

# Restorative Justice and Work-Related Death:

## A Literature Review

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Dr. Derek Brookes

CREATIVE MINISTRIES NETWORK 2008

Legal Services **BOARD**

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**RESTORATIVE JUSTICE AND WORK-RELATED DEATH: A Literature Review**

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Derek Brookes  
September 2008

## Foreword

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This literature review is the first stage of a project funded by the Legal Services Board to consider “Can restorative justice better heal bereaved families and workplace grief after a work-related death, and contribute to improve workplace safety?”

The project has arisen from the Creative Ministries Network’s (CMN) support for family members bereaved by work-related death over more than ten years. Our attempts to support bereaved families led CMN to research the impact of work-related deaths on employers and companies.

The evidence is that families and company directors, managers and workers grieving a traumatic death suffer more prolonged and complicated grief due to delays in legal proceedings, public disclosure of personal information, lack of information, and increased stress from involvement in the prosecution process and coronial and other litigated processes.

CMN acknowledges the important role of these processes, but has been asking ‘how can these be improved or modified to reduce the risk of them causing or exacerbating harm, and/or facilitating the healing of hurt?’

We were then inspired to examine the possibilities for restorative justice because we have seen the deeply human benefits for families and company representatives when a considered restorative practice was carried through.

This literature review aims to clarify the issues that need to be resolved to establish an effective model for restorative justice after a work-related death in Victoria.

The literature review has been practically grounded by the contributions of a Reference Group convened by CMN to support this project.

The literature review presents a number of working hypotheses that will be tested in the next research stage. This will be followed by a round-table with key stakeholders and a Discussion Paper that presents and evaluates the issues at both a theoretical and practical level. It is envisaged the Discussion Paper will also propose a preferred model for the development of a restorative justice service that can respond to the harm caused by work-related deaths.

Creative Ministries Network is an agency of the Uniting Church in Australia’s UnitingCare network.

John Bottomley  
Director  
Creative Ministries Network  
September 2008



## Overview

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This Review aims to explore the feasibility of a restorative justice service in the context of work-related deaths, specifically in Victoria.

**Section 1** provides a brief summary of restorative justice and the kind of processes that are most likely to be used in the context of work-related death.

**Sections 2 and 3** discuss some of the ‘foundational’ questions that are likely to be raised in this context.

- Section 2 raises an issue that is similar to the problem of whether it is fair or reasonable to assign personal criminal liability for corporate fault. Work-related death is often treated as a consequence of ‘system failures’, rather than individual misconduct. In such cases, who would take responsibility for what happened? Who would apologise? What would they be apologising *for*? How would they benefit, and what might they risk?
- Section 3 looks at what it is that restorative justice can offer a bereaved family. The life of their loved one cannot be ‘restored’; and they already have access to a range of support services, grief counselling, financial compensation, and so on. Perhaps some of these are not meeting the relevant needs of those concerned; but the solution, in that case, would be to reform or expand the existing services, rather than create another. What then, are the distinctive benefits that restorative justice can provide?

There are good reasons to address these questions here. The proposal to use restorative justice for work-related deaths is relatively new and highly sensitive. For many, it is profoundly challenging. These questions raise complexities that do not arise in quite the same way elsewhere. It seems appropriate, then, to consider them in some depth, from the outset.

There is, in the literature, a range of suggestions as to how restorative justice *could* be used in the context of work-related death. **Section 4** will attempt to present this array of potential applications – informed by real cases wherever possible.

One way of narrowing down the available options is to bring them before the bar of what is practically feasible. **Section 5** will therefore present a brief proposal regarding what may be the most effective and efficient strategy or model, in terms of developing a pilot restorative justice service in this area.

Finally, this Literature Review is only the first step in a wider project. The aim is to follow this Review with a consultation process that involves all the key stakeholders. **Section 6** thus seeks to offer some preliminary guidance as to the main objectives for such a consultation, and the kind of groups that should be involved.

## 1. Restorative Justice

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This Section provides a brief introduction to restorative justice and the kinds of processes that might be involved in the context of work-related death. Section 3 aims to provide a more in-depth discussion on the nature of restorative justice.

### Restorative Justice Signposts

The term ‘restorative justice’ has several contested definitions. However, the following list provides useful ‘signposts’ or indicators that suggest what it might mean to do justice in a restorative way:<sup>1</sup>

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**Justice is done restoratively when we . . .**

- **Focus on the harms done, rather than the laws broken.**
  - **Show equal concern and commitment to those harmed and to those responsible for the harm, involving both in the process of justice.**
  - **Work toward the restoration of those harmed, empowering them and responding to their needs as they see them.**
  - **Support those responsible for causing harm, encouraging them to understand, accept and carry out their obligation to repair the harm and make amends.**
  - **Recognise that while such obligations may be difficult, they should not be intended as punishment and they must be achievable.**
  - **Provide opportunities for dialogue, direct or indirect, between all those directly involved or affected, as and when appropriate.**
  - **Find meaningful ways to involve the community and to respond to community attitudes and feelings about the incident.**
  - **Encourage collaboration and reintegration rather than coercion and isolation.**
  - **Give attention to the unintended consequences of our actions and programmes.**
  - **Show respect to those who have been harmed, those responsible for the harm, and justice colleagues.**
- 

*Crime wounds . . . Justice heals*

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<sup>1</sup> This list is adapted from Mika, H., and Zehr, H. (1997) *Restorative Justice Signposts (Bookmark)*. Akron, PA: Mennonite Central Committee and MCC U.S..



## Restorative Justice Processes

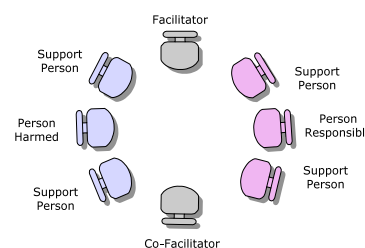
A Restorative justice **process** is any process in which relevant individuals participate together actively in the resolution of matters arising from an incident that has caused harm, generally with the help of one or two facilitators. To ensure the safety and effectiveness of the process, no meeting is held without the facilitator preparing all participants in advance. Restorative justice processes are designed to enable participants to explore, in a safe and structured way, the following three topics:

<b>1. FACTS</b>	What happened and why;
<b>2. CONSEQUENCES</b>	How people were harmed or affected;
<b>3. FUTURE</b>	What plans or agreements will meet the needs of all concerned, including the prevention of similar incidents.

Restorative justice processes fall into three broad categories, dependent on the kind of communication (if any) that takes place. The following are processes that are most likely to be applicable in the context of work-related death.

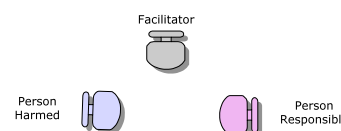
### Direct Communication:

**Restorative Justice Conferences (RJC)** are meetings in which those directly involved can invite support persons to attend (e.g. family members, counsellors, friends). This process is normally used where the incident has caused significant harm to individual(s), and where support people play an important role in generating a positive outcome.

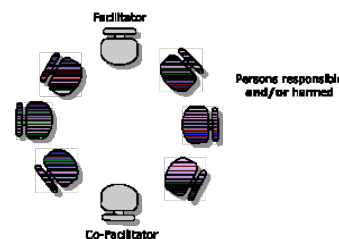


**Restorative Justice Group Conferences (RJGC)** differ from RJs in only one respect. In an RJC, the group remains together as they consider reparation or an action plan. In an RJGC, the person responsible and his or her 'support group' meet privately to come up with a plan, which is then brought back to the main group to be finalised.

**Face to Face Meetings** are attended only by those directly involved. They are used where support people would be unnecessary or unhelpful.

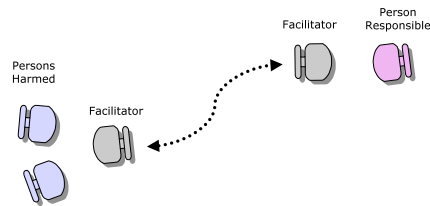


**Restorative Justice Circles** can be led by one or two facilitators and differ from conferencing insofar as speaking turns are democratically distributed by the use of a 'talking object': that is, an object (stick, feather, ball, stone, etc.) is passed around and only the person holding the object is permitted to speak.



**Indirect Communication:**

**Shuttle Dialogue** involves the facilitator acting as a ‘go-between’ to enable those directly involved to have a constructive dialogue. It is used where either cannot or does not wish to meet the other.

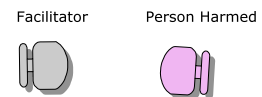


**RJCs (with PH representative)** and **RJGCs (with PH representative)** are conferences in which the person directly harmed does not attend the meetings themselves. Instead, they select a representative – usually a family member or friend – who can communicate their views and perspective in the meeting, including how the crime has affected them personally. This can be done by reading out a letter or statement written by the person harmed.

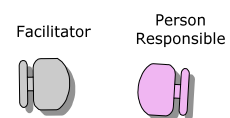
**No Communication:**

**RJCs (with PH surrogate)** and **RJGCs (with PH surrogate)** are conferences in which the person directly harmed does not attend, usually because they cannot be contacted or do not wish to have any communication with the person responsible. The person harmed is represented by someone who has experienced the same type of crime as the person harmed, and who is willing and able to communicate to the person responsible the impact of that type of crime.

**Support for Persons Harmed** involves only the person harmed in one-to-one or group meetings with a facilitator. It aims to help them talk about their experience, discuss strategies for recovery and gain access to other support services. The process is used only if no person responsible has been identified, or the person harmed doesn't want to communicate with the person responsible in any way.



**Victim Awareness** programmes involve only the person responsible in one-to-one or group sessions with a facilitator. It aims to enable them to understand the impact of their actions, and take responsibility in whatever way possible. It is used only where the person harmed cannot be contacted or does not want to communicate with the person responsible.



## 2. Who will take responsibility?

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Whilst there is considerable flexibility in how restorative justice processes are implemented, there are a number of essential or core elements. For example, a case becomes eligible for restorative justice only when (1) an individual is charged, found guilty or accused of a criminal offence or wrongdoing; (2) this person admits to what they have done; and (3) they agree to take responsibility for their actions in a restorative justice process. The context of work-related death creates a unique and significant barrier to these three criteria. First, individuals are rarely charged or found guilty of work-place fatalities, particularly in large companies; second, admissions of responsibility in this context are often plagued by moral uncertainty, complexity and sensitivity, not to mention legal risks. Would it make sense to take responsibility for an outcome that was not intended, desired, planned or foreseen? What would be the moral and legal implications of doing so, particularly when the outcome in question is a fatality? The aim of this section is to review these problems in detail, and then propose possible solutions.

### Personal vs. Corporate liability

In many cases of work-related death, it is the company or corporation that will be held criminally liable, not any individual. This is largely due to the well-known obstacles that lie in the way of imposing personal liability on individual managers and employers for corporate wrongs. In large companies, the decisions that ultimately lead to a work-related death are normally distributed over a wide range of individuals, at different levels in the corporate hierarchy. The company can therefore argue that it would be unreasonable and unfair to hold any one individual criminally liable: the fault may lie at the level of 'system failure' rather than the misconduct of any individual, no matter how senior.

Various attempts have been made to make directors and CEOs personally liable as the 'controlling mind' of their companies. But in larger companies, it can be extremely difficult to prove a requisite link between the decisions of any individual and the death in question.<sup>1</sup>

"It is almost impossible to establish that top people in large corporations are at fault when things go wrong at a particular site. Directors may reside in a distant metropolis and are probably unfamiliar with the technical details of the operations under their control. CEOs and directors can be expected to be diligent about setting up a safety management system and ensuring to the best of their abilities that it is working, but assuming they have carried out these obligations, they can hardly be held to be personally at fault when things go wrong at a particular site."<sup>2</sup>

<sup>1</sup> Cf. "[L]egal systems have considerable difficulty in tracing decision-making from the board-room to the scene of the accident or disaster and in making an explicit link between corporate policy and violent consequences." Punch, M. (2000) "Suite violence: Why managers murder and corporations kill" *Crime, Law & Social Change* 33: 243–280: pp. 272-73.

<sup>2</sup> Hopkins, A. (2006) "Holding Corporate Leaders Responsible" (Working Paper 48), National Research Centre for OHS Regulation, Australian National University, August: p. 3.

Consequently, an employer in Australia is most likely to incur personal liability when they are individually and *entirely* responsible for the offence.

“Current legislation holds individuals liable for corporate fault only if they were themselves individually at fault in some way, for example, by failing to exercise due diligence. The state of NSW has been more active than others in prosecuting directors who were personally at fault, but a recent study by Foster has shown that nearly all these cases involved very small companies – small family concerns or even one-person companies – and that in nearly all cases the director was personally involved in the incident. In an important sense, these are not cases in which a director has contributed to an offence by a corporation, but rather, cases in which the offence is wholly and solely attributable to the director.”<sup>1</sup>

Restorative justice assumes that at least one individual was, in some way, personally responsible for causing harm: it cannot proceed without someone accepting that they have wronged another. So how could a restorative justice service be applied where no individuals are found to be criminally liable? Who would ‘take responsibility’ for what happened? Would an apology even be appropriate? What, after all, would they be apologising *for*?

One solution would be to restrict restorative justice to small businesses, one-person companies, or cases where personal liability can be proven by law. But this would be an unnecessary limitation. I will argue that restorative justice is the kind of process that can avoid the obstacles that stand in the way of attributing personal criminal liability in a corporate context: in other words, it can be applied to work-related death regardless of the size of the company concerned and whether or not individuals have (or could be) found criminally liable.

### The Meanings of ‘Responsibility’

When a work-related death occurs, most employers and workers will instinctively shy away from any suggestion that they might have been ‘responsible’. One barrier to this acceptance is a lack of clarity about the ways in which someone can be said to be ‘responsible’. If, for example, they assume that ‘taking personal responsibility’ in the context of fatality would be equivalent to admitting to murder or manslaughter, then it is hardly surprising that they might be reluctant to step forward. Yet restorative justice cannot proceed unless individuals are willing to take responsibility for their part in what happened: it is the underlying premise upon which any restorative justice process is based. So it is crucial that we clarify – so far as we can – what it might mean to ‘take responsibility’ in this kind of context.

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<sup>1</sup> Hopkins 2006: p. 3.

To begin, we need to distinguish between four basic types of responsibility: that is, *Causal, Personal, Retrospective* and *Prospective*.<sup>1</sup> I will take each in turn:

## 1. Causal Responsibility

When we say that someone was ‘responsible for what happened’, at least part of what we mean is that ‘they acted in some way so as to cause it or bring it about’.<sup>2</sup> We are, in other words, ascribing causal responsibility.

When we need to be more precise about the extent to which a person is causally responsible, we can use a variety of qualifiers.

First, there is the **proximity** of the person in relation to the outcome: a person can be *directly* or *indirectly* responsible for something depending on how they were situated. For example, James is directly responsible for the goal if James is the one who kicked the ball into the net. Bill is indirectly responsible because he passed the ball to James in such a way as to make it possible for James to score the goal.

Second, there is the **contribution** that the person made to the outcome: someone can be *entirely* or *partially* responsible for causing something to happen, depending on how much of a role they played. For example, we might say that James was entirely responsible for having kicked the ball into the net, but only partially responsible for the team winning the match. Indeed, we might say that each player is entirely responsible for any action that they themselves performed, but only partially responsible for the team’s overall success.

Third, there are **acts of omission**: there are situations in which we could have prevented the outcome, but chose not to do so. For example, suppose a manager wrongly accuses a work colleague and you are the only independent witness. You could defend them, but you keep silent, perhaps fearing the backlash. In such a case, you might want to argue that you did not *actively* cause the damage and hurt experienced by your colleague. But it is clear that you played a significant role insofar as you could have prevented the harm that was done. In terms of causation, you are therefore partially responsible for what ultimately happened.<sup>3</sup>

<sup>1</sup> A similar four-fold distinction is made in Cane, P. (2002) *Responsibility in Law and Morality* Oxford: Hart Publishing: p. 57.

<sup>2</sup> Cf. “The criterion of causal responsibility, as I interpret it, is quite weak: it requires only that one be a cause of an outcome in the sense that the outcome would not have happened but for one’s act or omission. To say that a person is a cause merely connects his or her action with the outcome - along with the action of many other hands and the influence of many other forces. It does not establish that the person is the most important cause or even an agent on whom we should pin responsibility at all. If we wish to select an individual from among all the other causal factors in this ‘cone of causation,’ we have to invoke other moral and political considerations, chiefly the importance of the outcome in question and the formal and informal expectations of the individual’s official role. . . . unless an official’s action is at least a causal factor of an outcome, it is hard to see why the question should arise of holding that official, rather than anyone or everyone else, responsible for it.” Thompson, D. F. (1980) “Moral Responsibility of Public Officials: The Problem of Many Hands”, *The American Political Science Review*, Vol. 74, No. 4, (Dec.), pp. 905-916: p. 908.

<sup>3</sup> The degree of responsibility here also depends on our capacity to have prevented the harm in question. The more able we were, the more responsible. “[T]hose who do not protest against an unjust policy are normally thought to be more responsible for it than those who do protest; and among those who do not protest, those who have greater resources with which to influence the policy are more responsible than those with fewer such resources. . . . responsibility for a policy depends in part on the contribution an individual actually made, or could have made, to the policy.” Thompson, 1980: p. 907-08.

## 2. Personal Responsibility

We might say that ‘the tree was responsible for bringing down the power lines’, but this is merely a causal ascription. Likewise, our actions and decisions may have *caused* an outcome, but that does not mean that we *wanted* or *planned* for it to happen. This suggests that there is a second kind of responsibility, one that locates the causal source of an outcome in our choices, desires and intentions. It is the kind of responsibility that makes us ‘agents’ or ‘persons’ rather than inanimate objects. We are responsible, in *this* sense, to the extent that, by our choices, we are able to “influence the course of events and to achieve things in the world.”<sup>1</sup> We might therefore call this ‘personal responsibility’.

There are several ways in which we can be personally responsible for an outcome.

First, our actions can be **intentional**: This is where we ‘want’ or ‘plan for’ something to happen, and so act accordingly. The outcome is, in this sense, premeditated, deliberate, calculated, or purposeful.

Second, our actions can be **reckless**: This happens when *we can foresee* that our behaviour could easily lead to another person being harmed, injured or even killed, but we decide to go ahead anyway. We may not have *planned* or *wanted* them to be harmed or injured. We may be shocked and deeply saddened by such an outcome. But we nevertheless chose to act with indifference to the impact on others. The outcome is therefore something for which we are personally responsible.

It might be difficult to imagine how otherwise good people, employers with no ill intentions, could act with such disregard for the well being of others. But a useful analogy can be found in the psychological ‘inducements’ of gambling:

“[M]anagers in failing firms behave like losing gamblers who do their wildest betting when they realise that there is a real chance of going broke. The more they lose, the wilder they bet. This is because when failure is perceived to be a real possibility, managers have little to lose and may take high risk decisions that make matters worse.”<sup>2</sup>

Third, our behaviour can be **negligent**: This happens when *we should have foreseen* the harmful consequences of our actions, *but did not*. Consequently, we did not prevent what would otherwise have been entirely avoidable.<sup>3</sup> The crucial point here is not that we *did* foresee the outcome: that would be recklessness. It is rather that

<sup>1</sup> “[The function of personal responsibility ascriptions is] to allocate ‘ownership’ of conduct and outcomes. This ownership function contributes to the formation and maintenance of our identities as individuals, and to our sense of being able to influence the course of events and to achieve things in the world.” Cane, 2002: p. 57.

<sup>2</sup> Mellahi, K. (2005) ‘The Dynamics of Boards of Directors in Failing Organizations’ 38 *Long Range Planning*: p. 264. Quoted in Hall, K. (2006) “The psychology of corporate dishonesty”, *Australian Journal of Corporate Law* 19 AJCL No 3: p. 4.

<sup>3</sup> Some have argued that there is no difference between recklessness and negligence, but rather that there can be objective or subjective forms of either: in other words, recklessness and negligence are objective when the harm is *actually* foreseen, and subjective when it *should* have been foreseen by any reasonable person in the same situation. (See, e.g. Gobert, J. (1994) “Corporate Criminality - Four Models of Fault”, 14 *Legal Stud.* 393-410: p. 405). For the purposes of this paper, this distinction will be the defining difference between recklessness (objective) and negligence (subjective).

any reasonable person in the same situation would have been able to foresee the outcome. Again, we might never have wanted or planned for someone to have been injured or killed. But if, for whatever reason, we chose a course of action without first exploring the likely consequences, then we are, to some extent, personally responsible for the outcome. We might want to argue that we tried to think things through, but were too inexperienced or lacked the requisite expertise. But if these inadequacies were evident to us from the outset, then the excuse dissolves: any reasonable person in the same situation would have acknowledged their limitations and consulted with others before deciding to act.<sup>1</sup>

Negligence does not assume that we are capable of *specific* or *perfect* foresight: a manager, for instance, might want to argue that there was no way that he or she could have foreseen that a particular worker would have been killed in the specific way that they were. However, negligence assumes only that an experienced and competent manager should be able to predict, *with a sufficient degree of probability, that certain kinds of events will occur under certain types of conditions*:

“To reject a plea of ignorance, we do not have to show that an official should have foreseen the specific act of some particular official (for example, that an aide would misinterpret an order in exactly this way). It is sufficient that the official should have realized that mistakes of the kind that occurred were likely. In bureaucracies, certain patterns of fault are common enough that we should expect any competent official to anticipate them and to take reasonable precautions to avoid them or at least to minimize their harmful consequences. [For example:] When a superior puts great pressure on subordinates to produce results and gives the impression that questionable practices to achieve these results will be condoned . . . then the blame falls at least equally on the superior.”<sup>2</sup>

Fourth, we can act with **gross negligence**: This is where our failure to foresee is intentional, calculated or purposeful. It is a kind of ‘wilful ignorance’. For this reason, the degree of personal responsibility that applies here is virtually equivalent to intentional action – particularly where the negligence in question results in a death.<sup>3</sup> Gross negligence is where we deliberately avoid the reality of a situation: for example, a senior officer might ensure that OHS policies have been written, suspect

<sup>1</sup> For example: “There was insufficient ability and independence of mind in and associated with the organisation to see what had to be done and what had to be stopped and avoided. Risks were not properly identified and managed. Unpleasant information was filtered and sanitised. And there was a lack of skeptical questioning and analysis when and where it mattered.” *The Failure of HIH Insurance Vol 1: A Corporate Collapse and its Lessons*, Commonwealth of Australia, 2003, p 108. Quoted in Hall, 2006: p. 4.

<sup>2</sup> Thompson, 1980: p. 913. This is not to suggest that ignorance is never a good excuse: “An official who admittedly contributes to an objectionable outcome may seek to excuse the contribution by claiming that he or she did not know, and should not have been expected to know, that other officials had acted wrongly or would act wrongly. When as UN Ambassador in 1961 Adlai Stevenson stated that the U.S. did not have anything to do with the invasion of Cuba, he could not have been expected to realize that his statement was false, and therefore escapes responsibility for any wrong that was committed . . . Whether Stevenson should have been told is another matter, but ambassadors, spokespersons and others in similar roles have to trust that they are being told the truth, or at least that they are being told everything they need to know about governmental activities within their purview.” Thompson, 1980: p. 912.

