Address by * Inspector O. D. Barrett to the Queensland Branch, Australian Crime Prevention Council Seminar on Juvenile Crime and Restitution on 17 May, 1978

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JUVENILE OFFENDERS — THE LAW RELATING TO RESTITUTION AND COMPENSATION

One frightening aspect of modern living is the high degree of involvement by juveniles in the commission of most types of crime.

We may well ask, as others before us have done, is there something wrong with our court system? Should we do more to ensure the child offender pays for his misdeeds? Perhaps the answer is that he should, at least, be required to recompense the victim for property loss or personal injury.

A child under Queensland law is a person under, or apparently under, the age of seventeen years.

The report of the Commissioner of Police presented to Parliament for the last financial year showed that 15% of all cleared up crimes were committed by children. It may be said that that percentage is not too alarming. But what is alarming is the high incidence of children involved in breaking and entering offences and unlawful use of motor vehicles. Our state figures show that approximately 50% of all cleared up offences for breaking and entering was the work of children, whilst the figure is around 35% for unlawfully using motor vehicles.

What is actually done for the victims of these offences when property is lost or damaged beyond repair?

In seeking to contribute to this discussion, I have given serious thought to ascertaining if the present system of restitution and compensation is working successfully from the monetary aspect.

In most cases, restitution is ordered more often than orders for the physical restoration of property, whilst awards to victims for physical assaults by juveniles is a rarity.

To my utter amazement, ladies and gentlemen, there are no records available to enable me to give you an indication of what amounts of restitution were ordered against juvenile offenders to compare them with the actual amounts paid, regardless of the class of offence.

There are about 220 places in Queensland where Children's Courts may be convened. It seems that each such court has its own records but no data is ever collated to reveal the state-wide picture in these regards. Nothing whatsoever is prepared for input to the computer so the success of the scheme, from the monetary aspect, is guess work.

Many of you, ladies and gentlemen, would well know that we are confined to the provisions of Section 62 of the Children's Services Act for the authority to deal with child offenders in this regard. It s an Act supposedly designed exclusively to be utilised when handing down penalties for offences committed by children. It has, of course, other uses. Tribunals thus have authority to make orders for restitution, etc., against children, their parents or guardians, other than the director of the Department of Children's Services when the children are committed to his care. This latter provision exempts the director from restitution orders. It is a provision worthy of particular note. It will be also noted that the section provides no penalty default provisions.

The wisdom of the system must surely then, only be known to the legislators. It may be asked how the victim is afforded some guarantee of reparation. In brief, he has no guarantee that any order made will be ever fulfilled, in part or otherwise, to his satisfactior. He may never receive one cent from the offender as a result of the court order made and his only redress, then, is to revert to what may be termed loosely, the law of tort. A civil process.

He is required to obtain a certified copy of the court order and file it at any court of competent jurisdiction. After a period of 28 days, this certified order has the same force and effect and all proceedings and remedies for enforcement, with costs, may be taken, as if such order were a judgement of the court in the registry where filed. As it guarantees the victim nothing, he would be quite justified in declining to explore this avenue, believing that it would be an exercise in futility. In fact, ladies and gentlemen, I found evidence of just this in research carried out by Canadian authorities. I believe it has relative significance. It referred to personal injuries sustained and not loss of, or injury to property, but the principle in issue is the same.

An empirical study done at **the Osgoode Hall Law School** in 1966 demonstrated that only 1.8% of the criminally injured respondents collected anything from their attackers by tort suits. In other words, only three individuals out of 167 people interviewed received any financial reimbursement through tort law. Not only was the tort recovery rare, but very few victims even considered suing; fewer consulted a lawyer about their legal rights and still fewer actually commenced legal action against their assailants; only 14.9% of the respondents considered suing; only 5.4% consulted a lawyer and only 4.8% actually tried to collect something from their attackers. A study done in British Columbia by **Burns and Ross** closely resembled this data.

Reasons for this dreadful recovery pattern were varied. Victims expressed the view that it was not worth bothering about due to the small amount of their financial loss. The offender was not known, or unable to pay anyway. Whilst expense involved in launching the civil action; reprisal fears; and ignorance of any legal civil right were some other reasons.

However, there are many state compensation schemes in vogue at the present time in many parts of the world which enable a victim to be alleviated of the necessity to shoulder mammoth hospital expenses or loss of wages due to his being attacked. These are similar to our own state provisions which, subject to certain conditions, allows the state to be the nominal defendant in such cases.

Reverting to our Children's Services Act, no provision is given to satisfy victims if children are made the subjects of applications for care and control or for care and protection. If a criminal offence is included in the body of the evidence to support the application, no provision exists in either section 49 or section 61 to award restitution etc. If an irate complainant demands restitution, then the police must prefer the charge against the child and this must be done separately to any application being made.

I made mention of the fact that I believe the design of the law produced a system, **reasons** for which are apparently known only to the legislators. From my enquiries, I found that experts throughout the world have had great difficulty in ridding confusion from their **reasonings** for the purposes of restitution. However, considerable research in this field has been undertaken at great depth with few positive consistent conclusions. In fact, most varied considerably. In their reasonings, many views were expressed or queried. I would like to relate a few:

Should restitution be victim orientated;

Should it be directed towards rehabilitation of the offender alone;

Should there be less severe sanction for the offender;

What relationship does it have with other sanctions;

When should it be used in conjunction with other requirements;
When should it appropriately be used as a sole sanction;
When is it inappropriate;
Is it perceived as an effective strategy in the reduction of recidivism;
What are its real pre-sentence advantages;
Should victim-offender communication be encouraged;
Should the victim have veto-power over the use of restitution;
How can society be best served in considering this aspect;
What real abilities has the offender or his family to pay.

