

INSIGHT



ISSUE 005: November 2008 **Craig Langstone & Erynn Tompkins**

Restorative Justice Conferences — what they are & how they work

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As many of you will know, restorative justice is now a regular fixture when it comes to health and safety prosecutions. This article will give you some insight into the restorative justice process in a health and safety context.

So, what is restorative justice? It responds to offending and aims to prevent victimisation and promote healing through facilitated meetings (known as “restorative justice conferences”) between offender and victim. A restorative justice conference provides a forum where an offender can take responsibility for the offending, and the victim can become involved in the process by having a positive and safe environment in which they can ask questions and begin the healing process. Restorative justice has a strong alignment with Maori values such as reconciliation, reciprocity and whanau involvement.

If a company is prosecuted and found (or pleads) guilty, the Court will order the payment of two separate penalties. The first type of penalty is reparation, which may be covered by the company’s statutory liability insurance. Reparation is designed to compensate the victim for emotional harm and any economic loss not covered by ACC.

The second type of penalty is a fine. It is illegal to insure against health and safety fines, so they must always be paid by the company directly. A fine is punitive - i.e, it punishes the party who was convicted. There has been a recent increase in the level of fines ordered, so an insured company can now expect to pay around \$50,000 for a first offence of mild to moderate gravity (this is a live and hotly contested issue awaiting determination at the moment by the NZ Court of Appeal).

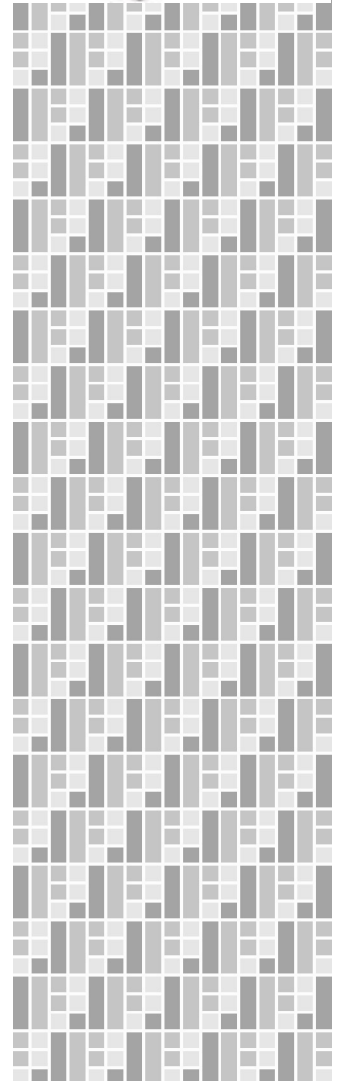
It is interesting to note that it is now common for the insured to have to pay more by way of fine than the insurer has to pay by way of reparation.

Attending a successful restorative justice conference prior to sentencing can affect both the fine and reparation ordered. Before we explain how, it is important to understand how restorative justice conferences work.

By attending a restorative justice conference, a defendant is accepting responsibility for the wrong-doing and any harm it caused their employee (or other victim). A company can only attend a restorative justice conference if it has pleaded guilty and is genuinely remorseful. The Court will never force parties to attend a restorative justice conference - attendance is purely voluntary. But if the victim refuses to attend, the lawyer can tell the Judge that the defendant requested a restorative justice conference but the victim didn’t want to attend. This is looked upon favourably by the Court.

Every restorative justice conference is unique. But generally, the parties that will attend are the victim and their support person (or if a fatality was involved, the deceased’s family); the defendant (if the defendant is a company, then senior management) and their lawyer; any employees who were involved in or witnessed the accident; the DOL inspector and the conference facilitators. A conference can cost up to \$2,500 and is paid for by the company or its insurer. Generally they are paid for by the insurer.

At the conference, the victim will talk about the accident and the effect it has had on them. Then the company will be asked to talk about the accident, and any impact it may have had on its employees. In our experience this is usually a good opportunity for the defendant to accept responsibility for what occurred, show remorse and offer an apology to the victim.



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A face to face apology is important. The victim will then be given an opportunity to ask questions of the company.

Usually the victim's primary concern is not reparation, but what remedial steps the company has taken to ensure the accident cannot re-occur. Up until this point, the victim has almost always had no involvement in the process. This lack of control tends to make victims resentful, and the positive effect of a simple apology is hugely underestimated. In our experience, it is common for a victim to completely change their attitude towards the company after some discussion about what happened, an apology and an expression of remorse. This assists the victim in healing and moving on, which is beneficial for the defendant during sentencing.

Finally, there will be discussion at the conference about how the defendant can right the wrong. This might be taking steps to ensure a similar accident cannot re-occur (e.g. guarding), instigating health and safety procedural changes within the company, making the victim a member of the health and safety committee, erecting a memorial in the case of a fatality, donating to a charity of the victim's choice, performance of any work or service or a payment to the victim.

This part of the process is voluntary. The defendant or its insurer has unfettered discretion about how much, if anything, to offer by way of amends. The victim is not required to accept any offer. If the victim rejects the offer, the fact an offer of amends was made is still a relevant factor to be taken into account by the Court and works in the defendant's favour.

The restorative justice facilitators will report to the Judge about the conference (including a transcript of the more significant dialogue). At the sentencing hearing, the Court will first consider the issue of reparation. The Act requires the Judge to take into account "any outcomes of restorative justice processes that have occurred" when considering reparation. If money has already been paid to the victim, or if an agreement about reparation has been reached, then the Court will usually affirm that amount, rather than order extra reparation. For this reason, any offer of amends made at a conference is usually paid for by the company's insurer.

However, if the Judge believes that the agreed amount was too low and did not provide sufficient compensation for financial loss or emotional harm, then the Court can make an additional reparation order. This rarely happens though.

It is impossible to put a figure on emotional harm, and commonly no amount of money can truly compensate a victim for physical injuries (especially where a fatality is involved). Therefore it is difficult to assess what level of compensation should be offered at restorative justice conferences and whether this will then be "approved" by the Judge. A lawyer experienced in the area of health and safety is in the best position to make this assessment.

After the Court has dealt with reparation, it will then assess the appropriate fine. The Judge must at this point take into account whether the company has accepted responsibility for the offending. Where a restorative justice conference has occurred, the Judge can read about the remorse shown and the apology given to the victim, and how that assisted the victim's healing process. In our experience this carries a lot more weight than a lawyer standing up and telling the Court how remorseful the defendant is, without anything to support it.

Companies that attend restorative justice conferences are less likely to re-offend. The process allows them to gain significant insight into how their offending has affected the victim – we have seen hardened company executives reduced to tears on many occasions – and take ownership of the health and safety improvements they have committed to implementing. And as well, attending a successful restorative justice conference can give you a significant "credit" in both the level of fine and reparation ordered. In our experience the discount in penalty will be well in excess of the costs of the restorative justice conference.

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