<sup>3</sup> This is recognised in English criminal law, which assumes that “for offences of any seriousness, the appropriate fault requirements are intention and recklessness, and therefore that advertence is needed. But English law departs from this principle in respect of homicide, presumably because the causing of death is so tragic an event that liability for inadvertent killing is thought appropriate when there is a high degree of inadvertent fault (gross negligence).” Ashworth, A. (2008) “‘Manslaughter’: Generic or Nominat Offences?” in Clarkson, C. and Cunningham, S., (2008) eds. *Criminal Liability for Non-Aggressive Death*, Ashgate Publishing Ltd.: p. 236.

that breaches of safety are nevertheless occurring, and yet never look into it – knowing that he or she would have to do take expensive or embarrassing corrective action if the suspicion was confirmed.<sup>1</sup>

Again, it might be hard to conceive of employers acting in such a way, when they are otherwise well intentioned toward their employees and customers. But there are plausible psychological explanations for this kind of behaviour. For example, if we are already committed to a particular decision, policy or action, this can lead to deliberate attempts either to avoid or block information that might undermine or challenge that commitment:

“[O]nce we commit to a decision or course of action, there is a tendency to defend that outcome. In particular, we are likely to compile information that supports that decision and minimise information that contradicts it. We can also be reluctant to stop what we have begun and can even try unrealistically to make it work.”<sup>2</sup>

To give another pertinent example: directors and senior management face an unavoidable conflict between managing health and safety and other key obligations: that is, (1) ensuring that the company carries out its core work, which could be intrinsically dangerous (compare the relative risks of mining to operating a call centre); (2) a range of other employment laws, including discrimination on the basis of pregnancy<sup>3</sup> or disability<sup>4</sup>, and anti-competitiveness laws; and (3) competitiveness within the market, including shareholder demands for increased profit.<sup>5</sup> In other words, health and safety does not operate in a vacuum. There are always competing responsibilities and pressures, and finding a manageable balance can be extremely complex. Unfortunately, there can be a tendency, especially under pressure, for the mind to swing towards meeting one obligation, not by conducting a process of careful and creative problem-solving but rather by employing a less admirable set of cognitive strategies:

“Negative or inconsistent information is often ignored, rationalised away or forgotten. . . . [T]his is a commonly observed phenomenon in the corporate context. . . . [B]oards regularly screen out negative information or fail to appreciate its significance.”<sup>6</sup>

<sup>1</sup> “[A]n official may sometimes be excused for consequences of a decision when he or she could not be expected to foresee the wrongs that other officials would commit in implementing the decision. . . . Such an excuse will not work when officials are the instruments of their own ignorance. They may, for example, encourage subordinates not to tell them about certain possibly objectionable plans so that they can deny knowledge of the plans if they go awry. Or officials may elicit misleading information from subordinates by indicating, sometimes unwittingly, what kind of conclusions they wish to hear.” Thompson, 1980: p. 912-13.

<sup>2</sup> Hall, 2006: p. 4.

<sup>3</sup> Randall, D. and Baker, D. (1994) “The Threat of Legal Liability and Managerial Decision Making: Regulation of Reproductive Health in the Workplace”, in Sitkin, S. and Beis, R. (1994), eds. *The Legalistic Organization*, Thousand Oaks, Calif.: Sage.

<sup>4</sup> Daniels, N. (2003) “Chevron v Echazabal: Protection, Opportunity and Paternalism,” *American Journal of Public Health* 93(4): 545-48.

<sup>5</sup> “[I]f directors risk personal liability for breaches incurred by the corporation, irrespective of the directors’ culpability, they . . . may become overly concerned with compliance issues and processes rather than wealth creation.” Corporations and Markets Advisory Committee (CAMAC), *Personal Liability for Corporate Fault*, Sydney, 2006: p. 1.

<[http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/Personal\\_Liability\\_for\\_Corporate\\_Fault.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/Personal_Liability_for_Corporate_Fault.pdf)> accessed July 22, 2008.

<sup>6</sup> Hall, 2006: p. 4.



One example of ‘screening out negative information’ in the face of conflicting obligations can be found in a recent newspaper article on the Beaconsfield mining tragedy that killed miner Larry Knight. In the article, one of the employees – Mr Webb – gave the following explanation as to why his concerns about safety were not heeded by mine management:

“You just got the deaf ear,” he said. He said miners were regularly told about the mine's financial trouble. ‘Most of the meetings . . . all they said was ‘we will pay you more money to get more ore because we are under the pump from Macquarie Bank’,” Mr Webb alleged.<sup>1</sup>

To conclude this section on personal responsibility:

One of the reasons why the distinctions above are so helpful in this context is that they challenge the perception that ‘being responsible for a work-related death’ *can only mean* that one is *entirely* and *directly* responsible for having *deliberately* caused the death of a work colleague. As we have seen, this is simply not the case. We can also be, to some extent, personally responsible for an outcome even if we had no intention or desire whatsoever that it should occur. Our contribution may instead have been to take part in a complex lineage of decision-making that involved varying degrees of recklessness or negligence. As Punch notes:

“It is perhaps difficult to imagine that a managerial board of a legitimate company would fully consciously take a decision that would directly lead to the avoidable death and suffering of multiple victims. . . . [H]arm is probably more often a matter of incompetence, negligence, poor communication, faulty judgement, and so on (and which, in turn, may be related to organizational variables such as quality of management, culture, control, auditing, relation to regulators, etc.); and a sophisticated company, with extensive control mechanisms . . . can react to powerful production processes by incrementally, and imperceptibly, building in a greater level of risk than anyone fully realizes.”<sup>2</sup>

Likewise, there may have been many others involved in bringing about the fatality, in which case we are *partially* responsible. We may have been nowhere near the incident at the time, but we might have played a role in creating the conditions in which it could (and was likely to) occur; so our responsibility would be *indirect*. Finally, it may be that we had some opportunity – however slight – to prevent what happened, but we chose not to do so, so we are responsible for this *act of omission*.

It is not difficult to see how this kind of (mis)perception about the nature of responsibility might arise. It is not always a matter of denial or dishonesty. It can be genuinely difficult to identify an incident in which we have wronged another individual. This is largely because we are thinking of responsibility in its most simplistic sense: that is, being entirely and directly responsible for having deliberately caused the wrongdoing in question. But such acts are quite rare, at least

<sup>1</sup> Darby, A. (2008) “Mine rockfall 12 hours before killer cave-in” *The Age*, July 25. <<http://www.theage.com.au/national/mine-rockfall-12-hours-before-killer-cavein-20080724-3kjo.html?page=2>> accessed July 25, 2008

<sup>2</sup> Punch, 2000: p. 251-52.

amongst the general populous. However, once we broaden out the concept of personal responsibility to allow for acts of recklessness, negligence and gross negligence and then include indirect responsibility, partial responsibility and acts of omission, the field opens up considerably. This is particularly relevant to ascriptions of responsibility within a workplace. As Gobert argues:

“It would be strange to discover the formal articulation of a policy requiring workers to behave in a manner which would create an increased risk to innocent lives. More likely . . . a company’s express policy will be to forbid potentially harmful practices. But corporate ethos is discernible in many ways. If pay raises are tied to increased productivity, if the budget of departments whose concern is safety is the first to be cut, and if profitability is the ever stressed bottom line, the formal policy which articulates a concern with safety will be seen by workers as the window dressing that it is.”<sup>1</sup>

### 3. Retrospective Responsibility

When we ascribe personal responsibility, we are identifying *who* was involved in bringing about some outcome and *the part they played*. But once this has been established a second issue immediately arises. Part of what it means to be ‘persons’ or agents with free will is that we are liable or accountable for what we have done or failed to do. Put another way, if we are personally responsible for something, then we are answerable for it. This kind of ‘answerability’ is entirely backward looking. It arises after the event, and so we will call this **retrospective responsibility**.<sup>2</sup>

There are a number of clarifications that we need to make in order to better understand this kind of responsibility.

#### a. The Relationship between Retrospective and Prospective Responsibilities

There are responsibilities or duties that we have in advance, before we act. For example, employers have a responsibility to provide a safe workplace, and we all have a responsibility not to harm others. These are called **prospective responsibilities**. We will consider these in more detail in the next section, but for now it will be helpful to clarify the relationship between prospective and retrospective responsibility.

First, retrospective responsibility *depends upon* prospective responsibilities: we cannot be answerable for failing to meet duties or obligations that do not exist. I cannot be held responsible for breaking a promise that I never made. Second, they have to be *our* obligations if we are to be answerable for them. I can be held accountable for not having made sure the fire exits were unblocked only insofar as I was responsible for carrying out this particular task.<sup>3</sup>

<sup>1</sup> Gobert, 1994: p. 402.

<sup>2</sup> Cane calls this ‘historical responsibility’. Cane, 2002: p. 31ff.

<sup>3</sup> “[O]ur prospective responsibilities help determine our retrospective responsibilities: we hold a parent retrospectively responsible for her child’s truancy only insofar as it was her prospective responsibility to ensure that he attended school.” Duff,

Third, retrospective responsibilities, when activated, can *reinforce* our prospective responsibilities. For example, when employers know that there is a good chance that they will never be brought to account for violating their OHS duties, then, for some, this will mean these duties need not be taken seriously. For others, their sense of identity is so bound up with the fulfillment of their prospective responsibilities that the threat of being held to account does not function as a significant deterrent.<sup>1</sup>

Finally, it might be said that wrongdoing *creates* certain duties or obligations. For example, if I have stolen your car, I now have an obligation to you to make amends for the harm I have caused. If I have also been ordered by a court to pay a fine or do community service, I have a responsibility to carry out these sanctions as well. We *could* call these 'new prospective responsibilities'<sup>2</sup>, but that would muddle the very distinction we have made between prospective and retrospective responsibility. Paying a fine and making amends are different from all our other duties and obligations in that they are *ways of being accountable for a past wrong*. They specify *what is involved* in being answerable or accountable for our actions. It is by fulfilling such duties and obligations that we can *acquit* our retrospective responsibility. In short, *the duties and obligations that we have as a consequence of what we have done or failed to do* are precisely what is being referred to by the term 'retrospective responsibilities'.

#### b. What are we responsible for - and to whom?

There are two basic ways in which retrospective responsibility can be realized. First, our actions can receive evaluative judgments, whether from others or ourselves. Our actions can be extolled or deplored, praised or censured, commended or condemned, and so on. Second, these judgments can be *expressed* through certain reactions. For example, some would argue that censure and denunciation are most effectively conveyed by **punishing** those who do wrong. Others would argue that the appropriate reaction to wrongdoing is to make amends or **repair the harm**.

One helpful way of clarifying the distinction between reactions like punishment and reparation is to treat them as each having a different focus. On the reparative view, the focus is **relational**, in the sense of being victim-orientated. If I have caused someone harm, then I am responsible *to* that individual *for* the specific harm they have experienced. The punitive view focuses more on our **conduct**, in the sense of being rule- or law-orientated.<sup>3</sup> Under a liberal democracy, if my actions break a law,

A. (2005) "Who is Responsible, for What, to Whom?" *Ohio State Journal Of Criminal Law* 2: 44: p. 443. "Historic [i.e. retrospective] responsibility finds its role and meaning only in responding to non-fulfilment of prospective responsibilities and in this sense, it is subsidiary and parasitic." Cane, 2002: p. 35.

<sup>1</sup> "[I]mposition of historic responsibility may play a role in maximising compliance with prospective responsibilities. 'Deterrence' is generally recognised to be an important function of the imposition of historic responsibility. But in a well-functioning legal system, most people will comply with their prospective responsibilities most of the time regardless of the possibility of imposition of historic responsibility for non-compliance." Cane, 2002: p. 35.

<sup>2</sup> As Duff does in the following: "[I]f I am held criminally liable for a past crime, I will probably acquire new prospective responsibilities: to pay a fine, for instance, or to carry out the prescribed Community Service." Duff, 2005: p. 443.

<sup>3</sup> This is not to suggest that consequences are of no importance in conduct-focused responsibility, only that they are, *in general*, secondary when it comes to determining the appropriate response. Cane provides a list of over-laps: "There are 'result crimes' as well as 'conduct crimes'. The *actus reus* of the typical crime includes a reference to the impact of the criminal conduct on the victim. As a general rule, the more serious the harm resulting from criminal conduct, the more serious the crime. Completed crimes may be punished more severely than attempts, and victimless crimes may be controversial precisely because they

then I am answerable to ‘the polity’ or ‘my fellow-citizens’ for having violated the shared values that are embodied in that law, on account of which they agreed to create and enforce such a law.<sup>1</sup> Cane argues that this distinction forms the basis for the differences between civil and criminal law:

“The nature and quality of outcomes and their impact on the victim are central to the civil law paradigm because it is only by paying attention to them that we can give an adequate account of, and justification for, victim-oriented remedies [or ‘obligations of repair’]. Conversely, agent-conduct is the focus of criminal law because penalties and punishments are its main sanctions.”<sup>2</sup>

This relational-conduct distinction holds equally between restorative justice and the criminal law. It is particularly useful as a way of explaining why punishment is so ill suited to a restorative justice context. Restorative justice is not, however, equivalent to the civil law paradigm. To show why this is so, we need to distinguish between the kind of retrospective responsibility that is passive and that which is active.<sup>3</sup>

### c. Passive vs. Active Retrospective Responsibility

**Passive** responsibility is what happens when a legitimate authority ‘holds someone responsible’ for their wrongdoing. It is acquitted when the authority establishes the offender’s guilt and imposes upon them a fair and proportionate response (e.g. punishment, reparation, a rehabilitative program, etc.).

**Active** responsibility is what happens when a person ‘takes responsibility’ for their wrongdoing. It is acquitted when they acknowledge what they have done, sincerely apologise, express their remorse, make amends for the harm they have caused and take steps to ensure that it doesn’t happen again.

Restorative justice is quintessentially about the offender taking (active) responsibility, whereas both the criminal and civil law paradigms are concerned primarily with ensuring that the offender is held (passively) responsible. The ideal for restorative justice, then, is that individuals choose to ‘step forward’, without coercion or manipulation, in order to take (active) responsibility. Thus, even if an individual were prosecuted or sued (‘held responsible’), it would not follow that they are suitable for restorative justice. They might still refuse to *acknowledge* that they were responsible. Again, they might even accept the finding of guilt, but *show no remorse* for their part in what happened.

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offend the ‘harm principle’, which is deeply embedded in widely-accepted liberal ideas about the proper scope of the criminal law.” Cane, 2002: p. 50.

<sup>1</sup> “A liberal democracy’s law is a ‘common’ law, in the sense that it is the citizens’ own law, as distinct from one imposed on subjects by a sovereign: it claims to speak in terms of the shared values of their polity, as a law that they make for, and impose on, themselves. From this perspective, I am answerable for my (alleged crimes) to my fellow citizens, since it is our law, and the values embodied in that law, that I have violated. I am called to answer by and in a criminal court: but the court claims to speak and act in the name of the citizens.” Duff, 2005: p. 460.

<sup>2</sup> Cane, 2002: p. 50.

<sup>3</sup> The source for this distinction is Boven, M. (1998) *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations*, CUP.

One might ask: What is the point of passive responsibility if it neither requires nor assumes that an offender has *taken* responsibility? This is a critical question, given that restorative justice advocates often critique the criminal justice system on the grounds that it does nothing to encourage offenders to take responsibility and much to dissuade them from doing so. But there are two problems with this objection. First, the criminal justice process should not aim to induce active responsibility, as that would violate the autonomy of offenders. As Tasioulas argues:

“This sort of intrusion into [the] innermost self [of an offender] fails to respect his status as a responsible moral agent: it is an attempt coercively to manipulate his deepest moral feelings and convictions, pre-empting his own decision-making about how it is best for him to live. If the process succeeds, the resultant condition will have been achieved heteronymously and, as in indoctrination or domination, the offender’s rational capacities will have been overborne. If it fails, then the offender will at best have been forced to make certain insincere protestations of guilt and repentance that he will inevitably find demeaning. But either way, his status as a responsible moral agent is violated.”<sup>1</sup>

Second, the objection assumes that only *active* responsibility counts. But there is surely a place for passive responsibility, especially in a liberal democracy. In the aftermath of a crime, the moral reform of offenders and the needs of individual victims are not the only issues at stake. In addition, the polity needs to have some way of being reassured that its shared values, as embodied in the law, are being consistently and uniformly upheld. The role of the criminal justice system is to provide this reassurance. By holding offenders to account, equal before the law, it publically upholds and reinforces the societal values that were violated. This kind of reassurance would hardly be possible if it had to depend upon whether or not offenders *took* responsibility. This is why it is a mistake to argue that if offenders fail to appreciate or accept the censure that is communicated within the courtroom, then the process has thereby failed. As Narayan argues:

“The Judge can see herself as having successfully carried out her censuring function regardless of whether the offender feels she deserves the censure or not, is repentant or not, tries to morally reform or not, and even if the offender chooses to conform to the law in future merely because being subjected to trial and censure is an unpleasantness she would rather avoid.”<sup>2</sup>

In sum, the main function of any criminal justice system is to serve the **public interest** by acquitting the passive responsibility that arises as a consequence of an offence. Restorative justice is designed primarily to meet the **private needs** of those individuals involved. Its role is to enable the offender to take responsibility for the harm they have caused. This suggests that the respective roles of criminal justice and restorative justice are complementary, rather than mutually exclusive.

<sup>1</sup> Tasioulas, J. (2007) “Repentance and the Liberal State”, *Ohio Journal of Criminal Law* Vol 4: pp. 487-521: 509.

<sup>2</sup> Narayan, U. (1993) “Appropriate Responses and Preventive Benefits: Justifying Censure and Hard Treatment in Legal Punishment” 13 *Oxford J Legal Stud*: p. 175.

#### d. Passive vs. Active Responsibility in a Corporate Context

In regard to the context of work-related death, there are two important implications that we can draw from this active-passive distinction.

**First**, some have argued that a corporate entity might be construed as ‘morally responsible’ for its behaviour.<sup>1</sup> Whether or not this is the case, it seems clear that the only retrospective responsibility which could sensibly apply to the behaviour of a corporate entity would be passive, not active. This is because the acquittal of active responsibility requires the expression of moral emotions and attitudes, such as remorse and regret.<sup>2</sup> It is of no help to restorative justice then, to attribute moral responsibility to corporate entities. Lacking an emotional life of any kind, such an entity could never participate in a restorative justice process in a meaningful way.

**Second**, unlike criminal or civil law, restorative justice does not require that personal responsibility be *proven*. It requires only that the individual concerned *accept* responsibility. This distinction opens up the possibility of applying restorative justice in situations where individual criminal or civil liability for corporate wrongdoing has not been (or cannot be) proven.

To explain: attempts to demonstrate that corporations can be held legally and/or morally responsible would seem to be motivated by mere pragmatic necessity. First, prosecutors are unlikely to have the resources or the access required to obtain the evidence necessary to convict individuals.

“Prosecutors are able to take the short-cut of proceeding against corporations rather than against their more elusive personnel and so individual accountability is frequently displaced by corporate liability, which now serves as a rough-and-ready catch-all device.”<sup>3</sup>

“The shift of judicial attention from individual to corporate fault would . . . avoid the evidentiary problem of tracing the strands of responsibility to particular individuals, with its inherent dangers of scapegoating.”<sup>4</sup>

Second, even if the evidence of individual complicity were forthcoming, their actions could easily fall outside the scope of liability as defined by the criminal law in any case. Holding the entire corporation liable is one way of ensuring that these individuals are at least indirectly punished.

<sup>1</sup> See, for example, Fisse, B., Braithwaite, J. (1988) “The Allocation of Responsibility for Corporate Crime - Individualism, Collectivism and Accountability”, 11 *Sydney L. Rev.* (March) 468-513.

<sup>2</sup> “Can corporations . . . have ‘good will’; can they be ‘malevolent, spiteful and deeply insulting’; can they have ‘grave shortcomings’, and, if so, should they be expected to show (genuine) regret and remorse?” Moore, G. (1999) “Corporate Moral Agency - Review and Implications” *Journal of Business Ethics* 21: 329–343: p. 330.

<sup>3</sup> Fisse and Braithwaite, 1988: p. 469. Cf. “Responsibility [for the mine disaster that killed 111 men] here transcends individuals. The miners at Centralia, seeking somebody who would heed their conviction that their lives were in danger, found themselves confronted with officialdom, a huge organism scarcely mortal.... As one strives to fix responsibility for the disaster, again and again one is confronted, as were the miners, not with any individual but with a host of individuals fused into a vast, unapproachable, insensate organism. Perhaps this immovable juggernaut is the true villain in the piece.” Stillman, R. J. (1980) *Public Administration: Concepts and Cases*, 2d ed. Boston: Houghton- Mifflin: p. 34.

<sup>4</sup> Gobert, 1994: p.409.

“Punishment directed at a corporate entity typically seeks to deter a wide range of individual associates from engaging in conduct directly or indirectly connected with the commission of an offence. Individual persons who are directly implicated in offences may be difficult or impossible to prosecute successfully, and those who influence the commission of offences indirectly may fall outside the scope of liability for complicity or other ancillary heads of criminal liability. The punishment of collectivities with a view to inducing compliance with the law by human agents is thus consistent with a deterrent hypothesis based on the human calculation of costs versus benefits: the threat of corporate punishment can be a substitute for the threat of individual punishment when the legal system is unable to impose punishment directly on the personnel responsible.”<sup>1</sup>

It is therefore entirely understandable that scholars should expend so much effort to finding ways of attributing liability to the corporate entity. It is, in many cases, the only way in which passive responsibility can be acquitted.<sup>2</sup> But the kind of retrospective responsibility that restorative justice is designed to acquit does not suffer from these same evidential or legal barriers. Whilst it may not be possible for individuals to be found criminally liable, they may yet be *morally* responsible. As Thompson puts it:

“[O]ne official is more or less responsible than another official without implying, as in the law, that degrees of fault correspond to proportionate shares of compensation or match the standard categories of criminal liability. Legal responsibility, though suggestive, is not a reliable guide to moral responsibility.”<sup>3</sup>

Again, individuals are unlikely to volunteer a guilty plea in the absence of any prosecutorial evidence or allegation; but they may yet want to relieve their conscience or feelings of guilt by taking responsibility for their part in what happened within a restorative justice context. In short, the focus on active responsibility means that restorative justice may be the only way to get to the bottom of what really happened:

“Outside investigators face many handicaps in getting to the truth. They have a rather limited capacity to arrive unannounced or to inspect a work-place without arousing suspicion. Outsiders can rarely match the technical knowledge insiders have of unique production or documentation processes. Internal investigators’ specialized knowledge of their employer’s product lines make them more effective probers than outsiders who are more likely to be generalists. Their greater technical capacity to spot problems is enhanced by a greater social capacity to do so, inside compliance

<sup>1</sup> Fisse and Braithwaite, 1988: p. 489.

<sup>2</sup> “The question of whether or not one can hold a corporation morally responsible is a crucial one. It is important not merely for the philosophical delight of deciding whether or not a corporation is a full-fledged moral person, a collective, or merely an aggregate of individual actions. Somehow we need to determine who is responsible for business practices, both commendable and questionable ones. Because the law treats corporations as legal persons, these practices are commonly attributable to corporations. But if . . . corporations are not in any sense moral agents, they cannot be held morally liable. In that case one needs to find out who and how individuals are responsible for so-called corporate practices and how to distribute that responsibility accordingly and fairly. Otherwise individuals AND corporations are let off, and no individual or entity is held properly liable for his, her, or its actions.” Werhane, P. (1989) ‘Corporate and Individual Moral Responsibility: A Reply to Jan Garrett’, *Journal of Business Ethics* 8, 821–822: p. 821. Quoted in Moore, 1999: p. 329.