No doubt, ladies and gentlemen, there are many further reasoning points which could be listed but it gives you some idea of the many and varied ones which, no doubt, our legislators, too, had taken into account.

May I comment on just the last mentioned . . . the real ability to pay . . . and reveal some amazing court decisions.

In Victoria, restitution of $144,000 was ordered against two youths found guilty of setting fire to part of the Geelong College. $120,000 was ordered to be paid by another youth for burning two railway carriages. One wonders at the rationale behind such court orders.

As I am a police officer, perhaps it might be natural for me to have contended that punishment in every instance should fit the crime. I have, therefore, supported full restitution to the victim but some decisions have rudely awakened me to respect the arguments put forth for restitution being disallowed, more especially, if payment of restitution would be an absolute impossibility during the lifetime of the offender.

I would like to quote some beliefs, now, as given to me by officers associated with our Children's Courts. I am assured that a high proportion of restitution ordered is never paid and similarly very few certified orders are sought from the Children's Courts to explore that avenue of civil process which I previously outlined. In fact, an average of half a dozen orders or so each year would be the maximum number requested and usually it is insurance companies seeking reparation. I am further assured on the other hand, that that number cannot be compared with the innumerable enquiries received from angry complainants and victims, who regularly enquire if any instalments have been paid by the offending parties.

The present system is one where really no one cares about the aggrieved party, following the making of the court order. Perhaps the victim may be described as the Cinderella of the criminal law. What is the solution? Should we have alternatives in the system to order default? An argument against this would be, for instance, in the case of a destitute, widowed mother required by law to serve a term of imprisonment for defaulting in payment of restitution ordered against her for the misdeeds of one of her delinquent children. Perhaps the architects of the present statute should rethink all aspects and evaluate the needs of today's society.

If they were to do so, I would hasten to support any suggestion of amending the Children's Services Act which would enable restitution and compensation to be ordered against the Department of Children's Services in their capacity as guardians, just as the system now provides for such orders to be made against parents or other guardians. Restitution could be sought following the preferring of criminal charges against children under their care who were released by that department into society and where such children continued a life of crime with gay abandon. If such provisions existed, orders could be then sought especially when it was painfully obvious by the offender's criminal record that society should have been protected from his presence.

For the information of those who are not too familiar with the provisions of the Children's Services Act, when a Children's Court wishes to have a child detained in an institution, short of sending him to jail, the court can only commit him to the care and control of the director. The court may emphasise, spell out and verbally bring to the notice of the director's representative in this court what the wishes of the bench are. Nevertheless, the only decision it may lawfully order is a committal to the care and control of the director. In turn, the director or his delegated representative may completely usurp the court's wishes and allow that child instant freedom.

If sanctions were included in any amendment, then decisions of that department would need proper consideration. When reviewed in retrospect, if the offender reappeared at court, the decisions made would reveal whether it had been wise to release him. It would also disclose to the court where neglect, incompetence or radical policy had totally failed society. Clearly it would show whether or not society had ever been considered in the light of the offender's totally, incorrigible behaviour. This is said with particular emphasis where further loss or damage to property was inflicted on victims. It is a matter to which the legislators could well pay heed. Really, on this aspect alone, the act needs revising. No decision of any court should be usurped by a departmental representative, some few seconds after the wishes of the court are made known. This is now the case much to the frustration of members of the judiciary, the magistracy and the police.

It is the police officer who becomes the target for complaints when monies ordered by the court are not forthcoming, or when the victims are told that no restitution was ordered because the juvenile offenders were already under the **'care of the state'**. Regardless of the explanations, the public believes that the policeman is to blame irrespective of the reasons or excuses put forth to appease victims. In other words, we have a system which causes the police considerable embarrassment yet they are in no way associated with its deficiencies.

Nevertheless, my feelings on this subject are ambivalent.

I have always contended that courts wisely administer justice, and I believe that a well designed statute could, and should, be produced to satisfy the punishment needs of each particular case.

If there is support for the view that the victim has long been forgotten, whilst attention has been focused primarily on the offender, then I believe that consideration should be given to default terms as an alternative to tort redress.

It reminds me of the old, Irish sergeant of police who when contacted by his subordinates for advice and assistance, had one stock phrase. He gave neither advice nor assistance but would simply say . . . be guided by the circumstances.

Perhaps then if courts were given absolute power to deliver judgement on juvenile offenders after having considered and been guided by all the circumstances, and that such decisions could not instantly be usurped by a much lesser authority, the needs for restitution and compensation orders would rapidly diminish. One amendment to the Children's Services Act to allow tribunals to order offending children to be detained for given periods in nominated institutions would bring just that result. Society is entitled to be safeguarded against recividists released at large to plunder at will.

I believe there should be another amendment embracing "accountability". There should be 'show cause' provisions included in the Act so that when orders for restitution, restoration or compensation had not been complied with, default penalties could then be considered. Accountability provisions against those named in the respective court order could be made mandatory if we are to be in any way genuinely concerned about the victims of our society.

If offenders, and all categories of guardians, were made to accept their responsibilities and required to show cause why default penalties should not be enacted, then probably more positive efforts would be made by them to honour restitution or compensation ordered.

I subject that the wisdom of the justices in their deliberations would, as always, remain paramount and that all parties concerned would receive the justice deserved. We could then say that we have ample law and ample justice which is not the case at present.

I leave it to you, ladies and gentlemen.