience as it might be for many others. Clean clothes, comfortable bed, three meals a day, health care, television, something to do and at the end of it, some money. What objectives of sentencing are achieved if that be true.

The article proceeds to discuss restorative justice as a viable alternative in some circumstances. But, being closer to home, I turn to Ms Benjamin's paper. The emphasis of the restorative justice model is on the needs of the victim, and holds offenders accountable and responsible for harm they have caused. It calls for increased community involvement with rehabilitation and reintegration of both parties into society. Criminal acts do more than break the law, they also cause harm, and the victim impact statement goes only part of the way towards addressing the needs of the victim and does nothing in respect of those of the community.

I was attracted by the quote attributed

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to a restorative justice worker from New Zealand at the commencement of Ms Benjamin's paper "if you always do what you have always done you are always going to get what you have got". The challenge is clear. The restorative justice model is not rigid and is not of universal application. Its strength is that it is capable of being individualised to the circumstances of the offence and of the offender together with those of the victim, the victim's family and the community. It takes many forms. Mediation is one means which undoubtedly allows a great deal of flexibility. Amongst other examples are those tending to highlight reconciliation and the provision of an alternative to incarceration, restoring to the community the solution of the problem underlying the crime and confronting offenders with the effects of the crime. The victim may come to see the offender as a human being rather than a vague impersonal threat, has the opportunity to receive an apology and exercise the privilege of forgiveness. The mediation process may be more structured, akin to what one might find in settling civil disputes, but may involve more people, such as members of the families on both sides, social workers, teachers, employers and so on. It contrasts with the rigidity of the criminal justice system as we know it, police investigation, prosecution, punishment and correctional services. It challenges the current notion that crime is a public wrong amenable only to state intervention.

None of the proponents of restorative justice are prepared to say that it is appropriate for all kinds of criminal offending, particularly the most serious, nor is it likely to be a panacea in all situations. There are many issues such as admission of guilt, confidentiality, and the point of diversion from the normal criminal justice process, but as Ms Benjamin points out, for restorative justice to become accepted as an effective and respected criminal justice mechanism, it will need to be experienced as a truly inventive, desirable and accountable professional paradigm shift in the minds of decision makers.

You may be aware that it was recently announced that agreement had been reached between the Commonwealth and the Northern Territory to institute diversionary programs from the traditional criminal justice system in respect of juvenile offenders. The details have yet to be worked out and the community will no doubt be most interested in the outcome.

In the meantime I would like to go back to the two cases to which I referred earlier. M was convicted for unlawfully causing bodily harm to her husband. It was the second time she had stabbed him, on both occasions after becoming intoxicated. She and the victim were aboriginal people the victim gave evidence in court. It was that there had been several meetings between the affected community clan groups to discuss the circumstances of the offence and possible resolutions. During the meetings, the offender had to face all the clans and families concerned under distressing conditions. The meetings took place over time. One outcome was that husband and wife both went to live at a dry community, and she overcame her problems with alcohol. I quote from his evidence:

> As far as traditional law is concerned everything has been settled and finished ... if traditional law has resolved this issue why can't balanda law respect this? After all, it is under customary law that my wife and i live and will continue to live. This system has already decided that the issue is finished ... if the prosecution proceeds, not only does it discredit our decision to deal with our own problems according to our cultural law, but she would be tried twice for the same alleged offence. To me, this does not seem fair. Any person not living under customary law would not be subjected to two trials for the same offence.

His reference to two trials was taken as meaning two punishments. The victim's two mothers provided written references to the court confirming the settlement. The pre-sentence report confirmed the meetings, noted that the husband and wife were now reconciled and that they were taking a leading role in religious and other worthwhile activities for the community where they resided. It was held that the offender had accepted obligations which assisted in restoring the peace of the community and had been subject to discipline, a penalty analogous to a good behaviour bond. She was convicted, but released upon her own recognizance to appear before the court if called upon to do so during a period of 18 months from the date she was sentenced (*R V Miyatatawui* (1996) 6 NTLR 44).

The other case also involved violence to the person. Prior to the offence, a fifteen year old child, over whom the offender had parental responsibility, was killed in a drunken brawl. The offender, a traditional Aboriginal man, aged 46, was attending a ceremony for the death of the child when a fight broke out over abusive comments made in aboriginal language by members of another clan. He attempted to stop the fighting, but lost his tempter, took hold of a large machete which he began swinging at two members of the other clan. He caused permanent injury to one of them. He then swung the machete at two police officers, but luckily did not cause injury to either. At first instance there was a suggestion from the community relayed through the offender's counsel, that the offender be dealt with in a traditional manner, but that was not pursued. However, in the court of appeal evidence was called for on the point. The court was properly informed that there had been a reconciliation between the elders of the two affected clans. The victim and his family, and the offender and his family, could now be brought together at a family meeting. At the meeting there would be discussion in the traditional way of bringing the two clans together. The offender and the victim could speak together to seal the peace in front of the other clan members who would witness the talk which would also take place in the presence of a sacred dilly bag. No physical punishment was involved. As an outcome mutual responsibilities would be accepted. The court was told: "When the peace is sealed personally between the two men before their families that is the end of the matter and life goes on as before", *Munungurr V R* (1994) 4 NTLR 63.

Maybe we thought that us balanda were being proper smart when we thought about that restorative justice. It appears that in some Aboriginal communities, at least, it has been working effectively for a long time. It may even have predated the Mennonite church from where the modern restorative justice impetus originated. We should sit up and take notice.