<sup>3</sup> Thompson, 1980: p. 905.

personnel are more likely than outsiders to know where problems of illegality have occurred previously, and to be able to detect cover-ups.”<sup>1</sup>

In view of these evidential and legal barriers, Fisse and Braithwaite have argued that, whilst regulatory enforcement should focus upon corporate liability, individual responsibility should be addressed by activating ‘internal discipline’ or ‘private justice systems’.

“A more promising approach for achieving accountability for corporate crime would be to structure enforcement so as to activate and monitor the private justice systems of corporate defendants. Already under the present law one aspiration of corporate criminal liability is to catalyse internal discipline, especially where organizational secrecy, numbers of suspects and other such considerations make it difficult or even impossible to depend on individual criminal liability. . . . Where the *actus reus* of an offence is proven to have been committed by or on behalf of a corporation, the court, if equipped with a suitable statutory injunctive power, could require the company (a) to conduct its own enquiry as to who was responsible within the organization, (b) to take internal disciplinary measures against those responsible, and (c) to return a report detailing the action taken.”<sup>2</sup>

There is, of course, a crucial difference between restorative justice and the suggestion made above. The call for ‘internal discipline’ may avoid, to some extent, the legal and evidential barriers faced by criminal and civil systems, but it remains a way of *holding* individuals accountable. In other words, it is simply an extra-legal way of acquitting *passive* responsibility. It has little if anything to do with *active* responsibility. For that reason, whilst there are similarities with restorative justice, a ‘private justice system’ as defined will ultimately encounter all of the limitations of passive responsibility.

#### 4. Prospective Responsibility

As previously mentioned, the concept of prospective responsibility refers to how people ought to behave in the future. It involves the duties and obligations that we should take into account *before* we act, rather than those that arise as a *consequence* of our actions (i.e. our retrospective responsibilities).<sup>3</sup> There are two kinds of responsibility that fall under this heading: moral and task responsibility.

<sup>1</sup> Fisse and Braithwaite, 1988: p. 496. Cf. “The criminal law . . . demands a *direct* link between the policies and actions of management and the specific act of negligence . . . Without full knowledge of what went on in the boardroom – and managerial decision-making is frequently screened from scrutiny . . . – it is quite difficult to judge the motivation and behaviour of managers. This is especially true when we make inferences about the causes of business deviance and the motivation of managers in relation to violence, injury and harm. How conscious are managers of the harmful consequences of their actions?” Punch, 2000: p. 251.

<sup>2</sup> Fisse and Braithwaite, 1988: p. 510-11. It should be noted that Fisse and Braithwaite go on to argue that, if a company carries out (a)-(c), then criminal liability should not be imposed. But it is possible to imagine that a company go through (a)-(c) - using a more restorative approach - AND that it is held criminally liable.

<sup>3</sup> Cf. Cane, 2002: p. 57



### a. Moral Responsibility

First, there are prospective responsibilities that are concerned with the **moral duties or obligations** that we have toward each other. As human beings we all share an intrinsic worth and value. No matter who we are or what we have done, we are of incalculable and unassailable worth – simply by virtue of our humanity. It is in virtue of this intrinsic quality that we have a *moral* responsibility to treat each other with respect, care, honor and dignity. (See Section 4 for more detail).

The hard part of course is to specify how this kind of prospective responsibility should be applied in actual situations. But we can at least break it down further into three general types of duties: (a) promoting the welfare or well-being of others (**positive duties**), (b) not causing them harm (**protective duties**)<sup>1</sup> and (c) preventing others from being harmed (**preventative duties**).<sup>2</sup>

We can also include, under the banner of moral responsibility, what might be called **character responsibility**. When we say that someone is a ‘responsible person’ we are referring to a quality of their moral character rather than any particular action they might have performed. What we generally mean is that they are trustworthy or dependable, in the sense that they can be relied upon to do the right thing: they are the kind of person who can be trusted to fulfill the moral duties and obligations mentioned above.

### b. Task Responsibility

The second kind of prospective responsibility consists of duties and obligations that we have relative to particular tasks. There are two kinds of responsibility in this sense.<sup>3</sup> First, we might say that employers are ‘responsible for providing a safe and healthy workplace for their workers and contractors’. What we mean is that they have a duty or obligation to carry out a certain range of tasks in an ongoing way (e.g. ‘implementing arrangements for the safe use, handling, storage and transport of chemicals’).<sup>4</sup> We can call these **task responsibilities**.<sup>5</sup>

Second, like character responsibility, we can also say that someone is a ‘responsible manager’, in the sense that they can be trusted to carry out their managerial duties. I will call this **role responsibility**.

<sup>1</sup> Goodin calls this a ‘negative task responsibility’: “These are responsibilities for making sure that certain things not occur. Thus, it is the duty (negative task responsibility) of everyone to make sure they do not cause others harm.” Goodin, R. E. (1987) “Apportioning Responsibilities”, *Law and Philosophy*, Vol. 6, No. 2, (Aug.), pp. 167-185: p. 179.

<sup>2</sup> This distinction between (a) and (b) is based on Cane’s taxonomy: he calls the responsibility to prevent harm ‘preventative responsibility’, and the responsibility not to cause harm ‘protective responsibilities’. Cane, 2002: p. 32. “Protective obligations are directed against harming by misfeasance [i.e. negligently and improperly performing the obligation], whereas preventative obligations are directed against failing to prevent harm by nonfeasance [i.e. failure or refusal to perform the obligation].” p. 32.

<sup>3</sup> See Hart, H. (1968) *Punishment and Responsibility* (Oxford University Press): pp. 211-30.

<sup>4</sup> These examples are taken from the Victorian WorkSafe website under the section ‘Employer Rights & Responsibilities’ <<http://www.workcover.vic.gov.au/wps/wcm/connect/WorkSafe/Home/Laws+and+Regulations/Employer+Rights+and+Responsibilities/>> accessed August 20, 2008.

<sup>5</sup> As in Goodin, 1987.

Like moral obligations, task responsibilities can be *positive* (promote well-being), *protective* (do no harm) and *preventative* (stop harm from happening). We noted earlier how difficult it might appear to be to ascribe any responsibility for a workplace fatality to senior executives who are far removed from the ‘coal face’. The distinction between protective and preventative duties serves to erode this barrier.

“[N]obody seriously contemplates that senior executives will personally oversee the actions of all company personnel. That would be impossible. On the other hand, it is not unreasonable to expect the company to put into place policies that would prevent ‘accidents’ from occurring, and to establish monitoring and review mechanisms which would detect violations if they were to occur.”<sup>1</sup>

## The Relationship between Moral and Task Responsibilities

The way in which moral and task responsibilities inter-relate is of critical importance to situating the role of restorative justice in the context of workplace health and safety. There are two basic principles in this respect: (1) Morality underwrites the kind of task responsibilities specified in OHS regulation; and (2) if there is any conflict between the two, moral obligations always trump task responsibilities. I take each of these principles in turn.

### a. Morality underwrites Occupational Health and Safety Regulation

The importance of this principle, in our context, is the way in which one particular set of work-related duties reflects our moral obligations. These duties are those that are related to health and safety. It will no doubt have been noted that the three general kinds of moral duties (positive, preventative, protective) are each concerned, amongst other things, with health and safety: promoting well-being, preventing harm, and not causing harm. Thus the task responsibilities of employers and employees, in this respect, would appear to be underwritten or based upon moral duties. This means that health and safety regulations should not be thought of as ‘administrative burdens’ with little or no connection to social norms or ethical values. Rather, they are an attempt to apply the three general moral duties above to the particularities and complexities of a work-place environment. They enable employers and workers to see what it would mean, in practice, to fulfill the moral duties to promote well-being, do no harm, and prevent harm. As Cane puts it, “just as we may appeal to morality to tell us what the law ought to be, so we may appeal to the law as providing a pointer to sound thinking in the moral sphere.”<sup>2</sup>

Thus, for example, one responsibility that every employer has is *to provide a safe and healthy workplace for workers and contractors*. This is not merely a task duty for employers, but also a moral duty – for the reasons given above. But it is the specific OHS regulations (e.g. ensure fire exits are not blocked) that enable the employer to know how best to fulfill this moral duty. Put another way, OHS regulations provide

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<sup>1</sup> Gobert, 1994: p. 397.

<sup>2</sup> Cane, 2002: p. 14.

employers and workers with “a pointer to sound thinking in the moral sphere”. In this sense, failing to ensure that the fire exit is not blocked is not merely a regulatory violation, but also a moral wrong. It violates the moral duty that employers have to their workers and contractors to ensure that they come to no harm.

As we have seen, what is distinctive about restorative justice is that, in terms of retrospective responsibility, it focuses on the fact that someone has been *wronged*, rather than that a law has been broken or a regulation breached. By contrast, regulatory bodies, such as WorkSafe Victoria, are required to direct their energies toward enforcing the existing laws and regulations. The use of restorative justice in the aftermath of an injury or death could therefore provide a *complementary* process through which the moral underpinning of the prospective responsibilities embodied in OHS regulation might be powerfully reinforced in the minds of those individuals who were in some way personally responsible.

### **b. Moral Obligations can over-ride Task Responsibilities**

Whilst task duties are usually reflective of – or at least consistent with – our moral duties, this is not always the case. Where there is a conflict, being assigned a task does not absolve us from carrying out our moral duties and obligations. It is generally agreed that ‘I was just following orders’ is not an adequate defence for unethical behaviour. If fulfilling an assigned task or role entails the mistreatment or harmful neglect of a fellow human being, then the obligation to carry out the assigned task has thereby become null and void. Moral responsibilities always trump task responsibilities.

One of the most horrific examples of what can happen when this principle is reversed can be found in the role of Adolf Eichmann, who is sometimes referred to as ‘the architect of the Holocaust’.

“Eichmann . . . operated unthinkingly, following orders, efficiently carrying them out, with no consideration of their effects upon those he targeted. . . . [T]he extermination of the Jews became indistinguishable from any other bureaucratically assigned and discharged responsibility for Eichmann and his cohorts.”<sup>1</sup>

The ‘morality-trumps-task’ principle does not merely include *explicit* task-responsibilities: it is, after all, unlikely for an employee to be given a *direct* order to act in an unethical manner. It is more probable that they will do so on the understanding that this is what is expected of them.

“This is the gray area between command and discretion. When a superior relies on subordinates to know what to do without being told, the superior can no more escape responsibility for the subordinates' actions than they can.”<sup>2</sup>

<sup>1</sup> “Hanna Arendt”, *The Internet Encyclopaedia of Philosophy* <<http://www.iep.utm.edu/a/arendt.htm#H6>> accessed August 20, 2008.

<sup>2</sup> Thompson, 1980: p. 913.

## The Friedmanian Objection

There is an important objection to the view that ‘morality-trumps-tasks’, particularly in this context. I will respond to this objection below.

### a. The Objection

The objection is based upon the premise that corporations are businesses, not public services. They are not created to be socially responsible. Corporations exist primarily in order to make money. The most well known proponent of this view was the economist Milton Friedman.

“[T]here is one and only one social responsibility of business - to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud. . . . Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible.”<sup>1</sup>

Corporate executives who take this view might reason to themselves that, so far as their role *as an executive* is concerned, increasing shareholder value is the only obligation to which they are answerable. It is not that they cannot have extra-corporate goals, values or personal ethics. Being an executive is compatible with wanting “to make the world a better place.”<sup>2</sup> However, their duty *as an executive* is to act in the corporation’s best interest, even when this conflicts with their own personal ethics and values: their decisions and actions *qua* executive are dictated by the corporation’s self-interest.<sup>3</sup>

Such an executive could even appeal to corporate law to justify their restricted focus: the American Bar Association, for example, states that: “While allowing directors to give consideration to the interests of others, [the law] compel[s] them to find some reasonable relationship to the long-term interests of shareholders when so doing.”<sup>4</sup> In short, the only bottom-line is financial. Health and safety obligations – indeed all other moral obligations – are always secondary and derivative in this context: they can only be justified if they will increase shareholder value.

“[A]ccording to Friedman . . . [t]he executive who treats social and environmental values as means to maximize shareholders’ wealth – not as ends in themselves – commits no wrong.”<sup>5</sup>

<sup>1</sup> Friedman, M. (1962) *Capitalism and Freedom*, University of Chicago Press: Ch. VIII. <<http://www.ditext.com/friedman/cf8.html>> accessed August 30, 2008. Cf. “There is but one ‘social responsibility’ for corporate executives, Friedman believes: they must make as much money as possible for their shareholders. This is a moral imperative. Executives who choose social and environmental goals over profits – who try to act morally – are, in fact, immoral.” Bakan, J. (2004) *The Corporation: The Pathological Pursuit of Profit and Power*, Constable: London: p. 34.

<sup>2</sup> Bakan, 2004: p. 50.

<sup>3</sup> Ladd captures the implications of this view with alarming candour: “We cannot and must not expect formal organizations, or their representatives acting in their official capacities, to be honest, courageous, considerate, sympathetic, or to have any kind of moral integrity. Such concepts are not in the vocabulary, so to speak, of the organizational language game.” Ladd, J. (1970) “Morality and the Ideal of Rationality in Formal Organizations”, *The Monist* (October), 485–501: p. 499.

<sup>4</sup> American Bar Association, Committee on Corporate Laws (1990) “Other Constituencies Statutes: Potential for Confusion,” *The Business Lawyer* 45 2261. As cited in Bakan, 2004: p. 39.

<sup>5</sup> Bakan, 2004: p. 34.

## b. Response

It is revealing to note the kind of positions that would endorse Friedman's view. It would certainly appeal to those who are driven by economic self-interest, such as the Enron employee who reportedly said: "You can break the rules, you can cheat, you can lie, but as long as you make money, it's all right".<sup>1</sup> At the other end of the spectrum, the Friedmanian view of the corporation makes an attractive and relatively easy target for political activists.<sup>2</sup> One might even argue that this view is tacitly – and sometimes explicitly – assumed by regulatory bodies that rely almost entirely upon financial penalties.

"The major motivator for a corporation to introduce a prevention program would be cost reduction. This was indicated by chief executives who gave the maintenance of productivity and profits as the most important reason for taking accident prevention measures. Therefore, it could be argued that the best deterrence for dealing with corporate non-compliance is a credible penalty. A credible penalty is one that greatly exceeds the cost of compliance adjusted by the probability of escaping detection."<sup>3</sup>

There is clearly evidence that *some* executives *claim* to be motivated primarily by the economic bottom-line. But there is no reason to assume that executive decisions are *invariably* dictated by market forces, as distinct from other kinds of human motives and qualities, including their moral responsibilities. As Langevoort argues:

"Orthodox academic discourse about corporations is famously arid, employing an economic model of human behaviour inside the firm that admits of 'calculative self-interest' but little else. This simplicity infuriates critics who insist that it misses what is rich and complicated about corporate life when observed in action; richness and complexity that spawn precisely the kinds of issues corporate law tries to address. Familiar human flaws like conceit, obsession and denial, that nearly everyone acknowledges to be part of real-life corporate stories, disappear. So too do the better parts of human nature, like loyalty, honesty and common decency."<sup>4</sup>

<sup>1</sup> Langevoort, D C (1996) "Selling Hope, Selling Risk: Some Lessons for Law from Behavioural Economics About Stockbrokers and Sophisticated Customers: 84 *Cal L Rev* 62 at 64. Quoted in Hall, 2006: p. 9. Friedman's view has, of course, also appealed to political conservatives, although perhaps with less candor than the Enron employee. "The 1980s of 'Reaganomics' and 'Thatcherism' reinvigorated and legitimated the principle of the 'market' and of 'competition' as generally applicable to most business situations and introduced this economic approach to all stakeholder relations. Consequently, ethical or philanthropic responsibilities were not judged under the criterion of certain ethical values or social duties but under the clear perspective of corporate interests. Therefore, 'investing' in social, ethical or philanthropic causes was increasingly deemed to be acceptable as long as it added to the bottom line." Matten, D., Crane, A., Chapple, W. (2003) "Behind the Mask: Revealing the True Face of Corporate Citizenship" *Journal of Business Ethics* 45, 109–120: p. 111.

<sup>2</sup> "[The goal of the corporation is to] ensure that the human beings who [it is] interacting with, you me, also become inhuman. You have to drive out of people's head natural sentiments like care about others, or sympathy, or solidarity. . . . The ideal is to have individuals who are totally disassociated from one another, who don't care about anyone else . . . whose conception of themselves, their sense of value, is 'Just how many created wants can I satisfy? And how deeply can I go into debt and still get away with satisfying created wants?' If you can create society in which the smallest unit is a person and a tube, and no connections to people, that would be ideal." Bakan, 2004: p. 135. Based upon an interview with Noam Chomsky.

<sup>3</sup> McLean, C. (1998) "The impact of prosecution on workplace prevention" *J Occup Health Safety - Aust NZ*, 14(5), 517-521: p. 520. The source of the managerial motivation mentioned above is: Yann, Campbell, Hoare and Wheeler (1990) *Occupational health and safety survey: conducted for the Victorian Congress of Employer Associations*. Melbourne: YCHW.

<sup>4</sup> Langevoort, D C (2004) "Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls" 93 *Georgetown L Jnl* : p. 285. Quoted in Hall, 2006: p. 2.

Moreover, there are many executives and political theorists who would argue, *contra* Friedman, that corporate decisions can and *should* operate in accordance with a wider range of ‘bottom-lines’ or responsibilities.<sup>1</sup> In other words, they would hold that corporations not only have an *economic* responsibility to be profitable; they also have a *legal* responsibility to abide by the laws of the relevant society; an *ethical* responsibility to do what is right, just and fair even when not compelled to do so by the legal framework; and a *philanthropic* responsibility to engage in those activities ‘desired’ by society, such as contributing resources to various kinds of social, educational, recreational or cultural purposes.<sup>2</sup>

### c. Implications

There are several implications that flow from repudiating the Friedmanian view:

**First**, corporate executives – or even small businesses – cannot so easily rationalise potential risks to employees or customers by appealing to the financial ‘bottom-line’. This would, after all, amount to a rejection of the morality-trumps-tasks principle, that is, where the task in question is to turn a profit. It is both psychologically flawed and theoretically contentious to assume, *pace* Friedman, that their primary responsibility is to advance the ‘economic well-being’ of the company, and that any moral obligations are therefore secondary and derivative.

**Second**, if the Friedmanian view is false, then there is a legitimate place for non-punitive methods of persuasion in any regulatory framework. It is possible to assume that employers and employees *do* have a conscience, and so would *want* to do the right thing. Enforcement might be necessary to curb the behaviour of those who, for whatever reason, are caught up in the single-minded pursuit of profit over safety, along with those who are simply incompetent<sup>3</sup>; but for those who respond well to persuasion, the automatic application of penalties is more likely to create defiance.

“There could also be benefits in adopting a combined deterrence and cooperative enforcement strategy . . . This involves an approach whereby ‘bad’ organisations are relentlessly pursued and prosecuted for even minor violations of the law. In contrast, ‘good’ organisations are approached by the regulator in a spirit of cooperation, inspections are infrequent and trivial violations not likely to cause injury are overlooked. The intention of a combined ‘deterrence’ and ‘cooperative’ enforcement strategy is to maximise the number of cooperative organisations by reducing costs for ‘cooperators’ while increasing costs for evaders. This approach acknowledges that using persuasion on people with no will to comply can be as counterproductive as using punishment on people who are trying their best. It follows that both a regulatory strategy of uncompromising and consistent punishment and a strategy of total reliance on persuasion are doomed for failure.”<sup>4</sup>

<sup>1</sup> “In terms of power and influence, you can forget the church, forget politics. There is no more powerful institution in society than business – I believe it is now more important than ever before for business to assume a moral leadership. The business of business should not be about money, it should be about responsibility. It should be about public good, not private greed.” Roddick, A. (2000) *Business as Unusual*, Harper Collins Publishers, London: p. 3.

<sup>2</sup> Matten, Crane and Chapple, 2003: p. 110.

<sup>3</sup> Cf. Braithwaite’s well-known enforcement pyramid (Braithwaite, 2002).

<sup>4</sup> McLean, 1998: p. 520.

**Third**, it also follows that there is an important place for restorative justice in the aftermath of serious injury and death in the workplace. Restorative justice responds to the recognition that employers and employees are real human beings, with genuine human emotions and values, who have all been in some way damaged and hurt in the wake of work-related death and injury.<sup>1</sup>

“[O]ffenders experience a variety of harmful outcomes in the aftermath of their own crimes, including diminished integrity, loss of standing, loss of connectedness, loss of self-control, shame, diminished personal and social prospects, moral debt and a sense of obligation to their victims. White-collar offenders are no different and they too can benefit from a restorative needs-based process aimed at repairing that harm, thereby helping society as a whole. Former Enron CEO Jeff Skilling, for example, was often caricatured as “the greedy, arrogant executive with a Darwinian view of the world.” On the other hand, there is evidence indicating that Skilling was emotionally distressed, felt lonely and lost the drive to work during his short tenure as CEO. Presumably, this would be something Skilling would wish to relate to the many Enron victims, regardless of whether he is found guilty or not. Indeed, Skilling tried to convey this through his testimony in court, but with so much at stake, this was not the secure and supportive environment needed for sharing such emotions.”<sup>2</sup>

Restorative justice can provide this ‘secure and supportive’ place in which directors, CEOs, senior managers, and employees can come together with those who have been harmed in order to remember and to reveal who they all are: people who feel, who hurt, who can weep over what they have done, who want a safe, compassionate and just world to live in. Restorative justice thus offers a powerful challenge to the view that business interests can be isolated, prioritised over and hermetically sealed off from ordinary human values and ethical considerations.<sup>3</sup>

### Individual Responsibility in a Corporate Context

We are now at a stage in which we can articulate a plausible way of identifying the extent to which an individual – acting in a corporate context – might be personally responsible for an outcome that involved ‘many hands’. Again, it is important to note that this is not intended to provide a legal basis for *holding* individuals responsible. That is not our concern here. This is only intended to provide the conceptual tools that might be needed for an individual employer or employee to consider two questions: whether or not it makes sense for them to *take* responsibility in the

<sup>1</sup> Cf. “Though the movement against corporate rule would be impossible, even senseless, without robust nongovernmental institutions, community activism, and political dissent, the belief that these can be a *substitute* for government regulation, rather than a necessary complement to it, is dangerously mistaken. Many among the corporate elite and their defenders would likely sing ‘Hallelujah’ the day activists against corporate abuse abandoned government. That is, after all, what many business leaders want: replacement of government regulation of corporation with market forces, perhaps shaped by the oversight of nongovernmental organisations (with no legal powers) and the demands of conscientious consumers and shareholders (with minimal effects). In this scenario, corporations get all the coercive power and resources of the state, while citizens are left with nongovernmental organisations and the market’s invisible hand – socialism for the rich and capitalism for the poor, to borrow a phrase from George Bernard Shaw.” Bakan, 2004: p. 151.

<sup>2</sup> Gabbay, Z. (2007) “Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime” 8 *Cardozo Journal of Conflict Resolution*: p. 456-7.

<sup>3</sup> “No social and ideological order that represses essential parts of ourselves can last – a point as true of the corporate order as it was for the fallen Communist one. We only have to remember who we are and what we are capable of as human beings to reveal how dangerously distorted is the corporation’s order of narrow self-interest.” Bakan, 2004: 167.

context of a work-related death; and if so, what might be reasonable and fair for them to take responsibility *for*. Given that ‘many hands’ may have been involved in the events and circumstances that led to the fatality, what degree of responsibility should they take upon themselves?

### a. Assessing personal responsibility

Here the concept of task-responsibility is particularly useful. The extent to which an individual is personally responsible depends upon (a) their role in the organization, and (b) the causal contribution of that role toward producing (or not averting) the outcome in question. There would be no implication that anyone intended the fatality. However, by virtue of performing their allocated tasks well or badly, each person will have made choices that contributed to the final unintended outcome.<sup>1</sup> To give an actual example:

“Weick . . . masterfully unravels the worst plane crash in history, when two wide-bodied planes collided on the runway at Tenerife in 1977 with the loss of 583 lives. He takes the decision of a pilot to commence take off – apparently without permission, in thick mist, and with another plane crossing the runway – and ties it into a range of variables including cockpit behaviour and the personalities of the crew, communication difficulties with the control tower, conditions of work in the industry (and penalties for exceeding working times), technology on the airfield, and the creation of a “temporary system” caused by terrorist activity elsewhere leading to a diversion of aircraft to Tenerife and increased pressure on all concerned.”<sup>2</sup>

In this case, there will have been individuals, each of whom had a responsibility to prevent one or more of factors that collectively led to the plane crash. At no point would any individual have intended for the plane to crash; the contribution of some will have been considerably less than others, depending on their role and how well or badly they carried it out. But each bears a measure of personal responsibility for the deaths that ensued – even if this would not amount to criminal liability.

### b. Moral obligations can outstrip task responsibilities

There are complexities that we need to mention here. An individual may have done all that was required of them, in terms of their task duties, and yet a fatality still occurs. The situation is not quite like Eichmann’s, in that their duties are unlikely to have been explicitly ill intentioned. But something is amiss: if a fatality has occurred, and the relevant task duties were completely fulfilled, then might this not indicate a problem with the scope or quality of those task duties? As Hopkins argues:

<sup>1</sup> Cf. “[W]hat each participant . . . intends - but all that any of them intends - is to play one's own part in the plan. None of them . . . would truly intend the outcome of their combined actions. Differential responsibilities would then follow straightforwardly. Those who intend lesser contributions are less responsible for the overall outcome than those who intend greater contributions. This might be a reasonable account of responsibilities for accidents, where the intended actions of various agents interact in ways that none of them intend in order to produce the outcome that all regard as unfortunate.” Goodin, 1987: pp. 174-175.

<sup>2</sup> Punch, 2000: p. 250.



“If a company has failed to ensure the safety of its employees, notwithstanding the fact that its most senior people may have exercised due diligence, we can reasonably ask these people to try even harder, and to be even more attentive to what may be going on at the operational level of their organisation.”<sup>1</sup>

It might be helpful to illustrate this problem with a hypothetical example.<sup>2</sup> Suppose a company appoints a number of officers, each of which is responsible for ensuring compliance with a particular set of regulatory obligations: for example, a trade practices compliance officer, an environment officer, and a health and safety officer. Suppose a work-related death occurs as a consequence of some breach of OHS regulation, such as failing to ascertain that contracted work could be done safely. Putting aside the problem of legal liability, which, if any, of these officers would be most likely to ‘step forward’ and take personal responsibility in a restorative justice process? We might expect the health and safety officer to do so. But suppose that she argued robustly and incessantly that the company needed to comply with the OHS laws in question. Yet the trade practices compliance officer insisted that ‘screening’ contractors for health and safety performance could breach the Part IV competition provisions of the Trade Practices Act 1974 (Cth).<sup>3</sup> Given this internal conflict, the OHS officer’s position may have been over-ridden, due to either political or commercial reasons. As Haines and Gurney put it:

“The resolution might come down to who holds more political influence within the organization and who can make the best case to the organization that there are greater commercial benefits and fewer costs associated with taking particular steps to comply with the area of law with which they are concerned than other, potentially contradictory, steps to comply with other areas of law.”<sup>4</sup>

As a result, the health and safety officer might feel that, whatever the legal outcome, she was in no way ‘responsible’ for what happened. Likewise, the trade practices compliance officer might feel that, given their limited remit, they should not take responsibility for health and safety breaches. In arguing as they did, they were just fulfilling their job requirements.

Are these defences plausible? One useful way of disentangling the complexity is to draw upon the distinction between moral and task responsibilities made above. Take the health and safety officer. Because her task responsibilities are specifically related to safety, it follows that, if she had somehow failed to fulfil her duties in that role, then her personal responsibility for the outcome would have been greater than the trade practices compliance officer. As Goodin puts it:

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<sup>1</sup> Hopkins, 2006: p. 4.

<sup>2</sup> This example draws upon a discussion in Haines, F. and Gurney, D. (2003) “The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict”, *Law & Policy*, Vol. 25, No. 4, October: p. 370.

<sup>3</sup> Haines and Gurney, 2003: p. 364.

<sup>4</sup> It can be enormously difficult for companies to ensure that contracted companies are compliant with OHS laws whilst not falling foul of anti-competitiveness laws. For example, “An attempt by the company to meet with others in the industry to draw up a preferred list of contractors or identify which contractors to avoid on the basis of occupational health and safety performance may also fall foul of the Act’s “boycott” provisions. Arguably, also it could open up the possibility of collusion between companies, one of the most serious offences under the Act.” Haines and Gurney, 2003: p. 364.

“It is the job of the Health Visitor, in a way it is not the job of the neighbours, to detect and report cases of child neglect. If the Health Visitor fails in that duty, the Health Visitor therefore bears more responsibility for the subsequent death.”<sup>1</sup>

However, in the example above, the health and safety officer did not shirk her task-responsibilities. The question, then, is this: if she were to reflect upon her role – from a moral point of view – what would she find? Did she do all that a reasonable person could have done in the same situation? Should she have done more? Could she, for example, have argued her case more vociferously? Could she have reported the company to the authorities? *Did the fulfilment of her task duties fully discharge her moral obligations toward the workers under her care?* This is, of course, not an easy question to answer and it is one that regulatory bodies are very unlikely to ask. Yet it is also one that the officer, in the privacy of her own conscience, will undoubtedly ask herself again and again. What this example reveals is the way in which our moral duties can extend beyond the limits of our task responsibilities.<sup>2</sup>

It may help to give another example: In the following case of a work-related death, the interviewee was clearly feeling guilt about his decision to authorize the task that led to the death – even though this did not involve any breaches of safety known to him at the time.

“In the week or two after it happened, we talked it out quite a bit in the office, particularly Anne, Peter and me. We talked about how it was affecting us, our grief, anger and guilt. I felt the guilt because I authorised him to do the particular work. I rationalise it now and realise that given the circumstances there wasn’t any reason not to have him do that work, especially with his safety record. I still wish I hadn’t said ‘yes’ to him doing it. Obviously we’d all like to turn the clock back, but the guilt is at a manageable level. It’s still there a little bit, but it’s manageable.”<sup>3</sup>

In the interviewee’s mind, he had fulfilled all his task-responsibilities. So why does he have a residual sense of guilt? One explanation might be the lack of correspondence between his task and moral responsibilities. Whilst he discharged his task-duties to the full, it seems clear that those duties did not enable him to fulfil his moral duty to make sure that the worker came to no harm. This may explain the lingering guilt.

Returning to our hypothetical example: take the trade practices compliance officer. Again, he might have fulfilled his task-responsibilities. But did he not violate the ‘morality-trumps-tasks’ principle in doing so? Was the threat of breaching competition provisions *more important* from a moral point of view than the risk of potential injury and death? This officer’s decision to persuade the company to

<sup>1</sup> Goodin, 1987: p. 182.

<sup>2</sup> Hopkins gives an example of the kind of intervention that goes beyond ‘due diligence’: “The Chief of the Air Force . . . received a complaint from a lowly corporal that maintenance activities were not what they should be. He thereupon commissioned a special team to visit Air Force bases and report to him on how extensive the problem was. In this way he was able to bypass the normal Air Force chain of command and inform himself far more directly about what was happening. . . . These kinds of interventions on the part of directors go beyond most conceivable due diligence requirements, yet they are the kinds of interventions that are necessary if the disconnect [between the intentions of both the DPI (the inspectorate) and the companies, on the one hand, to reduce risk through systems and management plans and, on the other, the reality of risk encountered at the “coal face”] is to be rectified.” Hopkins, 2006: p. 4-5

<sup>3</sup> Urban Ministry Network, 2000: p. 7.

override the risk to health and safety means that he must bear considerable responsibility for the fatality, even if he would never have wanted or intended such a devastating outcome.

Finally, those who agreed with the trade practices compliance officer and/or made decisions on the basis of commercial advantage must also share responsibility. Whilst they might have been conscientiously acting in accordance with their duty to maximise profits, they did so in clear violation of the ‘morality-trumps-tasks’ principle. Put another way, as employers, they would have had a task duty to prevent harm to their workers and contractors. In this case, they may have decided that their duty to maximise profits trumped the OHS duty. But as we have seen, the OHS duty to prevent harm is more reflective of our moral obligations toward others than the duty to promote economic self-interest.<sup>1</sup> It is for this reason that the employers’ decision was flawed. If there is a conflict between a task responsibility and our moral duties toward others, the latter always trumps the former. Adolf Eichmann is the role model for those who would presume otherwise.

The implications for restorative justice are clear: in cases where due diligence is taken, and OHS obligations are fulfilled, there may yet be a case to answer from a moral point of view. Employers and managers may not have been found criminally liable, but they might nevertheless wish things could have been ‘done better’, or deeply regret not having ‘gone the extra mile’. These are moral perceptions and emotions that need to be honoured and expressed.

### c. Outcome Responsibility

One way of articulating how this kind of situation might be brought into a restorative justice setting is to draw upon Honoré’s concept of **outcome responsibility**.<sup>2</sup> This idea falls within the domain of retrospective responsibility. It is way of responding appropriately to a particular *outcome* that was in no way intended or deliberate, and that resulted partly from the actions of others, accidents and/or sheer bad luck.<sup>3</sup> Hopkins gives the following example from the game of soccer:

“[A] player can be sent off and even suspended for several games for elbowing another in the face, even where that action was quite unintentional and simply a matter of bad luck.”<sup>4</sup>

<sup>1</sup> This is not to suggest that maximising profits is *necessarily* incompatible with the fulfilment of OHS duties. As Steve Kolotylo suggests: “Often economic benefits and OHS benefits can be mutual and can be found. Exploration of such solutions is a means of achieving a win-win result in the moral-task conundrum.” (personal communication, 1 September, 2008.)

<sup>2</sup> Honoré, T. (1999) *Responsibility and Fault*, Oxford: Hart Publishing. As mentioned by Hopkins, 2006: p. 5.

<sup>3</sup> The concept of ‘outcome responsibility’, as used here, is restricted to incidents that involve ‘sheer luck’, rather than ‘making one’s luck’, which is more a result of negligence. Clarkson provides a useful definition of this distinction in the following: “‘Sheer luck’ covers situations where a fortuitous result which is unconnected to one’s endeavours occurs: for example, a company operates machinery safely in a factory and a worker, disregarding all safety instructions and training, sticks a hand into the machine and the hand is severed. One ‘makes one’s own luck’ when a consequence occurs which is directly connected to one’s endeavours. . . . So, if the machine in the factory is negligently installed without appropriate safety mechanisms, the company can be regarded as operating a dangerous activity . . . .” Clarkson, C. (2008) “Corporate Manslaughter: Need for a Special Offence?” in Clarkson and Cunningham, 2008: p. 81.

<sup>4</sup> Hopkins, 2006: p. 5.

Honoré gives an everyday example:

“If I trip someone quite by accident, I incur a moral obligation. ‘An apology is called for, and the person who has been tripped must be helped up and if necessary taken for treatment’.”<sup>1</sup>

One justification for the concept of outcome responsibility is this: it would be patently inconsistent to accept the beneficial outcomes of activities for which one is not directly responsible, and yet disavow any negative outcomes. If an employer for example, is willing to accept the rewards of the company’s activities, even though they are not directly involved at the ‘coal-face’, then “fairness requires that they accept responsibility for the consequences when things go wrong.”<sup>2</sup>

The inability to accept this implication of ‘fairness’ is not uncommon, and is due primarily to what psychologists call a **self-serving cognitive bias**. To give an example, employers often complain that it is unfair to reduce the problem of a ‘bad situation’ to ‘bad people’.<sup>3</sup> The inconsistency here is easily exposed by asking whether they would apply this excuse if the company’s record of health and safety was exemplary: would they not, in fact, account for a ‘good situation’ by reference to the fact that they are ‘good people’?

“When things are going well, corporate managers are likely to assert that this is because of good corporate management. When things are not going well, however, they will say it is because of external circumstances and factors beyond their control.”<sup>4</sup>

A similar connection exists for employees who realize that their workplace is unsafe: if they choose not to protest in order to keep their jobs, then they must accept that their silence makes them morally complicit in any subsequent injury or death.

“Consider the worker in a factory recently converted from automobile-making to the production of tanks for use in an unjust war. He knows that if he resigns, he will be re-placed easily; and if he protests the war, he will be fired. Losing the job would be a personal hardship, and, because he is of an unpopular and suspect race, he believes that no one would be influenced by his protest. Sabotage is out of the question, as it has been repeatedly detected and suppressed. To hold back his objections to the war and quietly continue to build the tanks seems to involve him in moral complicity. The only remaining options are to resign without giving reasons or to protest. The prohibition of complicity does not demand protest, but it blocks off as illegitimate a choice to reap the maximum benefits of remaining silent.”<sup>5</sup>

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<sup>1</sup> As quoted in Hopkins, 2006: p. 5.

<sup>2</sup> Hopkins, 2006: p. 7.

<sup>3</sup> As argued by Galbraith, J.K. (1972) *The New Industrial State*. London: Andre Deutsch: p. 187. Source: Haines and Hall, 2004: p. 270.

<sup>4</sup> Hall, 2006: p. 4.

<sup>5</sup> Hill, T. E. Jr. (1979) “Symbolic Protest and Calculated Silence” *Philosophy and Public Affairs*, Vol. 9, No. 1, (Autumn), pp. 83-102: p. 87-88.

It is important to distinguish outcome responsibility from two closely related concepts, **scapegoating** and what might be called **apologetic grandstanding**.<sup>1</sup> First, directors or senior management who take outcome responsibility are not thereby offering themselves up as ‘the fall guy’. They are not accepting the blame for the decisions and actions of others, no matter how widely distributed or diffuse those decisions were. This would be unfair, and might encourage those lower down the hierarchy to avoid taking responsibility for their part in what happened. They are only taking responsibility for *their* role in the outcome.<sup>2</sup>

Second, it is not uncommon for political leaders to claim that they ‘take full responsibility’ for a disastrous policy outcome. Whilst this ritual may have a superficial resemblance to taking outcome responsibility, it differs to the extent that the pronouncement often lacks any substance or authenticity. This can be confirmed by discovering that the statement had no adverse consequences for the leader in question, they took no steps to address the problem, repair the harm or compensate those affected and it ultimately worked to his or her own political advantage in the ways that Thompson describes below:

“With regular incantations of ‘I accept full responsibility,’ an official strengthens his or her own political standing by reassuring the public that someone is in charge and by projecting an image of a courageous leader who does not pass the buck. Also, as one becomes known as a leader who takes the blame for subordinates, one gains gratitude and thus greater obedience from those subordinates in the future. Most significantly, the ritual often quells public debate about a controversial decision or policy, effectively blocking further inquiry into the genuine moral responsibility of all of the officials involved, especially that of the leader.”<sup>3</sup>

For our purposes then, the concept of outcome responsibility opens up the possibility for individuals who are not found criminally liable to nevertheless *take* responsibility for a work-related death. They may have done all that was required of them by law; it may be that the fatality was a result of unforeseeable mistakes, mishaps, and accidents; but it was nevertheless a consequence of the company’s existence and activities. More could – and should – have been done to prevent such a devastating outcome. More will be done in the future. Amends will be made, in accordance with the wishes of the bereaved family. Together with a desire to offer a sincere expression of remorse, this perspective on the matter would form the basis of what it might mean for an employer or employee to take outcome responsibility in a restorative justice context.

<sup>1</sup> “By elevating mere responsibility to full responsibility, failings are transformed into bragging rights.” Daum, M. “The little black dress of ‘responsibility,’” *Los Angeles Times*, July 14, 2007.

<<http://www.latimes.com/news/columnists/la-oe-daum14jul14,1,3821939.column>> accessed September 8, 2008.

<sup>2</sup> Cf. “The intended purpose of the Bill is to reduce the incidence of deaths and serious injuries by making a company and senior officers of a company criminally liable for the negligent acts or omissions of others. Such an artificial transfer of criminal liability is likely, human nature being what it is, to generate a sense of diminished responsibility among employees of the company who have the good fortune not to be senior officers; and the latter may well incur liability for the acts and omissions of those with that diminished responsibility. In other words, the Bill, if enacted, will tend to be subversive of the principle of mutuality of obligations which underpins OHSa.” Dunlop, I. (2000) “AICD Submission to The Department of Justice Victoria on The Crimes Industrial Manslaughter Bill”.

<<http://www.companydirectors.com.au/Policy/Submissions/2000/AICD+Submission+to+The+Department+of+Justice+Victoria+on+The+Crimes+Industrial+Manslaughter+Bill.htm>> accessed July 20, 2008.

<sup>3</sup> Thompson, 1980: p. 907.

## Additional Questions about Responsibility

### a. Is it possible to apologise without admitting fault?

Previously, we have tried to show that responsibility is a far more subtle and complex concept than is often supposed; and that once we gain some clarity about its various uses, the way opens up for the application of restorative justice – regardless of the size of the company, or whether or not personal criminal liability has been or can be imposed. However, there are a number of remaining questions that we need to consider in relation to what it would mean to ‘take responsibility’ in a restorative justice context. The first involves the issue of offering an apology.

Companies are often strongly advised by their lawyers not to participate in a process that requires any admission of fault or liability. But apologies have traditionally been defined as including an admission of fault. Indeed, a defence lawyer might advise their client not to participate in restorative justice unless they make sure that their apology does not admit any wrongdoing.<sup>1</sup> But is this, in fact, possible?

One way of doing this might be to offer what has been called a ‘partial apology’. This involves only the expression of sorrow, empathy and concern. It omits any claim to have been personally responsible – as in ‘I am sorry that you were hurt’, rather than ‘I am sorry I hurt you’. A good example of this was reported recently in *The Age*. On July 24<sup>th</sup>, 2008 a bus and truck collided in Gippsland. Two people were critically injured and another 15 were hurt. The Senior Sergeant was reported to have said: “At this stage it’s too early to say who’s at fault”. But the general manager of the Bus company, Cameron Cuthbertson, was nevertheless quoted as follows:

“We extend our sincere apologies to the passengers who were on the vehicle and who have been shaken by this experience – and we are arranging counseling for them and will continue to do so over the coming days if required.”<sup>2</sup>

Clearly, this is a ‘partial’ apology. It does not apologise *for having caused the injuries that were sustained*. Nor does the manager take any personal responsibility. In using the third person pronoun ‘we’, Cuthbertson apologises on behalf of the company, rather than himself. The apology is an expression of sympathy and regret, not an admission of fault. It is equivalent, morally speaking, to the expression of *regret* made by Fosters below – with the exception that Cuthbertson at least spoke the words himself, rather than leaving the matter to his lawyer:

“Ross Ray, QC, for Foster’s, said his client greatly regretted the death of Mr Huynh and had spent more than \$2.9 million upgrading equipment in the wake of the accident.”<sup>3</sup>

<sup>1</sup> See <[www.sorryworks.net](http://www.sorryworks.net)> accessed June 13, 2008.

<sup>2</sup> Petrie, A. and Cooper, M. (2008) “Two badly hurt in horror crash”, *The Age*, July 25.

<<http://www.theage.com.au/national/two-badly-hurt-in-horror-crash-20080724-3kk2.html>> accessed July 25, 2008.

<sup>3</sup> Collins, 2008.

In several American states, legislation has even been instituted which protects medical professionals from liability if they express a ‘partial apology’ prior to any investigation.<sup>1</sup> Closer to home, the *Coroner’s Act (1985)* appears to protect companies who wish to express an ‘apology’ – before or after the investigation, provided they do not admit fault in so doing:

“(1) In this section, *apology* means an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault. (2) In an investigation of a death— (a) an apology . . . does not constitute an admission as to how death occurred or the cause of death, for the purposes of findings under section 19. (3) Subsection (2) applies whether the apology . . . —(a) is made orally or in writing; or (b) is made before or after the investigation commenced.”<sup>2</sup>

One might expect then, that this kind of protection would reassure lawyers and insurance companies. Unfortunately, a ‘partial apology’ is, in fact, merely an expression of sympathy or regret and this is in no way morally equivalent to repentance.<sup>3</sup> A genuine apology does not provide a ‘safe harbour’: on the contrary, it is a way of opening oneself up to all the consequences of wrongdoing. As Taft argues:

“If apology is to be authentic, the offender must clearly admit his wrongdoing; he must truly repent if the apology is to be considered a moral act. When an offender says, ‘I’m sorry,’ he must be willing to accept all of the consequences – legal and otherwise – that flow from his violation. If a person is truly repentant, he will not seek to distance himself from the consequences that attach to his action; rather he will accept them as a part of the performance of a moral act and the authentic expression of contrition.”<sup>4</sup>

This is not to suggest that ‘partial apologies’ are always inappropriate. It can be most helpful to offer an expression of regret and sympathy *when fault has yet to be determined*.<sup>5</sup> But in cases where company directors or managers want to take outcome responsibility, then offering only a ‘partial apology’ would not be sufficient. They may not be apologising for having directly or deliberately caused the death, but they are nevertheless apologising for their role in the activities that gave rise to the death. Thus taking ‘outcome responsibility’ still requires the offer of a full apology.

<sup>1</sup> See <<http://www.sorryworks.net/laws.phtml>> Some states even offer protection when the apology *does* admit fault.

<sup>2</sup> CORONERS ACT 1985 No. 10257 of 1985, Version incorporating amendments as at 19 March 2008, Section 18A. <[http://www.austlii.edu.au/au/legis/vic/consol\\_act/ca1985120/s18a.html](http://www.austlii.edu.au/au/legis/vic/consol_act/ca1985120/s18a.html)> accessed July 21, 2008.

<sup>3</sup> “If I say ‘I am sorry to hear that your aunt is ill,’ or ‘I am sorry your recovery from illness was so difficult,’ I am not apologizing, I call this the compassionate or empathic ‘I am sorry.’ These statements are not apologies, since they do not contain acknowledgements of grievances, acceptance of responsibility for causing them, and expressions of personal remorse.” Lazare, 2004: p. 25.

<sup>4</sup> Taft, L. (2000) “Apology Subverted: The Commodification of Apology”, *The Yale Law Journal*, vol 109: 1135-1160: p. 1157. Cf. “In its fullest form, the apology has several elements: expression of embarrassment and chagrin; clarification that one knows what conduct had been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation, and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution.” Goffman, E. (1972) *Relations in Public*. Harmondsworth: Penguin: pp. 143–4.

<sup>5</sup> Where the evidence of an individual’s responsibility is not clear, then if a person expresses a ‘partial apology’, then the research found that the recipients “were less angry . . . judged the offender as experiencing more regret . . . and as being of higher moral character . . . rated the offender’s conduct more favorably . . . and were more willing to forgive the offender. . . . than when the evidence was more clear”. Robbenolt, 2003: p. 499, n. 189.

Indeed, it is highly likely that the bereaved family would report less sympathy for company directors and managers who resorted to a partial apology.<sup>1</sup> To give an example, a recent news article reported that “Australia’s most senior Catholic”, Sydney Archbishop Cardinal George Pell, had apologised to Mr Jones, who had been sexually assaulted by Father Goodall. For Mr Jones, the apology did not acknowledge the full extent of how he had been wronged by Dr Pell – and so was condemned as not being ‘genuine’.

“But Dr Pell has apologized only for badly drafting a 2003 letter in which he said Anthony Jones’ claims of sexual assault at the hands of Father Terence Goodall could not be substantiated. He did not apologise for dismissing Mr Jones’ claims or for subsequently suggesting the attack could have been consensual, despite revelations Father Goodall had admitted forcing himself on Mr Jones. ‘I do apologise to you for my (2003) letter ... which was poorly drafted and, I regret, open to interpretations which I did not intend,’ Dr Pell said to Mr Jones in a letter that arrived yesterday. Dr Pell also offered to meet Mr Jones and promised a formal response to his complaint against the church within weeks. But Mr Jones was scathing about Dr Pell’s apology, saying: ‘I expected an apology (in which he admitted) he got the whole thing wrong. Until that happens, there will be no peace.’ He accused Dr Pell of being aware since 2005 of Father Goodall’s admission the attack was not consensual, “so his apology is not genuine”.<sup>2</sup>

It is for this reason that before a restorative justice process can proceed, a person who has caused harm must be willing to offer a full and genuine apology for their part in what happened – no matter how small. Would company lawyers still advise against participation in restorative justice? Perhaps. It may depend on the legal risk of doing so. I have argued that restorative justice can take place in situations where personal criminal liability has not been (and could not be) imposed. So the risk need not be substantial. In the end however, company directors, senior managers or employees who wish to offer an apology must do so in the full knowledge of any legal consequences. This need not prevent them from proceeding. As Taft says, making an apology in a situation of legal risk requires the “exercise of great courage, one of the markers of a truly moral act.”<sup>3</sup>

<sup>1</sup> “When the offender failed to take responsibility in the apology (i.e., offered a partial apology) for an incident that resulted in a severe injury the degree of responsibility attributed to the offender was greater and the offer was seen as less likely to make up for the injury. Moreover, an offender who failed to take responsibility in the apology (i.e., offered a partial apology) in the face of strong evidence of responsibility was seen as less likely to be careful in the future than those offering either a full or no apology. This suggests that if relatively clear fault is explicitly not accepted, the careless behavior is seen as more stable, that is, as more likely to persist. In addition, where there was strong evidence of responsibility, participants reported less sympathy for the offender who offered a partial apology than for offenders who offered a full apology or no apology.” Robbenolt J. K., “Apologies and Legal Settlement: An Empirical Examination” (2003) 102(3) *Michigan LR* 460 at 498-499: p. 498.

<sup>2</sup> Stafford, A. (2008) “Pell says sorry for priest sex abuse letter” *The Age*, August 13.

<<http://www.theage.com.au/national/pell-says-sorry-for-priest-sex-abuse-letter-20080812-3u60.html>> accessed August 13, 2008.

<sup>3</sup> Taft, 2000: p. 1157.



## b. Should responsibility be taken for the cause or the outcome?

In cases of work-related death, the relevant offence will either focus on the *cause* (the breach of regulatory law that led to the fatality) or the *outcome* (the death itself). A focus on the **outcome** is usually justified by two considerations: first, the moral seriousness of work-related death and second, the need to create a more potent individual deterrent in the minds of directors and senior management.<sup>1</sup> To direct this focus on the outcome, jurisdictions employ the legal framework of 'traditional' criminality, and thus introduce the crime of corporate manslaughter or homicide.<sup>2</sup> For example, the UK's *Corporate Manslaughter and Corporate Homicide Act (2007)* means that "companies can be held liable for manslaughter where gross failures in the management of health and safety cause death, *not just health and safety violations.*"<sup>3</sup>

Focusing on the **cause** of the fatality, as in Victoria, requires the framework of 'regulatory' criminality, where the offence for which a company is prosecuted is a breach of Health and Safety laws, rather than manslaughter or homicide.<sup>4</sup> An example of this is a case involving the death of an employee at Foster's in 2006. Whilst the newspaper headline was: "Foster's facing \$2m fine for work death", the fine was in fact for the breach of two health and safety laws:

"Brewing giant Foster's faces fines of up to almost \$2 million after admitting that failure to provide a safe workplace at their Abbotsford brewery caused the death of the 58-year-old father of three. Yesterday the company pleaded guilty in the County Court to one count of failure to provide a safe workplace and one count of failure to provide adequate training and supervision. The maximum penalty for each charge is a fine of \$943,290."<sup>5</sup>

<sup>1</sup> A good example of this underlying rationale can be found in the following argument for introducing the crime of 'corporate manslaughter' in the UK: "The lack of corporate criminal accountability gives the appearance that companies and directors are above the law; while the criminal justice system is so earnest in catching traditional criminals, corporate criminals appear immune from prosecution for serious offences. The failure of the law in this area means not only is there a serious lack of moral justice, something most keenly felt by those bereaved by corporate offenders; it also gives the impression to the corporate world that they can evade justice. . . . This is another area that the government must act upon. And this is why they must reform the law of manslaughter and enact a new offence of Corporate Killing" Transport & General Workers' Union, (2003) *Corporate Killing: Make it a Crime*: p. 5.

<<http://www.corporateaccountability.org/dl/Corporatekilling/T&GRep.pdf>> accessed June 20, 2008

<sup>2</sup> The distinction made here between 'traditional' and 'regulatory' criminality is taken from Haines and Hall: "Manslaughter is seen within the contemporary context as signalling 'traditional' as opposed to 'regulatory' criminality, where traditional criminal law refers to outcome or result-based offences such as murder or manslaughter, and regulatory criminal offences are contained, for example, in OHS statutes, and are often more duty-based." Haines, F. and Hall, A. (2004) "The Law and Order Debate in OHS" *J Occup Health Safety - Aust NZ*, 20(3): 263-273: p.264

<sup>3</sup> Ministry of Justice "Justice for corporate deaths: royal assent for corporate manslaughter and corporate homicide act" 26 July 2007 <<http://www.justice.gov.uk/news/newsrelease260707b.htm>> accessed July 23, 2008. Emphasis added.

<sup>4</sup> "In an analysis of occupational health and safety (OHS) offences in Victoria, Santina Perrone noted that between January 1987 and December 1990, 353 work related deaths had occurred in Victoria alone. Of those fatalities, 203 occurred in a corporate context. Perrone identified 25 of those 203 'corporate fatalities' as exhibiting an 'extreme level of company negligence', namely a degree of negligence 'sufficient to establish criminal culpability, whether intentional or reckless, necessary to sustain a manslaughter conviction under the *Crimes Act 1958 (Vic)*.' Even allowing for a margin for error in Perrone's analysis, it appears that there was a significant number of cases involving fatalities in which corporate negligence warranted a manslaughter prosecution. Yet no [successful] prosecutions occurred. Instead these cases, if they were prosecuted at all, were prosecuted as breaches of provisions of the *Occupational Health and Safety Act 1985 (Vic)*." Coles, A. *Corporate Killers: A 'Republican' Alternative To Corporate Manslaughter Prosecutions* - A paper submitted for the Research Unit, Faculty of Law, the Australian National University, October 1998. <<http://law.anu.edu.au/criminet/Coles.html>> accessed June 18, 2008.

<sup>5</sup> Collins, S. (2008) "Foster's facing \$2m fine for work death", *The Age*, July 25.

<<http://www.theage.com.au/national/fosters-facing-2m-fine-for-work-death-20080724-3kjj.html>> accessed July 25, 2008.

The problem that this distinction poses is this: normally, referrals to a restorative justice service are made on the basis of the relevant criminal offence. But what if the crime in question is a regulatory breach, such as ‘failing to provide adequate training and supervision’? The bereaved family may want the company to acknowledge any such violations of OHS law, and provide reassurance that all measures will be taken to ensure that they will not happen again. However it is not *merely* the company’s breach of OHS law that has caused the family’s immense pain and distress. It is the *result* of that breach, namely, the death of their loved one. Treating the relevant ‘offence’ as a regulatory violation would simply reinforce the anger and frustration that bereaved families already feel as a result of the regulatory approach. For the bereaved families, a conviction for breaching an OHS regulation communicates a profoundly hurtful and offensive message: namely, that the society in which they live is more concerned with breaches of health and safety procedures than with the death of their loved one.<sup>1</sup>

This perspective is perhaps the chief rationale behind the introduction of corporate manslaughter legislation. We argued earlier that one of the primary functions of the criminal justice system in a liberal democracy is to reinforce societal values, as embodied in the law, by holding those who violate them to account; and that it should so do without being ‘held to ransom’ by the vagaries of whether or not offenders have ‘taken responsibility’ for their actions. Corporate manslaughter legislation can thus be seen as a way of ensuring that, when a death has been caused through corporate negligence, the polity can be assured that they live in a society that takes such wrongdoing with utmost seriousness.<sup>2</sup>

“[I]nstrumental arguments of deterrence do not tap into the wellspring of calls for industrial manslaughter legislation, which are essentially expressive and emotional. . . . This emotional core is both individual (it is about making some individual pay for his/her wrongdoing, that is, retribution) and social (it reassures us that society is moral, that is, denunciation). . . . In the case of reforming industrial manslaughter law, the demand for a recognizable form of criminality to apply to organisations is a reaffirmation of the sacredness of human life.”<sup>3</sup>

Restorative justice, as we have seen, is not designed to express this kind of public denunciation. Its proper remit is to attend to the personal or private needs of those directly involved. We have also seen that restorative justice is not offence-focused, but relationally orientated. It is not concerned with the punishment of a particular

<sup>1</sup> This prioritisation of OHS regulation is also reflected in the fact that it would be entirely consistent with the regulatory approach *not* to prosecute – even where there is a work-related death – if it can be shown that the company had an effective prevention strategy in place. “It is important that OHS prosecutions target the more negligent cases rather than those that result in major consequences. It is not uncommon for prosecution activity to focus on serious injuries to the exclusion of serious negligence. Prosecution agencies should carefully consider which organisations are to be targeted for prosecution. Where an organisation has an effective prevention program in place and a serious accident does occur, consideration needs to be given to the efforts taken to provide a safe workplace, thereby mitigating the need for a prosecution. Alternatively, where an organisation has no prevention strategy and there is a high degree of negligence associated with an incident that has the potential to result in injury, then prosecution should be considered even though there may have been no injury or illness as a result of the incident. This approach will provide a strong incentive for organisations to proactively address workplace safety. It will also dispel the myth that has been created by current prosecution practices that prosecutions will normally only result if a serious injury or fatality occurs.” McLean, 1998: p. 520-21.

<sup>2</sup> Cf. Clarkson, 2008: p. 96.

<sup>3</sup> Haines and Hall, 2004: p. 268-69.

offence, but rather with addressing the harm done to individual victims. So there would be clear differences, in this context, between the objectives of restorative justice and corporate manslaughter legislation. Nevertheless, the two approaches do share one feature in common. As mentioned above, the bereaved family will consider the *primary wrong* or *harm* to have been the death of their loved one, not the OHS breach. Hence, like corporate manslaughter legislation, the fatality would need to be the focus of any restorative justice process.

In the absence of corporate manslaughter legislation, it may be that restorative justice can therefore play a role in meeting, to some extent, the family's moral and emotional needs – needs that a regulatory framework, on its own, is not equipped to fulfill. This role might also be attractive to those who are sympathetic to these needs, but fear that using industrial manslaughter laws to meet them will have the kind of unintended consequences mentioned by Haines and Hall:

“[P]olicies that capture the emotional needs of societies (including the need to blame) have historically been subject to political distortion and abuse. If this is true of the current push for industrial manslaughter legislation, such reforms may succeed in temporarily satisfying the need to blame, but in doing so will deflect attention away from measures that may be more fruitful and instrumentally beneficial” in terms of addressing “structural (and competing) imperatives (economic, political and social) that contribute to the toll of illness, injury and death”.<sup>1</sup>

On the other hand, if the presenting framework is ‘regulatory’, then this poses a problem for how the role of restorative justice might be conceived. For example, in Section 5 we will see that a number of potential applications include referrals from the criminal justice process. Thus, a case might be referred to restorative justice as an alternative to prosecution, a pre-sentence disposal or a ‘restorative sanction’.<sup>2</sup> But if these referrals are conceived of by the referring agencies as ‘alternative ways of addressing the criminal offence’ – and the offence in question is a regulatory breach such as ‘failing to provide adequate training and supervision’ – then it is not clear that restorative justice is the appropriate vehicle to achieve the envisaged end. The dialogue may, at some point, attend to health and safety issues, but it will invariably focus, in the main, upon the devastating *consequences* for the bereaved family and the company's responsibility in *that* respect.

It is unlikely that either the referral agency or the company would find this shift in focus acceptable, at least not without considerable political debate and negotiation.<sup>3</sup> It would, after all, constitute a kind of subversion or usurpation of the regulatory framework that produced the referral in the first place. This problem diminishes if we situate restorative justice outside the legal process, for example, in a post-sentence context. However, it does not completely dissolve. Suppose that the only

<sup>1</sup> Haines and Hall, 2004: p. 272

<sup>2</sup> For the sake of argument, I have here put aside the perspective, argued above, that whilst restorative justice may *complement* prosecution and sentencing, it is not a viable *substitute* in terms of serving the public interest.

<sup>3</sup> Cf. Gabbay asks a similar question regarding (economic) white-collar crimes “The involvement of highly-paid defense attorneys in these cases leaves very little room for doubt about the readiness of white-collar offenders to be held accountable for their actions. What are the chances that these offenders would actually accept responsibility in a restorative justice process and allow themselves to be held accountable by the victims without dominating the conversation?” Gabbay, 2007: p. 454.

charges laid are regulatory, and that manslaughter was not even alleged. In that case, individuals will need to know what the legal implications of apologising for their part in causing a fatality might be.

### c. Will responsibility be taken for the harms that occur in the aftermath?

There are many other kinds of wrongdoing or harm that can occur within the context of work-related death (See Section 5, Option 8). This can include insensitive media reporting or injudicious investigative practices. In the main, these will not amount to criminal or civil offences. At most, they might involve a breach of the relevant organisation's code of ethics. At the lower end, they could be result of misinterpretation or some communication that is perceived in a way that was not intended.<sup>1</sup> But they can nevertheless cause severe hurt, frustration and anger. In terms of initiating a restorative justice process, this kind of situation may or may not be problematic. Ideally, those responsible will – more or less immediately – see for themselves that they have done the wrong thing. They might then wish to approach those harmed, through a restorative justice service, to offer an apology and make amends.

But if this kind of self-referral does not take place, then the starting place for restorative justice may be complex. Those who have been harmed will need to make a complaint or allegation either directly or through a restorative justice service. There may need to be an internal investigation on behalf of the relevant organisation. Considerable good will and honesty on the part of the organisation and those responsible will be required. Whether the allegation is accepted or not may require preliminary negotiations and shuttle diplomacy – particularly where there is some dispute about what actually happened and who was responsible or where an admission could have professional repercussions for the accused. Denials, minimisations, 'victim-blaming' and rationalisations will need to be managed carefully by the restorative justice facilitator to ensure that individuals are not re-victimised. It will remain the case that restorative justice cannot proceed unless there is an admission of responsibility and sufficient common ground between all those involved on the nature and extent of the harm done.<sup>2</sup>

### d. Who is responsible for making reparation?

The United Nation's *Handbook on Restorative justice Programmes* presents several of the key underlying assumptions of restorative justice. One of these is that "victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation."<sup>3</sup> One problem with the use of

<sup>1</sup> As suggested by Steve Kolotylo (personal communication, 1 September, 2008.)

<sup>2</sup> "Thus in the initial meetings with offenders by RJ facilitators, the primary concern is whether an offender is suitable for RJ, regardless of stated intent. If offenders deny their guilt, express intense anger or give other indications of posing a risk to victims or supporters in an RJ process, facilitators have readily excluded them." Sherman, L.W. and Strang, H. (2007) "Restorative Justice: The Evidence" (The Smith Institute): p. 37.

<sup>3</sup> *Handbook on Restorative justice Programmes* (United Nations Office On Drugs And Crime): p. 8.

restorative justice in the context of work-related death is how the harm done (a fatality) can possibly be repaired. In Section 3, we will present a clarification of what this might mean in terms of the *symbolic* repair that can result from a restorative justice process. However, it might be argued that *material* reparation should also be included in this context, given the severe financial losses that a death can incur for the bereaved family.

The problem here is that compensation to bereaved families or injured workers is the responsibility of the insurers (e.g. WorkCover), rather than the company at fault. The rationale for this is commendable: it relieves those affected from the burden of costly (and not inevitably effective) civil action. However, it follows that the issue of financial compensation will generally need to be disentangled from any restorative justice process. This is not impossible, but it will need to be taken into consideration to avoid unwarranted or unrealistic expectations. In other words, 'making amends', in this context, may need to be conceived of as more symbolic or task-orientated than monetary.<sup>1</sup>

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<sup>1</sup> It should be noted that the focus on symbolic reparation is not far removed from most restorative justice processes in any case: "Material reparation, however, is only one form of reparation. Symbolic reparation was far more prevalent. We have already discussed apologies, which are forms of symbolic reparation, acknowledging the harm done and reinstating the victim as someone to whom respect and reparation is due. In one sense, indeed, the whole restorative justice process, if it goes as intended, could be seen as symbolic reparation, in that the offender has acknowledged responsibility for the offence, has agreed to come to a meeting, has stated they have done the offence and has acknowledged that at least some harm has been done to the victim." Shapland, J., Atkinson, A., Atkinson, H., Colledge, E., Dignan, J., Howes, M., Johnstone, J., Robinson, G., and Sorsby, A. (2006) "Situating restorative justice within criminal justice." *Theoretical Criminology* 10(4) 505–532: p. 518.

### 3. What are the distinctive benefits?

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#### What can possibly be 'restored'?

*"Sometimes I have a little trouble with just the term "restorative justice." It is almost offensive if you or the community thinks that they are going to restore me to where I was before my son was murdered. I hope people do not think that is what it is supposed to be."*<sup>1</sup>

When serious harm has been caused, it is difficult to see what can possibly be 'restored'. The world of those who have been affected cannot return to the way it was. Life has changed forever. As an article about peacemaking in the Sierra Leone puts it: "you cannot reverse the rape, you cannot restore the dead from their grave, and you cannot replace the severed arms".<sup>2</sup>

This kind of concern is particularly germane to the context of work-related death. Hence, it is important to clarify the suitability of 'restorative' language in this context. What is it that restorative justice processes seek to achieve in the context of work-related death? What can be restored, and to whom? One general answer to this question, given by Braithwaite, is this:

*"whatever dimensions of restoration matter to the victims, offenders and communities affected by the crime."*<sup>3</sup>

This response might not seem particularly helpful, but it does suggest that restorative justice is primarily concerned with (a) meeting the *needs* (b) of *all* those who are affected, (c) as *they* see them. It also reflects the way in which restorative justice is sensitive to context. It can be adapted to suit a variety of situations.<sup>4</sup>

Another frequently cited definition of restorative justice is this:

*"Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."*<sup>5</sup>

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<sup>1</sup> Mica, H., Achilles, M., Halbert, E., Amstutz, L. and Zehr, H. (2002) *Taking Victims And Their Advocates Seriously: A Listening Project*, Mennonite Central Committee Office on Crime and Justice: p. 8

<<http://www.restorativejustice.org/resources/docs/mika>> accessed July 10, 2008.

<sup>2</sup> [www.focus-on-sierra-leone.co.uk](http://www.focus-on-sierra-leone.co.uk) "New Emphasis Should Be On Making Up, Not Breaking Up The Nation's People", *Focus* Vol.2 No.5. <<http://www.focus-on-sierra-leone.co.uk/Issues%20of%20Peace%20and%20Reconciliation.htm>> accessed July 22, 2008.

<sup>3</sup> Braithwaite, J. (1997) *Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory*. Review Essay Prepared for University of Toronto Law Course, Restorative Justice: Theory and Practice in Criminal Law and Business Regulation: p. 5.

<sup>4</sup> Llewellyn, J. (1999) *Restorative Justice ~ A Conceptual Framework*: Prepared for the Law Commission of Canada. p. 21. <[http://dspace.dal.ca/dspace/bitstream/10222/10287/1/Howse\\_Llewellyn%20Research%20Restorative%20Justice%20Framework%20EN.pdf](http://dspace.dal.ca/dspace/bitstream/10222/10287/1/Howse_Llewellyn%20Research%20Restorative%20Justice%20Framework%20EN.pdf)> accessed July 20, 2008.

<sup>5</sup> Marshall, T. (1999) *Restorative Justice: An Overview*. London: Home Office Research Development and Statistics Directorate: p 5.

This definition is, like Braithwaite's, useful insofar as it encompasses a wide range of possible applications. What it adds to Braithwaite's response are four procedural elements: (a) the *coming together* of all those who have been affected, (b) entering into a dialogue in which every voice is heard and respected, (c) the aim of achieving consensus, and (d) a focus on *what can be done*, rather than *what cannot be undone* ('the past cannot be changed, so what do we do now').

Most of the elements mentioned so far are common to a range of other processes, such as problem-solving groups, mediation and Alternative Dispute Resolution. Again, there are a range of services already in place that are designed to "deal with the aftermath of the offence and its implications for the future". For example, in the context of work-related death in Victoria, the cause of death, as well as prevention plans, are the responsibility of WorkSafe and the coroner's court; compensation is handled by WorkSafe's Workplace Injury Insurance (WorkCover) or the civil courts; and various other grief support and counselling services are available to bereaved families to assist with practical and emotional issues. So the definitions above do not yet give us a clear sense of what is distinctive about 'restorative justice'. What does it have to offer over and above the existing range of responses?

A good starting place in terms of answering this question, is to make the very simple observation that the term 'restorative' is an adjective. If it stood on its own, as in the term 'restoration', that would leave the question of 'What is restored?' open to an almost infinite number of responses. What is distinctive about 'restorative justice', then, is not that it 'restores' in some generic sense. Rather, what sets 'restorative justice' apart is that it advocates a different kind of *justice*.

### What kind of 'justice' is this?

The term 'restorative justice' does not refer to the principles that determine the allocation of material or economic goods (i.e. what is usually called 'distributive justice'). Nor does it apply where the issue at stake is a problem that needs to be solved, or a disagreement, a dispute or a conflict that needs to be resolved. These matters already have well-established methods and techniques, such as mediation and ADR. Rather, 'restorative justice' refers to the kind of justice that is sought in the aftermath of some kind of *serious wrongdoing*.<sup>1</sup>

In its early days, restorative justice advocates such as Howard Zehr tried to clarify the type of 'justice' that restorative justice was seeking to deliver by positioning it in *opposition* to the traditional criminal justice system (CJS). Zehr created parallel lists exhibiting the key distinguishing features of each approach.<sup>2</sup>

<sup>1</sup> "Restorative justice as *justice*, is . . . necessarily concerned with addressing *wrongs*. Thus, although the scope of restorative justice will extend far beyond the scope of those wrongs defined as criminal at a given time or place, it is not a general answer to the problem of human conflict resolution. . . . [For example, in] commercial settings, there are many disagreements between agents about future courses of action within an industry or enterprise that might usefully be referred to arbitration or mediation as a means of conflict resolution but, again, unless there is a connection with a wrong, this is not the business of restorative justice." Llewellyn, 1999: p. 17.

<sup>2</sup> Zehr, H. (2002) *The Little Book of Restorative Justice*, Good Books: p. 21.

<b>- Two Different Views -</b>	
<i><b>Criminal Justice</b></i>	<i><b>Restorative Justice</b></i>
<ul style="list-style-type: none"> <li>• Crime is a violation of the law and the state</li> </ul>	<ul style="list-style-type: none"> <li>• Crime is a violation of people and relationships</li> </ul>
<ul style="list-style-type: none"> <li>• Violations create guilt</li> </ul>	<ul style="list-style-type: none"> <li>• Violations create obligations</li> </ul>
<ul style="list-style-type: none"> <li>• Justice requires the state to determine blame (guilt) and impose pain (punishment)</li> </ul>	<ul style="list-style-type: none"> <li>• Justice involves victims, offenders and community members in an effort to put things right.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Central Focus:</b> offenders getting what they deserve</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Central Focus:</b> victim needs and offender responsibility for repairing harm</li> </ul>

In recent years, there has been considerable softening in Zehr's work toward the role of the CJS. He, like many other restorative justice advocates, now recognise that the CJS has an important role to play.<sup>1</sup> However, his strategy is still to argue that restorative justice is fundamentally more important than (or takes priority over<sup>2</sup>) the CJS. This kind of evaluative positioning has had a powerful and lasting effect on restorative justice theory and is routinely used by advocates as a 'selling point'.<sup>3</sup>

However, there is another way of taking Zehr's parallel lists. On the face of it, the two approaches do seem ideologically opposed to each other, leaving us with an either-or decision as to which paradigm we must choose or prioritize. But these perspectives are not *logically* incompatible: both could be true. Criminal violations, for example, create both legal guilt *and* moral obligations toward the victim. They are only 'incompatible' in the pragmatic sense that it is extraordinarily difficult for both aspects of crime to be addressed in the same place, at the same time, using the same processes. But if they are done at *different* places and times, using *different*

<sup>1</sup> "In my earlier writings, I often drew a sharp contrast between the retributive framework of the legal or criminal justice system and a more restorative approach to justice. More recently, however, I have come to believe that this polarization may be somewhat misleading. Although charts that highlight contrasting characteristics illuminate important elements differentiating the two approaches, they also mislead and hide important similarities and areas of collaboration." Zehr 2002: p. 58. "Restorative justice usually acknowledges a place for the adversarial approach and the role of professionals and recognizes an important role for the state." Zehr 2002: p. 26; "[T]here are larger concerns and obligations that belong to society beyond those who have a direct stake in a particular event. These include a society's concern for the safety, human rights, and the general well-being of its members. Many argue that the government has an important and legitimate role in looking after such societal concerns." Zehr 2002: p. 28.

<sup>2</sup> For example, Zehr claims that one of the fundamental principles of restorative justice is that "Victims, offenders and the affected communities are the key stakeholders in justice . . . the state has circumscribed roles, such as investigating facts, facilitating processes, and ensuring safety, but the state is not a primary victim" Zehr 2002: p. 65; or again, "Obligations to victims, such as restitution, take priority over other sanctions and obligations to the state, such as fines." Zehr 2002: p. 66.

<sup>3</sup> Cf. Kathleen Daly: "The retributive-restorative oppositional contrast is not only made by restorative justice advocates, but increasingly one finds it canonized in criminology and juvenile justice textbooks. . . . Despite advocates' well-meaning intentions the contrast is a highly misleading simplification, which is used to sell the superiority of restorative justice and its set of justice products. To make the sales pitch simple, definite boundaries need to be marked between the good (restorative) and the bad (retributive) justice, to which one might add the ugly (rehabilitative) justice." Daly, K. "Mind the gap: restorative justice theory in theory and practice", in von Hirsch, A., Roberts, J., Bottoms, A., Roach, K., and Schiff, M (eds), (2003) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*, Oxford University Press: p. 363.



processes, then the either-or scenario quickly dissolves. With this in mind, it would seem that, rather than standing in opposition, the two approaches can be thought of as complementary. Each has its own distinctive role in addressing crime or serious wrongdoing: the criminal justice system is designed to attend to the *public or societal* dimensions of crime, whilst restorative justice aims to address the *private or personal* dimensions.<sup>1</sup> This is consistent with the position made earlier, with regard to the respective roles of the state's regulatory systems and restorative justice. It is also a distinction that is reflected in Zehr's own views:

"[C]rime has a societal dimension, as well as a more local and personal dimension. The legal system focuses on the public dimensions; that is, on society's interest and obligations as represented by the state. However, this emphasis downplays or ignores the personal and interpersonal aspects of crime. By putting a spotlight on and elevating the private dimensions of crime, restorative justice seeks to provide a better balance in how we experience justice."<sup>2</sup>

### Repairing Relationships

We now have a clearer position about the role of restorative justice: its purpose is *to address the private (personal and interpersonal) dimensions of wrongdoing*. But what are these 'private dimensions'? Primarily, they have to do with the way in which the act of wrongdoing has damaged the *relationship* between the person responsible and the person who has been wronged.

This does not mean that they might have had a prior relationship, although that could easily be the case.<sup>3</sup> Likewise, 'repairing the relationship' does not entail that they become friends in some sense. The repair can occur even if they decide never to meet again. The kind of relationship that matters here is the one that we have with every other member of the human race. In other words, it is based upon the assumption that every human being has intrinsic worth and dignity. What this means is that no matter what they have done or who they are, they deserve to be treated with respect, simply as a fellow human being.<sup>4</sup>

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<sup>1</sup> This distinction between the CJS and restorative justice is not intended to exclude the possibility of overlaps between the two. For example, there are aspects of the criminal justice process that do help to address the harm caused by crime, and enable healing (such as a sense of relief or vindication for victims when the offender is caught and/or sentenced). Likewise, criminal justice professionals, in their day-to-day contact with offenders, victims and their families, can have a powerful impact in terms of addressing the personal dimension. However, it remains the case that the primary function of the CJS is (and should be) to attend to the public dimension.

<sup>2</sup> Zehr, 2002: p. 12.

<sup>3</sup> A recent study of English restorative justice schemes found that: "In the conferences we observed, it was surprising to us how often, in the context of offending within a western, urban environment, such a relationship did actually exist, though perhaps less surprising given the finding from the environmental criminology literature that most offending is very local." Shapland et al., 2006: p. 518-19.

<sup>4</sup> By 'intrinsic dignity and worth', I mean a primitive, inviolable property of all human beings, which is distinct from and not determined by either any instrumentally valuable attributes they might have, or any agent-projection or bestowal of value. This view is standardly known as the (Kantian) 'egalitarian theory of human worth' See Hampton, J. (1997) "The Wisdom of the Egoist: The Moral and Political Implications of Valuing the Self", *Social Philosophy & Political Foundation*, 21-51: p. 27ff.

To say that person A has *wronged* person B is, among other things, to say that A did not treat B with the respect that B deserved as a fellow human being. It is because of this failure of respect that their relationship as human beings or fellow-citizens has been damaged. What restorative justice aims to do then, is to repair this kind of relationship. It does this by enabling the wrongdoer to *restore the respect that he or she owed to the person who was wronged*. This is achieved primarily by offering a sincere apology and making amends for the harm they have caused. Antony Duff has expressed this aim in the following way:

“[T]he aim is to reconcile [victim and offender] as fellow citizens (if they had no close relationship that could be salvaged): to repair or restore the normative relationship of fellow-citizenship so that they can treat each other with the acceptance and respect that fellowship in the polity requires. The offender’s crime violated the values which define that normative relationship. And was thus injurious to it; that injury must be repaired. . . . [Hence w]hat is required is a response that addresses the *wrong* that is done to [the victim]. That must at least involve an apology, which expresses the wrongdoer’s recognition of the wrong she has done, her implicit commitment to avoid such wrongdoing in future and her concern to seek forgiveness from and reconciliation with the person she wronged. Apologies own the wrong as something that I culpably did, but disown it as something that I now repudiate; they also mark my renewed recognition of the person I wronged as one to whom I owe a respect that I failed to display, and with whom I must reconcile myself by making up for what I did to her.”<sup>1</sup>

Thus in the context of work-related death, the role of restorative justice is not to ‘restore’ the life of a loved one. It does not pretend to return the world to the way it was before the death. It cannot resolve all ongoing issues, such as grief. Those responsible have no way of restoring the respect that they owed to the person who has died. Restorative justice can, however, offer something unique and distinctive to the living. Whatever acts that allowed or caused the death to take place conveyed a message to the bereaved family. What they communicated – whether intended or not – is a profound disrespect to the person who died and, by extension, to the bereaved family who loved and cherished them. These messages may be reinforced, again and again, by the way in which the family is treated after the death – not only by those responsible for the death, but any agency or individual that comes into contact with the family. It must be acknowledged that most of these messages are unintentional, but they are keenly felt nevertheless. They include the following:

- ‘Our needs are more important than yours’,
- ‘We don’t care that our actions might be hurting you’
- ‘Your feelings and your perspective do not count’
- ‘You are to blame for the pain or humiliation you are experiencing’

<sup>1</sup> Duff, A. (2003) “Restoration and Retribution” in von Hirsch et.al., 2003: p. 51. Llewellyn expresses a similar idea: “Restorative justice is fundamentally concerned with restoring social relationships, with establishing or re-establishing social equality in relationships. That is, relationships in which each person’s rights to equal dignity, concern and respect are satisfied. . . . At the same time, in taking the social dimension seriously, restorative justice captures an idea of transformation, of orientation towards the future. While the beginning point of restorative justice is a state of wrong that has disturbed the relationship between the wrongdoer and the sufferer of wrongdoing, its *endpoint* may be quite different than the *status quo ante*.” Llewellyn, 1999: pp. 1-2.

These are the kind of messages that violate the dignity of the bereaved family. They treat them as less than equals, as not being worthy of the normal respect they are owed, simply as human beings. No matter who they are, or what they are like, no one deserves to be treated with such contempt and disregard. This is the kind of injustice that restorative justice is designed to address.

### What does it mean to apologise?

Those who are in some way personally responsible will continue to be morally blameworthy until they can show that they no longer stand by these messages. In other words, they must express remorse and offer an *apology* to the bereaved family for their part in the wrong that was done to them.

It is important to be clear about what this expression of remorse involves. It must not, for example, be conveyed in a way that attempts to justify or rationalise what happened (e.g. 'I'm sorry, but you know the possibility that this could happen comes with the job'). Nor does it try to make excuses (e.g. 'We were under the pump from the bank'). It should certainly never blame the family for the way that they feel (e.g. 'Isn't it time you moved on?').

In other words, the apology should not attempt to deny the *meaning* of what happened or the messages that were heard. What an apology does is attempt to alter the *effect* which the wrongdoing has on the present. It is a way of standing with the family in denouncing or disavowing the messages of disrespect that were conveyed by the wrongdoing. It restores to the family the acknowledgement and respect that they deserve as human beings. To offer an apology is a way of saying that we want to be seen in a different light. We do not want our wrongdoing to define us. We want to reveal our humanity and our commitment to shared values.<sup>1</sup>

“[Repentance] is surely the clearest way in which a wrongdoer can sever himself from his past wrong. In having a sincere change of heart, he is withdrawing his endorsement from his own immoral past behavior; he is saying, 'I no longer stand behind the wrongdoing, and I want to be separated from it. I stand with you in condemning it.' Of such a person it cannot be said that he is *now* conveying the message that he holds me in contempt.”<sup>2</sup>

<sup>1</sup> “[A]pology . . . is an act of honesty because we admit we did wrong; an act of generosity, because it restores the self-concept of those we offended . . . an act of commitment because it consigns us to working at the relationship and at our self-development . . . [and] an act of courage because it subjects us to the emotional distress of shame and the risk of humiliation, rejection, and retaliation at the hands of the person we offended. All dimensions of the apology require strength of character, including the conviction that, while we expose vulnerable parts of ourselves, we are still good people.” Lazare, A. (1995) “Go ahead say you’re sorry”, *Psychology Today*, Jan, v28n1, pp. 40-3: p. 43; “While [facing the person they violated] is often an uncomfortable position for offenders, they are given the equally unusual opportunity to display a more human dimension to their character.” Umbreit, M. (1994). *Victim Meets Offender: The Impact of Restorative Justice and Mediation*. Monsey, New York: Willow Tree Press, Inc.: p. 9.

<sup>2</sup> Murphy, J. (1988) “Forgiveness and Resentment”, in Murphy, J. and Hampton, J. *Forgiveness and Mercy*, New York, NY: Cambridge University Press: p. 26. Cf. “[A]pologies represent a splitting of the self into a blameworthy part and a part that stands back and sympathizes with the blame giving, and, by implication, is worthy of being brought back into the fold.” Goffman, E. (1971) “Remedial Interchanges”, in *Relations in Public: Microstudies of the Public Order*, New York: Basic Books, 1971: 95-187: p. 113; “Solidarity requires that one enter into the situation of those with whom one is in solidarity; it is a radical posture. If what characterizes the oppressed is their subordination to the consciousness of the master, as Hegel affirms, true

## What are the benefits of accepting an apology?

It might be asked, why can't the family simply reject the messages of disrespect for themselves? What additional value would it be for them to hear an apology? Before answering these questions, we need to say, from the outset, that there should be no expectation or pressure placed upon anyone when it comes to participating in a restorative justice process. If the family do not feel that they need to hear an apology, or cannot see any value in doing so, then that should be honoured – without question. There should certainly be no pressure or expectation that, by participating in this process, they are more likely to experience 'closure', 'healing', or 'recovery'. It would be a mistake to suggest that restorative justice (or any other process) could somehow quell, once and for all, their grieving, their anger and their pain. As Gordon Livingston, who lost two sons within a 13 month period, conveys this perspective in the following:

“Like all who mourn I learned an abiding hatred for the word ‘closure’ with its comforting implications that grief is a time-limited process from which we all recover. The idea that I could reach a point when I would no longer miss my children was obscene to me and I dismissed it. I had to accept the reality that I would never be the same person, that some part of my heart, perhaps the best part, had been cut out and buried with my sons.”<sup>1</sup>

Restorative justice, then, can only be offered as one way of meeting some of the needs that families may be experiencing in the aftermath of the incident.<sup>2</sup> What are these specific needs? The matter is somewhat complicated, but worth spelling out.

The bereaved family may have felt devalued and disrespected by the actions of the company or others. But their dignity and worth as human beings are *intrinsic*. That means they cannot be removed or diminished by anyone.<sup>3</sup> It follows that restorative justice cannot 'restore' the family's dignity and worth. But what it can restore is the *respect* that was owed to them as human beings. In other words, the restorative justice process does not bestow, reinstate, or create dignity and worth: it is a way of helping people to *re-experience* and *re-cognise* the fact that they all share in common a basic human dignity and worth.<sup>4</sup>

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solidarity with the oppressed means fighting at their side to transform the objective reality which has made them these 'beings for another.' The oppressor is in solidarity with the oppressed only when he stops regarding the oppressed as an abstract category and sees them as persons who have been unjustly dealt with, deprived of their voice, cheated in the sale of their labour—when he stops making pious, sentimental, and individualistic gestures and risks an act of love.” Freire, P. (1994) *Pedagogy of the Oppressed*, revised edition, trans. M. B. Ramos, New York: Continuum Publishing Company: pp. 31-32.

<sup>1</sup> Livingston, G. (2005) *Too Soon Old, Too Late Smart*, Hachette Australia: p. 116.

<sup>2</sup> “[T]here is a process of recovery from victimization, which depends upon the individual victim and their situation, as well as upon the nature and extent of the offence.” Shapland et. al., 2006: p. 519.

<sup>3</sup> “[Egalitarian] theories of worth (e.g., of the sort held by Kant) . . . insist that [human worth] does not and cannot diminish no matter what we do (so that even a wrongdoer is held to be valuable, and deserving of our respect).” Hampton 1997: p. 28.

<sup>4</sup> “[I]n forgiveness the offended, relative to the offender, *recognizes* that the equality of their commonly shared humanity existed before, during, and after the hurtful event. Thus we do not restore what was never taken away—our humanity, our basic worth. Forgiveness helps us recognize that such equality has existed unconditionally and will continue to exist regardless of one person's behaviour towards another.” Enright, R.D., Gassin, E.A. and Wu, C. (1992) “Forgiveness: A Developmental View”, *Journal of Moral Education* 21, 99-114: p. 112.

Human dignity and worth may well be inviolable. But the *grasp* we have of our own dignity and worth is deeply connected to the way in which other people treat us.<sup>1</sup> The sense that we have of our own worth can be threatened or affirmed by the actions of others. When it is threatened – for instance, by the messages that come with being wronged – one option we have is to try to ‘shore up’ our own sense of dignity and worth by de-valuing or dis-respecting the person responsible. For example, we look down on them, seek revenge, view them with indifference, we ridicule them, we imagine ways of humiliating or exposing them, and so on. In other words, we attempt to defy the threat that their message poses by returning it in kind: we ‘reject our rejectors’, and ‘oppress our oppressors’.<sup>2</sup> We cover them with negative labels and we reduce them to stereotypes. They become ‘evil monsters’, ‘moral deviants’ and ‘social outcasts’.<sup>3</sup>

Another way in which we ‘defy’ the threat to our worth is by feeling emotions such as resentment, anger, hatred, contempt and so on. These emotions are often seen as entirely negative. But they do in fact serve several important functions. For example, the immediate emotional response of resentment or anger may reveal to us – with a forcefulness and clarity that we might not otherwise have experienced – that we have been wronged or treated with disrespect.<sup>4</sup> Indeed, the failure to experience these emotions may indicate a disturbingly fragile grasp of our own worth. Again, the expression of such emotions may reveal to the offender, in a way he may not have seen before, the severity of his violation. It may also serve to deepen and intensify his emotional responses of compassion and remorse.<sup>5</sup>

So there can be immense value in these ‘emotions of defiance’. But they can also do considerable harm. For example, our immediate response of anger can easily transform into a permanent background temperament of bitterness, cynicism and distrust, flaring up upon any reminder of the violation. Again, the anger we feel can

<sup>1</sup> “Most of us tend to care about what others (at least *some* others, some significant group whose good opinion we value) think about us—how much they think we matter. Our self-respect is *social* in at least this sense, and it is simply part of the human condition that we are weak and vulnerable in these ways. And thus when we are treated with contempt by others it attacks us in profound and deeply threatening ways.” Murphy 1988, p. 25; Cf. the following report of burglary victims: “It’s like we were raped. The stuff they took was all given to us for our wedding presents . . . they went through our clothes. . . . It wasn’t just a house they invaded, it was people’s property and real live human beings that they offended.” Umbreit, M. (1990) “The meaning of fairness to burglary victims”, in Galaway, B. and Hudson, J. (1990) eds. *Criminal Justice, Restitution, and Reconciliation*, Monsey, NY: Criminal Justice Press: p. 49.

<sup>2</sup> “[A]most always, during the initial stage of the struggle, the oppressed, instead of striving for liberation, tend themselves to become oppressors, or ‘sub-oppressors.’ The very structure of their thought has been conditioned by the contradictions of the concrete existential situation by which they were shaped. Their ideal is to be [human]; but for them, to be [human] is to be oppressors. This is their model of humanity.” Freire 1994: p. 27.

<sup>3</sup> “The offender is outcast, her deviance is allowed to become a master status” Braithwaite, J. (1989). *Crime, Shame and Reintegration*. New York, Cambridge University Press: p. 101. The tragic irony of this strategy is that those offenders who are, in this way, rejected by their victims (and the wider community), are most likely to continue the cycle of mutual rejection: indeed, criminal activity may—if Braithwaite is right—be explained as an act of defiance very similar to that taken by the unforgiving victim: “when we become outcasts we can reject our rejectors and the shame no longer matters to us.” Braithwaite 1989, p. 55.

<sup>4</sup> “Although Kantian beings who could know morality without relying upon their emotions are perhaps conceivable—just barely—that surely is not us. We need our emotions to know about the injustice of racial discrimination, the unfairness of depriving another of a favorite possession the immorality of punishing the innocent. Our emotions are our main heuristic guide to finding out what is morally right.” Moore, M. (1987) “The Moral Worth of Retribution,” in Schoeman, F. (1987) ed. *Responsibility, Character and the Emotions*, Cambridge: Cambridge University Press: p. 189.

<sup>5</sup> “The experience of being caught for an offense and being charged will be sufficient to incite a degree of regret in most offenders (if only out of self-pity). The task of the [restorative justice] scheme is then to build on this spark of remorse to encourage even more insightful realization of the harm caused and thereby to make that remorse deeper, more genuine, and less self-centered.” Marshall, T. & Merry, S. (1990) *Crime and Accountability—Victim/Offender Mediation in Practice*. Home Office, HMSO, London: p. 97.

be expressed in disproportionate vengeance or retaliatory violence, either against the offender or against innocent and more vulnerable parties. In either case, the defiant emotions have become 'dysfunctional' because they are no longer serving their proper function.

Why is it that this kind of dysfunction can happen? Here is one explanation. The nature of anger and resentment is such that we experience an immediate *reinforcement* of our sense of worth. It is this 'rush' of strength and clarity that better enables us both to grasp the fact that we have been wronged, and to resist the threat to our sense of worth. However this particular source of 'potency' can be immensely satisfying in its own right, even addictive. This is largely due to the functionality of the emotions in question. To stand defiant against the offender's threat to our worth, we must find some alternative source by which to buttress our sense of dignity and worth. And what better source than *from within*, that is, independently of the attitudes or behaviour of the offender? If we are in the state of enraged defiance, then we do not require the offender to restore the respect owed to us in order to secure our sense of worth. More importantly, we are no longer vulnerable to possibility that he will *never* restore the respect that we deserve. It may therefore be the powerful experience of independence or self-sufficiency that leads us to sustain or nurture our feelings of rage or resentment.

The solution, however, proves to be worse than the problem. First, perpetuating the emotions of rage and resentment typically requires that we keep hating or resenting the offender. But in that case our sense of self-sufficiency is an illusion. Far from gaining the freedom we desire, we are now deeply connected to the offender: for it is only the thought of him that can elicit or evoke the emotions upon which we rely to 'shore up' our sense of worth. Victims often describe their experience as 'being consumed by hatred' for the offender, that the offender has 'taken up residence' in their minds. Instead of the liberation and independence for which they long, their sense of worth is now shackled to the one figure they most detest. This captivity is eloquently expressed by an ex-prisoner of war, Eric Lomax:

"It is impossible for others to help you come to terms with the past, if for you the past is a pile of wounded memories and angry humiliations, and the future is just a nursery of revenge".<sup>1</sup>

Is there an alternative path? We do need to 'let go' of the perceived threat to our worth, but is there a less destructive way of doing it? Perhaps there is. We have seen that the standard way of defying the threat requires that we put up our defences, feel the anger and resentment, and thus 'reject our rejector'. But what would happen if our 'rejector' withdrew these messages of rejection? What if he told us that he had been wrong to show us such disrespect? In that case, surely, we would no longer need to defend ourselves. The fortifications could all come down. The emotions of defiance would serve no purpose. We would not need to continue blocking the threat that offender posed, because he has himself removed the threat.

<sup>1</sup> Lomax, E. (1995) *The Railway Man: A POW's Searing Account of War, Brutality and Forgiveness* (New York: W.W. Norton): p. 233. Quoted in Lazare, A. (2004) *On Apology*, Oxford University Press: p. 244.

We could instead stand alongside him as the one who has now re-affirmed our sense of worth, and returned to us the respect that we were owed. This is precisely the dynamic that a restorative justice process is designed to achieve. What it does is to create a safe and carefully structured social ritual, in which the person who has wronged another returns to them, in a sincere and authentic apology, the respect that they were owed as a human being.

If the person who was wronged hears and accepts that apology, this can begin to release them from their need to maintain the emotions of defiance. It frees them of the constant battle to defend themselves by 'rejecting their rejector'. They can begin to let go of the anger, resentment and hatred they felt towards him. They can start to see him now as a moral equal, as someone who is no longer a threat to their sense of self-worth and human dignity.<sup>1</sup> They can even, if they feel able, return the respect that they have been given – that is by accepting the apology and offering forgiveness.<sup>2</sup> The alternative path that a restorative justice offers is, in other words, a process in which human beings can become reconciled.<sup>3</sup>

One qualification is important here. This alternative path needs to arise from authentic or sincere motives: if the apology or the forgiveness is offered only as a result of third-party coercion, a sense of moral superiority, a fear of reprisal, or the desire for therapeutic 'closure', then it is unlikely to succeed. It will not change the way in which people view each other. Consequently, it will neither remove the threat posed by the wrongdoer, nor will it repair the damaged relationship.

So to return to our question: *What benefit could we gain from hearing and accepting an apology from the person responsible for causing us harm?* We have seen how a sincere apology provides us with clear and direct evidence that the wrongdoer no longer stands by his original messages of disrespect. This allows us to relax our defences and let go of our resentment, anger and bitterness. Hearing a sincere apology – and accepting it – can release us from the chain that has tied us to the offender for so long. For some, that is precisely the kind of freedom for which they long. Indeed, *without* the reaffirmation of worth expressed in the offender's apology, 'letting go' may become an exceptionally difficult and enduring struggle – one that can consume and 'imprison' us for many years. Hence, freedom from the past, from the chain that links us to the wrong that we endured, is the most powerful and distinctive benefit that restorative justice can offer.

<sup>1</sup> "Meeting the offender and being able to express one's feelings to the culpable party, to witness them as human beings rather than vague impersonal threats, to receive their apologies and exercise the privilege of forgiveness may help victims restore their social and personal equilibrium in a more direct and immediate way than would otherwise be possible." Marshall & Merry 1990: p. 182. "[T]he oppressed must not, in seeking to regain their humanity . . . become in turn oppressors of the oppressors, but rather restorers of the humanity of both." Freire 1994: p. 26.

<sup>2</sup> "There is often an instant rush of sympathetic and positive feelings toward the offender in response to what is commonly regarded as the gift of the apology." Lazare, 2004: p. 242.

<sup>3</sup> "To forgive someone for an action or a trait is a way of removing it as evidence of the state of his soul, so that one is able to judge him favorably without it." Hampton, J. (1988) "Forgiveness, Resentment and Hatred", in Murphy and Hampton, 1988: p. 86; "In a reintegration ceremony, disapproval of a bad act is communicated while sustaining the identity of the actor as good." Braithwaite, J. & Mugford, S. (1994) "Conditions of successful reintegration ceremonies", *British Journal Of Criminology* 34(2): 139-171: p. 142. "[T]he forgiver is able to respond to the wrongdoer as someone other than 'the one who hurt me,' and the wrongdoer himself is able, thanks to this new perspective, to regard himself as liberated from his burden of moral debt. Such liberation puts the two parties on an equal footing once more, and makes possible renewed relationships." Hampton 1988: p. 49.

## Why participate in restorative justice?

To sum up, these are some of the unique and distinctive benefits that a restorative justice process can offer.

- It allows all of those involved – the bereaved family and those responsible – to begin to see each other as individuals, rather than as stereotypes.
- It gives all of them an opportunity to experience a powerful re-affirmation of their dignity and worth as human beings.
- It enables them to repair a deeply wounded and damaged relationship: they can be reconciled as fellow citizens.<sup>1</sup>
- It can ease the hurt and negativity associated with the death by creating a positive experience of helping others in concrete and symbolic ways.<sup>2</sup>
- Every participant – and even the wider community – may, as a result, come to a deeper understanding of the unique experiences and hardships suffered in the aftermath of work-related death.
- Finally, everyone affected can become personally involved in collectively creating a plan that will help to make sure that no one else has to go through such pain and devastation.<sup>3</sup>

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<sup>1</sup> “A sense of being understood and forgiven by the person who had suffered the offence was seen by several interviewees as an important step back to self-respect.” Marshall & Merry 1990, 158; “it is the act of forgiving . . . that allows the victim to put a closure on the unfortunate experience, to draw a line under the balance-sheet, and to start to lead a normal life again.” Marshall & Merry, 1990: p. 3.

<sup>2</sup> “The most frequent motive [for victims, was] . . . *a desire to help*, a feeling of social concern. . . . It is the replacement of a negative anti-social experience by a positive socially responsible one, the replacement of feelings of vulnerability by the experience of doing good, the denial of a threatening environment by working toward social reintegration. The sense that some good has thereby been achieved may constitute a hitherto unregarded source of satisfaction to victims.” Marshall & Merry 1990: p. 185. “A series of successfully resolved conferences will provide a series of such stories with common themes that contradict a good deal of received wisdom. One common theme is . . . that communities brought together by something as negative as the commission of a crime can respond in a remarkably positive way, given the right setting. The experience of such a positive result can have a ripple effect through the local community.” Moore, 1996.

<sup>3</sup> When material losses cannot be restored (as in work-related death), the offender’s willingness to engage in rehabilitative programs or activities could be seen by the bereaved families as a kind of symbolic reparation: “[I]n terms of restorative justice, we could see the offender offering to change his or her ways as nearly equivalent to the offender offering to repair damaged goods (themselves)—particularly since victims may have been seeing rehabilitation as a confirmation of apologies. . . . The offender was taking responsibility and agency, to offer something which would be for the benefit of the victim or to make the victim feel better—in other words, to change themselves.” Shapland et. al., 2006: p. 518. Marshall & Merry, 1990: pp. 4, 186.



## 4. Potential Applications

This section presents a survey of potential applications of restorative justice in this context, as mentioned in the literature. This focus on the hypothetical is driven by the evidence. No instances could be found in which *formal* restorative justice processes<sup>1</sup> – such as Restorative Justice Conferencing – were employed to address work-related deaths.<sup>2</sup> There were, however, several cases in which *informal* restorative processes have been used in this context. For example, there is a significant movement in the U.S., supported by legislation, encouraging doctors and hospital management to apologise in cases of *medical negligence*, including fatalities.<sup>3</sup> There are an increasing number of high-profile cases in which CEOs offer a public apology and reparation for either individual or corporate wrongdoing.<sup>4</sup> Again, the Creative Ministries Network literature contains anecdotal evidence of *reconciliatory interactions* between employers and bereaved family members.<sup>5</sup> Finally, John Braithwaite gives accounts of ‘*restorative meetings*’ between bereaved families and management in the after-math of coal-mining disasters.<sup>6</sup>

Less directly, there are several examples of restorative justice processes being used to address *non-fatal* work-related incidents: for example, Braithwaite’s oft-cited account of the Trade Practices Commission’s handling of the mis-selling of insurance products in remote Aboriginal communities.<sup>7</sup> Again, restorative justice has been used in cases of sexual harassment and workplace bullying. There is also a well-established, though not extensive, use of formal restorative justice processes in cases of *non-work-related* manslaughter and homicide.<sup>8</sup>

<sup>1</sup> For the purposes of this Review, a restorative justice process is ‘formal’ only if it involves the following: (a) adherence to recognised referral protocols, (b) trained and independent facilitators, (c) accountability mechanisms (e.g. best practice standards, case supervision, monitoring and evaluation, and complaints procedures), (d) appropriate preparation for all participants, and (e) meetings that follow a prescribed procedure, ‘script’ or structure, as in ‘Restorative Justice Conferences’. Please note that no judgement is thereby implied as to the effectiveness or otherwise of the informal restorative process mentioned above.

<sup>2</sup> This is not to suggest that there have been no cases. It remains possible either that cases of this nature have not been documented, or that this survey of the literature was unable to detect them.

<sup>3</sup> See <[www.sorryworks.net](http://www.sorryworks.net)> accessed June 13, 2008.

<sup>4</sup> For example, in 2005 advertising executive Paul Coffin pled guilty to defrauding the Canadian government of over a million and a half dollars. In the court room he apologized to all Canadians, saying: “I realize what I have done. . . I know I have tarnished my family name. I know I have disappointed all Canadians.” He then repaid the government one million dollars out of his own funds. Gabbay, 2007: p. 454. See also Wyatt, N. (2005) “Paul Coffin, Convicted of Fraud in the Sponsorship Scandal, Makes Restitution”, C. P. N. W., Aug. 16.

<sup>5</sup> For example: “The agency sent Mary a letter of condolence as suggested in the UMN guidelines. Since then it’s been an informal contact because she works near-by. Jim thought Mary was quite happy to get the letter. Jim has been astonished and sustained by the fact that Mary had come in to the agency. “We’d hug each other,” he said, “and she was the widow of the employee. We’re actually helping each other to cope with it, both where Mary works, and here. Her attitude helped me a lot. I find it hard to believe myself. I expected her to come in and give me a punch, and she comes in and gives me a great big hug.” Urban Ministry Network (2000) *I Think About Him Everyday: Transforming the Grief of Work-Related Death into Renewed Workplace Safety*, Creative Ministries Network, September : 13.

<sup>6</sup> Braithwaite, J. (2003) “Does Restorative Justice Work?” in Johnstone, G. (2003) ed. *A Restorative Justice Reader* Willan Publishing: p. 338. See also Braithwaite, J. (1985) *To Punish or Persuade : Enforcement of Coal Mine Safety*, State University of New York Press.

<sup>7</sup> Braithwaite, J. (2002) *Restorative Justice and Responsive Regulation*, Oxford: Oxford University Press: 22-24

<sup>8</sup> For example, The NSW Department of Corrective Services Restorative Justice Unit.

See <[http://www.dcs.nsw.gov.au/offender\\_management/restorative\\_justice/index.asp](http://www.dcs.nsw.gov.au/offender_management/restorative_justice/index.asp)> accessed July 4, 2008. See also Umbreit, M., Vos, B., Coates R. and Brown, K. (2002) *Facing Violence: The Path of Restorative Justice and Dialogue* (Criminal Justice Press). Executive Summary of this work can be found at <[http://rjp.umn.edu/img/assets/13522/Ex\\_Sum\\_TX\\_OH\\_VOD\\_CSV.pdf](http://rjp.umn.edu/img/assets/13522/Ex_Sum_TX_OH_VOD_CSV.pdf)> accessed July 4, 2008.

The potential applications that were identified will be arranged in a (more or less) temporal order, that is, starting from immediate responses to a work-related death and ending with post-sentence approaches – as in the following table:

<b>THE OPTIONS</b>		<b>Page</b>
<b>1.</b>	Restorative and Respectful Communication with the Bereaved Family	<b>53</b>
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<b>8.</b>	Restorative Approaches in the Aftermath of Work-Related Death	<b>65</b>

**OPTION 1 | Restorative and Respectful Communication with the Bereaved Family**

In the aftermath of a work-related death, the nature and level of communication between a company and the bereaved family can play a significant 'restorative' role. In the following, I present the range of *communication objectives* that have been identified in the literature as having the potential to create a more respectful and restorative relationship between the company and the bereaved family.

**Objectives<sup>1</sup>**

- To make sure the bereaved family does not feel abandoned;
- To re-establish trust and communication;
- To provide information about the circumstances of the death;
- To acknowledge the loss in a direct and personal manner;<sup>2</sup>
- To take care of the immediate needs of the family (financial, counseling, etc);
- To inform the family about the nature and availability of support services, the legal processes (coronial, civil and criminal) that will or could take place, and the possibility, if all agree, of a restorative justice process at some point;
- To arrange access for the family to the site where the death occurred;
- To ask the family if they would like to meet and talk with co-workers;
- To promise cooperation with the investigation;
- To reassure the family that everything possible will be done to make sure that such an incident does not happen again;
- To discuss with the family appropriate company responses to anniversaries of the death, for example, by observing a minute's silence, lighting a candle, conducting a ceremony of remembrance, and so on;
- To discuss with the family the possibility of a tribute, for example an ongoing health and safety award, a memorial plaque, a tree, and so on;
- To ask if the family would like co-workers to assist with the funeral, for example as pall-bearers or guard of honour;
- To ensure that the family's legal rights to compensation are dealt with justly and compassionately.

<sup>1</sup> These aims are derived from three sources: (1) "Three-Step Disclosure Process", *Sorry Works* 2007 <<http://www.sorryworks.net/threestep.phtml>> accessed June 14, 2008.; (2) Urban Ministry Network, 2000: pp. 5, 14, 21; and (3) <<http://www.ohsrep.org.au/tool-kit/how-to/a-death-at-the-workplace/index.cfm>> accessed July 4, 2008.

<sup>2</sup> The Coroner's Act would appear to protect companies who wish to express an apology – before or after the investigation, provided they do not admit fault in so doing: "(1) In this section, *apology* means an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault. (2) In an investigation of a death—(a) an apology . . . does not constitute an admission as to how death occurred or the cause of death, for the purposes of findings under section 19. (3) Subsection (2) applies whether the apology . . . —(a) is made orally or in writing; or (b) is made before or after the investigation commenced." CORONERS ACT 1985 No. 10257 of 1985, Version incorporating amendments as at 19 March 2008, Section 18A. <[http://www.austlii.edu.au/au/legis/vic/consol\\_act/ca1985120/s18a.html](http://www.austlii.edu.au/au/legis/vic/consol_act/ca1985120/s18a.html)> accessed July 21, 2008.

## Referrals and Processes

In many cases, WorkSafe investigators, Union and OHS representatives, counsellors, and legal professionals will be able to assist with some or all of the objectives listed above. However, it is likely that there will be cases in which those involved would prefer to call upon an independent service with a 'restorative' orientation. In such a scenario, inter-agency cooperation and mutually agreed protocols and procedures would be essential.

### A. Assisted Dialogue

In many cases, communication between a company and the bereaved family will be *informal* and *initiated by the company or the family*. However, the company may wish to obtain advice on how to ensure that its words and actions are appropriately 'restorative', particularly in cases where they cannot admit fault, for moral, legal or insurance reasons. A restorative justice service would be able to offer such assistance.

Likewise, families might wish to initiate communication with or obtain information from the company. In such a case, the family could call on a restorative justice service to advise them on how to do so in a way that is most likely to meet their need for a respectful dialogue.

### B. Protective Dialogue (shuttle or direct)

There will be occasions when the company wants to acknowledge the loss, convey their personal sorrow and help the family in any way that it can. But they are reluctant to initiate contact due to concerns about how they will be received, fear of 'doing more harm than good' or legal implications.

Likewise, the family may not be ready or willing to receive any communication at this stage, at least not without independent advice. In such an event, a restorative justice service could act as an independent 'go-between' and thereby provide a safe or protected means of contact.<sup>1</sup>

If direct communication is wanted, then a restorative justice service would be able to assist, either by providing guidance or by facilitating a meeting.

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<sup>1</sup> This process is similar to 'Protective Mediation', which is generally used prior to a prisoner's release and in cases of domestic violence. It aims to help offenders and victims agree the level and nature of contact (if any) which will occur between them. See, e.g., The 'Protective Mediation' service offered by Western Australia's Department of Corrective Services <<http://www.correctiveservices.wa.gov.au/P/protectivemediation.aspx?uid=9524-1122-9044-7577>> accessed 4 July, 2008. See also Wauchope, M. (1994) 'Protective Mediation: A New Approach to the Victim-Offender Relationship' 14 *Socio-Legal Bulletin* 16-19

## OPTION 2 | Restorative Justice in the Absence of Prosecution

There is evidence that a number of work-related deaths are not prosecuted. This may occur when, after a thorough investigation, it is decided that prosecution is not in the public interest and/or the evidence is insufficient to support “a reasonable prospect of conviction”.<sup>1</sup> For example, the coroner may have found that the employee’s death was a consequence of his or her contravention of company policy and industry good practice, rather than any offence committed by the employer. Again, it may be that the business is small – for example, a farm – and the person who died was the ‘employer’ or a family member of the employer. In such cases, it might be judged that prosecution would not serve the public interest, and is likely to add unnecessary suffering to the bereaved family.

The use of restorative justice in such cases is not explicitly mentioned in the literature. However, it seems clear that such an approach could be appropriate and beneficial. This might include the kind of ‘informal’ objectives listed under Option 1. However, those involved may request a more formal process as a way of meeting their needs, such as a restorative justice conference.

### Objectives

To enable all those involved . . .

- To acknowledge responsibility for what happened;
- To find answers to remaining questions;
- To express their feelings about what happened;
- To agree on any plan(s) that relate to the future.

### Referrals and Processes

In this context, a restorative justice process is most likely to be initiated by the bereaved family and/or the company. But it could also be recommended by the coroner after handing down his or her decision or it could be suggested by WorkSafe investigators, Union and OHS representatives or grief counsellors once the decision not to prosecute has been taken.

<sup>1</sup> For more detail on these Prosecution Criteria, see the *Worksafe Compliance and Enforcement Policy*, July 2005: p. 30ff. <[http://www.worksafe.vic.gov.au/wps/wcm/resources/file/ebce32435de3d34/compliance\\_enforcement\\_policy.pdf](http://www.worksafe.vic.gov.au/wps/wcm/resources/file/ebce32435de3d34/compliance_enforcement_policy.pdf)> accessed June 14, 2008.

### OPTION 3 | Restorative Justice in the Coroner's Court

Michael King (Senior Lecturer, Faculty of Law, Monash University) has argued that Restorative Justice Conferences could be used within the context of a coronial process – albeit under certain stringent criteria.<sup>1</sup> He suggests that the objectives would include the following:

#### Objectives

To enable the company and the bereaved family . . .

- To meet in a safe, non-adversarial environment;
- To listen to people's experience of how the situation has affected them;
- To tell their own story;
- To express their own feelings about this situation; and
- Where possible, to reach an agreement as to any remedial measures.<sup>2</sup>

#### Referrals and Processes

One essential criterion that Michael King identifies is that in a coronial case, a restorative justice conference should not be considered when factual matters and issues of responsibility are still in dispute. Otherwise “there is a risk that any conference will descend into verbal attacks and blaming”.<sup>3</sup>

This criterion clearly has a bearing on when a restorative justice conference can take place within the coronial process. King suggests two possibilities: the first would be **prior to the coroner handing down a decision** “where the parties have agreed on the facts and responsibility.”<sup>4</sup>

There remains a problem with this location however. As King states, whilst the coroner might accept the statement of facts to which the parties have agreed, “there may be differences as to inferences to be drawn from the facts” and these disagreements could cause “confusion and trauma to the parties”.<sup>5</sup> Hence, in King's view “it is preferable that the conference be **held after the coroner has handed down a decision**”<sup>6</sup> – which may mean that it cannot take place until after an inquest has been held.

<sup>1</sup> King, M. (2008) “Non-Adversarial Justice and the Coroner's Court: A Proposed Therapeutic, Restorative, Problem-Solving Model” (Unpublished).

<sup>2</sup> Adapted from King, 2008: p. 15.

<sup>3</sup> King, 2008: p. 15.

<sup>4</sup> King, 2008: p. 14. Emphasis added.

<sup>5</sup> King, 2008: p. 15.

<sup>6</sup> King, 2008: p. 15.

In either case, the referral procedure, in King's view, might work as follows:

**Step 1.** “[A]fter handing down the decision, the coroner could explore with the parties the possibility of a restorative justice conference.”<sup>1</sup> This would include making it clear to the parties the following precautions: first, any admission of fault or liability within a restorative justice process could be ‘used’ in any legal process, civil or criminal.<sup>2</sup> Second, one of the outcomes of a restorative justice conference could be a voluntary agreement regarding recompense. Participants should be aware that if the case proceeds to a criminal or civil court, these agreements may or may not be taken into account: in other words, there may be, in addition, penalties or compensation orders imposed upon the company. Hence “the parties should seek legal advice before agreeing to participate in the conference.”<sup>3</sup>

**Step 2.** If, having received legal advice, the parties are still open to a restorative justice process, then the coroner could refer the case to a restorative justice service. The service would then meet with each of those concerned to assess their suitability. King suggests this should include the following:

1. Ensuring that all those involved are participating voluntarily.<sup>4</sup>
2. Ensuring that all participants are informed “as to the nature of communication to take place at a conference”: for example, that it will not be “settlement-driven” as in civil mediation but will instead consist of an “open exchange of views and feelings”.
3. Ensuring that participants have an opportunity to reflect on the aims of a restorative justice approach, and, if they still wish to proceed, what this might imply in terms of how they express their “feelings and wishes” and “interact with the other parties”.<sup>5</sup>
4. Ensuring that potential conflicts are, where possible, addressed *prior* to the conference – for example, disagreements regarding the coroner’s “recommendations relating to public health or safety”.<sup>6</sup>
5. Ensuring that there is agreement on who should attend the conference, and whether it might be necessary to hold two (or more) conferences.<sup>7</sup>

<sup>1</sup> King, 2008: 15.

<sup>2</sup> Within the context of the Coroner’s court, any acknowledgement of fault by a company cannot be used as evidence of fault in any subsequent prosecution. However, the information provided by the company could be used to ‘suggest new avenues of inquiry’ for the prosecution.

<sup>3</sup> King, 2008: p. 15.

<sup>4</sup> “[C]oercing an offender to be involved is more likely to promote recalcitrance rather than a repentant attitude and therefore most likely traumatise the victim. Pressure on a victim to participate in a conference can be upsetting for them.” King, 2008: p. 14.

<sup>5</sup> Otherwise, “there is a risk that the conference will depart from its intended process and cause frustration to all involved.” King, 2008: p. 14.

<sup>6</sup> For instance, the family might wish to know, at the conference, whether the company have implemented the coroner’s recommendations. If the company were to declare that it has no intention of doing so, this could utterly undermine the restorative aims of the conference. As King states, it may be that, in such cases, the conference should not proceed.

<sup>7</sup> As King suggests, it might be preferable “to conduct a series of conferences, with one dealing with the matters particular to the dead person, the family and others involved. Here only the immediate parties involved and a [facilitator] would be present. Another conference could be held to address any public health or safety concerns arising out of the case. That conference could have the participants of the first conference and representatives from agencies and community organizations with a direct interest in the subject matter, any relevant regulatory authority and the coroner.” King, 2008: p. 16.

## OPTION 4 | Restorative Justice as an Alternative to Prosecution

Several scholars and policy advisers have argued that restorative justice could be used as an alternative to or diversion from prosecution, usually as part of an enforceable undertaking.<sup>1</sup> But the general assumption appears to be that this approach would not include work-related deaths. Whilst doing so is not prohibited by legislation, Victorian WorkCover Authority's policy states that: "Generally, the Authority will not accept an [enforceable] undertaking in cases involving work-related fatality or serious injury"<sup>2</sup>.

Having said this, there are, in the literature, theoretical and empirical arguments that challenge this policy. Restorative justice, it is argued, is more likely than prosecution to create a potent deterrent and a safer workplace<sup>3</sup> as well as meet the legitimate needs of bereaved families and communities for justice. On the other hand, the legal, political and operational objections to diversion are daunting, including the lack of adequate due process safeguards, public interest issues, the compromise of restorative values and priorities such as voluntariness, and so on. It is nevertheless useful to present an outline of the form that a diversionary approach might take, as suggested by key advocates.

### Objectives

After studying thirty-nine mining disasters, Braithwaite concluded that 'restorative justice' processes could be used as an alternative to a criminal trial, so long as they achieved the following objectives:

- To enable an open public dialogue among all those affected;
- To ensure that the bereaved families are helped and cared for; and
- To put in place a credible plan to prevent recurrence.<sup>4</sup>

### Referrals and Processes

In the literature, there are two views on the criteria for referring a case to restorative justice as an alternative to prosecution.

<sup>1</sup> For example, Christine Parker argues that "if appropriately implemented, enforceable undertakings can be a valuable 'restorative justice' alternative to traditional regulatory enforcement action, simultaneously addressing both fairness and bias concerns." Parker, C. (2004) "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" *The Modern Law Review* 67(2) 209-246: p. 209.

<sup>2</sup> Victorian WorkCover Authority, (2006) *Supplementary Enforcement and Prosecution Policy - Subject: Enforceable Undertakings*: p. 5.

<[http://www.workcover.vic.gov.au/wps/wcm/resources/file/eb26aa4fd757672/enforceable\\_undertakings.pdf](http://www.workcover.vic.gov.au/wps/wcm/resources/file/eb26aa4fd757672/enforceable_undertakings.pdf)> accessed June 15 2008

<sup>3</sup> "[O]ffenders who know that they will benefit from ... mercy so long as they participate in a high-integrity process of truth-seeking and take active responsibility for the hurts they have caused can help us to learn from the truth they tell." Braithwaite, J. (2002) *Restorative Justice and Responsive Regulation* Oxford University Press: p. 298

<sup>4</sup> Adapted from Braithwaite, 2002: p. 64.



1. Fisse and Braithwaite appear<sup>1</sup> to argue that a referral should be determined by **how the company responds to the offence**. In other words, a company will be eligible if it is willing to publically discharge its liability for the *actus reus* of the offence by “diagnosing the causes of the offence, acting to remedy those causes, disciplining those responsible and making compensation for the harm done”. To be clear, the company’s ‘willingness’ is only a criterion for *referral*. If the company’s subsequent remedial actions are inexcusably “insufficient”, then “the court can proceed to criminal conviction and sentencing of the corporation.”<sup>2</sup>
2. Gunningham has argued that the referral criteria should be based upon **degree of culpability**, regardless of how the company responds to the offence. On his view, restorative justice should only be used as an alternative to prosecution where the company “neither intended harm nor were reckless in their behaviour”.<sup>3</sup>

The process of diversion from prosecution is not unfamiliar, but it may be useful to present the basic framework as it might appear within the context of OHS regulation. The following is derived from Richard Macrory’s 2006 report:

**Step 1. Referral:** “[W]hen a regulator has gathered its evidence and makes a decision whether or not to proceed to a prosecution, . . . it should consider suggesting an RJ process if appropriate. If the stakeholders agree to this process, then the regulator can defer criminal proceedings in lieu of the RJ process. This option would mean that no formal prosecution was initiated.”

**Step 2. RJ Process:** “The offender and victim would have the opportunity to engage in an RJ process and agree upon an outcome. . . . In this instance, the regulator would be present during the RJ process to ensure that the regulatory non-compliance was addressed and that it was content that the outcomes of the RJ process were adequate and that no further sanction was required.”

**Step 3. Outcome:** “The regulator may also have a role in ensuring that agreed upon actions are followed through by the offender. If this process was not followed through, or if there was a breakdown in the RJ process, then the regulator could initiate the prosecution as originally intended, if it was still in the public interest.”<sup>4</sup>

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<sup>1</sup> Fisse, B. and Braithwaite, J. (1993) *Corporations, Crime and Accountability*, Cambridge University Press, Melbourne: p. 180. It should be noted here that Anthony Cole – who appears to advocate a deferred sentence application of restorative justice – has argued that Fisse and Braithwaite would *not* divert work-related deaths from prosecution, or at least would only do so if the corporation was not “extremely negligent” (i.e. Gunningham’s view). Cole quotes the authors as stating that “under the accountability model those who commit serious offences are subject to prosecution”. I have been unable to substantiate this quote as Cole’s page reference appears to be inaccurate. In any case, Cole goes on to argue that “[c]ausing death through extreme negligence undoubtedly qualifies as a serious offence and the mobilisation of internal disciplinary systems and voluntary compensation for the offence seem manifestly inadequate to discharge liability for the offence.” Coles, 1998.

<sup>2</sup> Fisse and Braithwaite, 1993: p. 163.

<sup>3</sup> Gunningham, N. (2007) “Prosecution for OHS Offences: Deterrent or Disincentive?” *Sydney Law Review* Vol 29: 389, 390.

<sup>4</sup> Macrory, R. (2006) *Sanctioning in a post-Hampton World: Consultation Document*, (Better Regulation Executive, UK, May: 82. <[http://www.restorativejustice.org.uk/Better\\_Regulation/macrory.pdf](http://www.restorativejustice.org.uk/Better_Regulation/macrory.pdf)> accessed July 3, 2008.

## OPTION 5 | Pre-Sentence Restorative Justice

There appears to be more openness in the literature to the use of restorative justice in a pre-sentencing context: that is, where the judge delays the sentence so that a restorative justice process can take place, and then takes the outcome into account when sentencing.<sup>1</sup> The objectives of this approach include the following:

### Objectives

- To “offer the opportunity for victims’ families to set out how the tragedy has affected them”<sup>2</sup>
- To “let the corporation propose a plan to assist in the care of those families.”<sup>3</sup>
- To let the company “submit its own proposals for remedying the criminogenic aspects of its business . . . before sentence is imposed.”<sup>4</sup>
- To take into consideration the company’s response to the offence when the sentence is decided – for example, it may be “one of the factors bearing on which of the sanctions the court chooses to impose . . . .”<sup>5</sup>

### Referrals and Process

There is no mention in the literature of referral criteria for pre-sentence restorative justice. However, we can extrapolate from Option 4: Candidates might be (a) those companies who were willing to respond ‘restoratively’ to their offence, and/or (b) those whose degree of culpability was relatively low. Macrory provides some indication of how the process might work:

**Step 1. Referral:** “the judge could suggest that the parties should meet for RJ proceedings in advance of any sentencing”

**Step 2. RJ Process:** “the outcomes of this process could then be taken into consideration when sentencing does happen. The court has no direct involvement with the process or management of the outcome.”

**Step 3. Outcome:** “the courts . . . would then receive a report of the outcome . . . [which] could then be taken into consideration when sentencing does happen and may result in a reduced or deferred sentence.”<sup>6</sup>

<sup>1</sup> For example, “judges [already] have powers to defer sentencing pending specific reparative action on the part of the offender, which may be participation in a process of restorative justice.” *The [UK] Government’s Reply To The First Joint Report From The Home Affairs And Work And Pensions Committees Session 2005-06 HC 540 on the Draft Corporate Manslaughter Bill (2006)*: p. 28. <<http://www.parliament.uk/documents/upload/HACDraftCMGovtResponseCm6755.pdf>> accessed June 20 2008.

<sup>2</sup> Coles, 1998: Section E, 2.

<sup>3</sup> Coles, 1998: Section E, 2.

<sup>4</sup> Gobert, J. (1998) “Controlling Corporate Criminality: Penal Sanctions and Beyond” 2 Web JCLI.

<<http://webjcli.ncl.ac.uk/1998/issue2/gobert2.html#Heading1>> accessed July 25, 2008.

<sup>5</sup> Coles, 1998: Section E, 2.

<sup>6</sup> Macrory, 2006: p. 82.

**OPTION 6 | 'Restorative Sanctions'**

Several scholars and advocates have defended the use of 'restorative sanctions' or 'restorative sentences'. Applied to this context, their argument would run as follows: restorative justice is held by most of its advocates to be an intrinsically voluntary process. But crimes, such as work-related death, are too serious for diversion from prosecution or even pre-sentence restorative justice, and within the criminal justice process these are the only 'voluntary' options available. Hence, the voluntarist requirement effectively excludes the application of restorative justice to work-related deaths.<sup>1</sup> Their solution, called 'Maximalism', is to expand (or 'maximise') what counts as 'restorative justice' so that it includes processes that can be *imposed* on the offender, regardless of their consent. On this view, 'restorative justice' would therefore include court-ordered restitution or compensation, which could be paid either to the victim directly or into a victim fund<sup>2</sup>, community service, reparative projects carried out in prison, and so on.<sup>3</sup>

Whilst this view might seem attractive, there is an important alternative in the literature. One can agree that 'restorative sanctions' are superior, in many ways, to retributive sentencing. However, it seems confusing to re-classify them as 'restorative': First, these sanctions already have a well-established nomenclature, namely, 'reparation' 'compensation', 'restitution' and the like; second, restorative justice is widely held to differ from even these sanctions insofar as it is (a) a voluntary process in which (b) victim participation plays an essential role. Nevertheless, this is not the place to take a position on this debate, and so I shall attempt neutrality by using the term 'restorative sanctions' in scare quotes.

<sup>1</sup> "[R]estricting restorative justice to voluntary deliberations would limit its scope drastically. . . . The criminal justice system would probably refer only a selection of the less serious cases to deliberative restorative processes, thus excluding the victims of serious crimes who need restoration the most." Walgrave, L. (2007) "Integrating criminal justice and restorative justice", in Johnstone, G. and Van Ness, D. (2007) eds. *Handbook of Restorative Justice*, Willan Publishing: p. 565.

<sup>2</sup> "In the maximalist version of restorative justice, judicial procedures and sanctions are also considered from a restorative perspective. Restorative sanctions include imposing formal restitution of compensation, paying a fine or doing work for the benefit of a victim's fund and/or community service." Walgrave, L. (2003) "Imposing Restoration Instead of Inflicting Pain" in Von Hirsch et.al., 2003: p. 62; "[I]n cases for which informal restorative justice processes may be inappropriate, inapplicable or inadequate by themselves, it is possible to envisage a range of non-custodial court-imposed punishments that could be adapted to promote restorative outcomes. To this extent, at least, restorative justice could form the basis of a replacement discourse in which the emphasis would be on more constructive and less repressive forms of intervention." Dignan, J. (2003) "Towards a Systemic Model of Restorative Justice" in Von Hirsch et.al., 2003: p. 151.

<sup>3</sup> "[W]here custodial sentences are warranted . . . offenders [could be enabled] to undertake adequately paid work in prison in order to provide financial compensation for or on behalf of victims." (Dignan, 2003: 151). "Other deprivations of liberty, like an enforced stay in a closed facility, are used to enforce compliance with the restorative sanctions, or to incapacitate offenders who are considered to represent a high risk with respect to public safety. Because they are enforced and not a result of voluntary agreements, such sanctions do not completely fulfil the potential of the restorative paradigm." Walgrave, 2003: p. 62. See the 'Inside Out Trust' for voluntary examples of such projects.

## Objectives

The use of ‘restorative sanctions’ would seem to be supported by a wide variety of reports, and include the following objectives:

- To use more ‘innovative’ sentences, “other than just cash fines for both manslaughter and health and safety offences.”<sup>1</sup>
- To “provide the company the opportunity to make amends for its crime”<sup>2</sup> . . . by making sure that any sanctions are “focused on repairing harm or making some equivalent contribution to the community, and/or making payments towards the cost of enforcement.”<sup>3</sup>
- To give the rectification of “defective procedures and policies” a ‘restorative’ orientation and justification, rather than a rehabilitative one which has “overtones of treatment.”<sup>4</sup>

## Referrals and Processes

Many of the sentencing options available to the court already include these kinds of sanctions. So it is not immediately clear that a restorative justice service would have a role to play. However, there may be some cases in which the bereaved family would like to convey its views and feelings to the court, for example in a victim impact statement. In such a case, a restorative justice service could provide an independent ‘go between’ so as to facilitate this communication in the most restorative way possible.<sup>5</sup>

<sup>1</sup> *Draft Corporate Manslaughter Bill: The Government’s response*, Crown, 2006: p. 23.

<sup>2</sup> Gobert, 1998.

<sup>3</sup> *Regulatory Justice: Sanctioning in a Post-Hampton World’ A response from the Restorative Justice Consortium*, 2006. p. 3. <[http://www.restorativejustice.org.uk/Better\\_Regulation/MacroroyRegulationConsult\\_Final\\_Aug06.pdf](http://www.restorativejustice.org.uk/Better_Regulation/MacroroyRegulationConsult_Final_Aug06.pdf)> accessed July 3, 2008.

<sup>4</sup> Tasmania Law Reform Institute (2007) *Criminal Liability of Organizations* Final Report No. 9, April: p.21. <<http://www.law.utas.edu.au/reform/docs/CrimLiabOrgFinalA4.pdf>> accessed July 3, 2008.

<sup>5</sup> Macrory has suggested that “the judge could include RJ proceedings as something that could be entered into as part of the sentence, but this would require evidence that a restorative justice process was appropriate and the parties were willing to participate.” Macrory, 2006: p. 82. Given that a sentence is, by definition, involuntary, this option would appear to be self-contradictory. If it was stipulated that the restorative justice process was being offered to the parties as a voluntary option in conjunction with, but independently of the sentence, then a restorative justice service might play a role in facilitating such a meeting. But this would be equivalent to Post-Sentence or Parallel Restorative Justice.

## OPTION 7 | Post-Sentence Restorative Justice

This option involves placing restorative justice *after* the sentence has been imposed, and is *independent* of any legal process. Several authors have noted that a key advantage of this approach is that it would solve most of the problems that arise when there is an attempt to integrate legal proceedings and restorative justice processes, as represented by Options 3-6. For example:

“[a] conference involving the offender, the victim and other interested parties that is conducted *after* the offender has been sentenced, or even served a significant part of his sentence, would be more likely to induce forgiveness and reconciliation than one clouded by the suspicion that the offender is insincerely mouthing apologies in the hope of getting off lightly.”<sup>1</sup>

There are, of course, important concerns about post-sentence restorative justice.<sup>2</sup> For example, the legal process may create additional anger, hurt and frustration, and this could easily undermine or preclude any subsequent restorative approach. On the other hand, placing restorative justice *before* or *alongside* the legal process is equally at risk. No matter where restorative justice is situated, it is susceptible to being “destroyed by the alienating and negative effects of adversarial justice”.<sup>3</sup> The best solution, it would seem, is to reform the legal process so that it is less likely to produce such negative psychological affects upon those directly involved. In this respect, restorative justice is a natural ally of therapeutic jurisprudence:

“[T]herapeutic jurisprudence and restorative justice have in common a recognition of the importance of factors such as trust, procedural fairness, emotional intelligence and relational interactions which, if applied more broadly, can provide a constructive alternative to the flawed adversarial paradigm which presently dominates the criminal justice system.”<sup>4</sup>

Another concern about post-sentence restorative justice is that delaying the process until after sentencing will not meet the more urgent needs of participants. On the other hand, integrating restorative justice into the legal system is likely to mean that timing will be dictated by legal priorities, rather than the needs of the participants.<sup>5</sup> It may also be that those involved need the legal process to have been finalised before they can participate fully and authentically in any restorative process. Ultimately, the best policy – if practicable – would be to allow the participants to decide for themselves at what point they would prefer the process to be conducted.

<sup>1</sup> Tasioulas, 2007: 521. For a sustained critique of legally integrated approaches, see Brown, J. G. (1994) “The Use of Mediation in Criminal Cases: A Procedural Critique,” *Emory Law Journal*, 43.

<sup>2</sup> The considerations that follow reflect a general discussion on this subject held by the CMN reference group on 10 July, 2008.

<sup>3</sup> Marshall, T. (2003) “Restorative Justice: an overview” in Johnstone, 2003: p. 31.

<sup>4</sup> Freiberg, A. (2002) “Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?” *20 Law in Context*: p. 7.

<sup>5</sup> “A restorative justice process situated within criminal justice can rarely be sensitive to the stage the victim has reached. It is highly likely that, in general, victims of serious offences, particularly in relation to physical or sexual violence, may need to take longer to come to a point where their anger or fear can be diminished by restorative justice.” Shapland et. al., 2006: 519.

Alternatively, as Shapland et. al. suggest: “It may be that for serious offences, in fact, restorative justice may need to be offered to the parties at several points subsequent to the offence.”<sup>1</sup>

There is no explicit mention of this approach in the literature. However, we can assume that the **objectives** would be entirely focused upon *restorative* outcomes, rather than combined with other motives or agendas – such as the avoidance of or modification to the legal process.

We can also assume that **referrals** could be initiated by either the bereaved family or the company. Alternatively, as suggested by the UK Government, restorative justice could be “recommended” by the judge “after sentencing.”<sup>2</sup>

Finally, the **process** itself could involve a range of options, from protective dialogue to a series of face-to-face meetings, a restorative justice conference, or a restorative circle involving all those concerned.

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<sup>1</sup> Shapland et. al., 2006: 519.

<sup>2</sup> *Draft Corporate Manslaughter Bill: The Government’s response*, 2006: p. 23.

**OPTION 8 | Restorative Approaches in the Aftermath of Work-Related Death**

As mentioned earlier there are, in the literature, specific examples of harm that have arisen in the aftermath of work-related deaths. Restorative approaches could be readily and beneficially applied to each of these contexts. The following list includes examples drawn from CMN reports that identify specific areas of harm. Most speak of unintended harm, caused by misunderstandings, professional ‘blind-spots’, and unexplained formal procedures.

- 1. Harm caused by Investigators:** “WorkCover staff . . . were witnesses to Mark’s death, arriving at the site while Mark’s body was still visible. It is normal for people in this situation to lay the blame for the trauma they experience at someone’s feet, in this case the employer. However, this blaming response is unprofessional and destructive to the object of their blaming, and is a symptom of their own need for support in dealing with their exposure to the incident.”<sup>1</sup>
- 2. Harm caused by the Media:** “They wanted to get in and take photos of Mark’s body in the shed, and I feel nothing but disgust,” Bev said. “Their presence, and their intrusion right at the time was not wanted.”<sup>2</sup>
- 3. Harm caused by the Legal System/Professionals:** Employers expressed “[a]nger at the obvious injustice perpetrated against the company and its officers”<sup>3</sup>
- 4. Damaged Work Relationships:** “The greatest increase in anger and conflict was between employees and management, as reported by four companies.”<sup>4</sup>
- 5. Damaged Relations with Unions:** “The number of deaths in the building and construction industry in Victoria in 1999 seems to have led to a growth in resentment by building unions towards employers.”<sup>5</sup>
- 6. Damaged Family relationships:** “Almost all those surveyed reported increased pressure in . . . family (88%) relationships while they were managing their company’s recovery from the fatality.”<sup>6</sup>
- 7. Resolving Employee Guilt:** “the employees as part of the company feel responsible when the company is being blamed”<sup>7</sup>
- 8. Damaged Relations with Family due to Legal Process:** “Ruined our friendship with that family – for \$5000 (that is what they got from suing us). . . . Now, visiting the bereaved family would open up too many wounds.”<sup>8</sup>

<sup>1</sup> Urban Ministry Network, 2000: p. 70.

<sup>2</sup> Urban Ministry Network, 2000: p. 70.

<sup>3</sup> Bottomley, J. (2004) “Treated Like a Leper”, Creative Ministries Network, Victoria: p. 10.

<sup>4</sup> Bottomley, 2004: p. 8.

<sup>5</sup> Urban Ministry Network, 2000: p. 11.

<sup>6</sup> Bottomley, 2004: p. 10.

<sup>7</sup> Bottomley, 2004: p. 13.

<sup>8</sup> Bottomley, 2004: p. 14.

## 5. Implementation Strategy

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The eight options listed in the previous section can be broadly categorised in terms of how they are situated in relation to the legal process.

Options 1-2 and 7-8 are distinct insofar as they are *legally independent* (or ‘extra-legal’): they have no bearing on any legal procedure or outcome. By contrast, Options 3-6 are *legally integrated* in the sense that they function as either an alternative to or a modification of the normal legal process.

Given these categories, it is possible to envisage two possible models, or ways of situating restorative justice vis-à-vis the legal system.

- **Model A.** would be limited to those *options that are extra-legal* (1-2, 7-8).
- **Model B.** would allow *both extra-legal and integrated options* (1-8).

It might be thought that any restorative justice service should seek to implement as many of the available options as possible. On this assumption, Model B. would be the clear preference. But there are practical and theoretical grounds for caution.

First, as we have seen in this Review, there are serious objections to Options 3-6, including concerns that legal integration might undermine both due process and restorative values.<sup>1</sup> It is likely that these objections will be reiterated in the consultation process, and so could create significant political and funding obstacles.

Second, even if Model B. were to be regarded as the ‘ultimate goal’, implementing Options 3-6 could easily consume the finite resources of a pilot service. For example, whilst it may be possible to use pre-sentence restorative justice without new legislative safeguards, the threats to due process may reduce the number of referrals to such an extent as to make the service unviable. Yet, introducing such legislation would be a long and arduous process. Again, the consultation process is likely to confirm the existence of these, and many other complications.

In short, it may be preferable to focus on the extra-legal options in the initial phase of introducing a new service. Assuming that the various obstacles to legal integration could be overcome, then progress could be made, over time, toward Options 3-6.

Finally, there are aspects of Options 1 and 8 that could be implemented *alongside* the legal process, whilst still retaining their independence. Hence, neither Model A. nor the progressive implementation of Model B. implies that a ‘hands-off’ approach must be adopted during the legal process.

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<sup>1</sup> “There are concerns that the due process safeguards for rights, equality and proportionality could all be lost. There are also concerns that the power of judicial agencies might undermine and convert the aims of restorative practices.” Marshall, 2003: p. 31. See also Brown, 1994.



## 6. Community Consultation

As this review has shown, there are a number of ways in which restorative justice could be implemented in the context of work-related death. The previous section has suggested one way of narrowing down the options, on the basis of what is likely to be the most realistic and effective strategy in the short-term.

But the most important step is to listen to the views and concerns of those who are most likely to be involved or affected. There are many questions and issues that a literature review alone cannot resolve. Much depends upon the *actual* ground upon which the seed is sown, rather than the *hypothetical*. So we need to listen.

There are three main objectives to this consultation process:

Community Consultation Objectives	
1.	To ensure that there is an <i>expressed</i> need that <i>this service can</i> meet;
2.	To ensure that objections or concerns are heard and taken seriously; and
3.	To ensure that the approach that is used is felt to be the most realistic, beneficial and appealing to the widest possible range of stakeholders.

General interview or focus group questions can be oriented around these three core objectives. Additional questions might also be created to address the specific areas of concern, interest and expertise within particular stakeholder groups.

The main groups that will need to be consulted, for this context, are the following:

Stakeholder Groups	
1.	Bereaved Families
2.	CEOs, directors, management, employees
3.	WorkSafe Staff and Prosecuting Lawyers
4.	Unions
5.	Defence and Plaintiff Lawyers
6.	Coroners
7.	Restorative Justice Practitioners
8.	Chief Justice and Magistrates

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