

## MEDIATION MATTERS

# More about justice and fairness than a vindication of legal rights

By Deborah Clapshaw and David Hurley<sup>1</sup>

*"I learned the true practice of law. I learned to find out the better side of human nature and enter men's hearts. I realised that the true function of a lawyer was to unite parties riven asunder."*

- Mahatma Gandhi

*"What is the difference between a bad lawyer and a good lawyer? A bad lawyer will keep a case running for years. A good lawyer can keep it going even longer."*

- Featherston Street story from Evening Post - 15 May 1997.

MEDIATION is now regarded by lawyers and the judiciary as a serious option for the private resolution of disputes. With the development of its use as a dispute resolution option in commercial and general civil litigation, it is timely to reflect on what mediation offers and what its potential may be.

Our experience as mediators is that the process is approached in different ways by practitioners. Some practitioners have a real understanding of the opportunities that exist for the resolution of underlying conflict. They come to mediation armed with the know-how to ensure that their clients get the most out of it. Other practitioners have yet to appreciate its potential. These practitioners approach mediation from a positional basis founded on rights arising out of past events. This approach, whilst understandable given our legal training and the relative newness of mediation in the private non-statutory arena, inhibits the process. Approaching mediation from a positional stand point can result in deal-making, but the outcomes achieved are likely to be limited to a compromise within the framework of the parties' legal rights.

This article is one of an occasional series intended to discuss topical issues in mediation and to address the differences between mediation on one hand and litigation (and arbitration)<sup>2</sup> on the other. In this article, we focus on the opportunities for dramatically different outcomes from the two processes.

External decision making, (litigation and arbitration), has traditionally been the only dispute resolution process offered when negotiation has failed. However, litigation has not been without its critics<sup>3</sup> and its ability to determine the truth of a matter has been called into question<sup>4</sup>. More importantly, from the writers' perspective are its limitations in terms of resolving the real conflicts between disputing parties. In other words, does litigation provide solutions that are meaningful to the parties involved?

The writers consider conflict to provide a challenge; the opportunity for change. Conflict has traditionally been viewed as pathological

and destructive, to be avoided or suppressed but the constructive resolution of conflict creates growth and creativity.

To resolve conflict on a basis satisfactory to the parties, it is important to appreciate that there are three dimensions to be satisfied. These have been identified as the substantive, procedural and psychological interests people have in conflict situations<sup>5</sup>.

Litigation has traditionally focused on the substantive dimension. It deals with the past and with rights identified by reference to an external rule of law. It is concerned with the rational application of external rules of law to the facts. The procedure is dictated by the rules of court process and evidence which either party is able to prove to a legal standard. The psychological dimension has been excluded from the process. Adjudicated decisions are limited by statutory and common law constraints on the kinds of relief and remedies available. They include payments of money (whether by way of compensation or damages) declarations, injunctions and the like.

We are not suggesting that mediation is a panacea for all conflict - quite the opposite. There will always be cases which benefit from third party decision making - an interpretation of a statute, a case requiring a precedent, cases where one party has no interest in resolving the conflict, to name but a few. However, even at its most basic level,

mediation offers not only a cost effective means of achieving a settlement deal ie a settlement based on likely court outcomes, but much more. What can be achieved in mediation is the opportunity to resolve the underlying conflict in a manner which is more satisfying to the parties<sup>6</sup>. This is because it recognises and allows their substantive, procedural and psychological interests to be addressed.

Most disputes are framed in terms of money eg compensation, payment due, damages. However in our experience, when parties are asked what they want to achieve in mediation, money is seldom put first. Many people specify that it is not the most important issue. The most important issues for them seem to be psychological. These are for example:

- To have some validation of the pain they are suffering.
- To restore their good name.
- To restore self regard.
- To make sure that the same thing does not happen to anyone else.
- To obtain closure so that they can get on with their lives.
- To vent their feelings and know the other side has listened to their story.
- To communicate.
- To have their perspective of the dispute acknowledged, even if not accepted.
- To achieve a satisfactory result.

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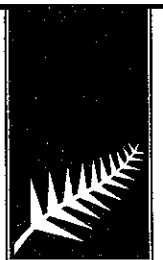
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To avoid litigation costs, the perceived pressures of the litigation process and its inevitable delays.

Parties in conflict may make money a metaphor<sup>7</sup> for their pain; a monetary value is put on the loss of faith, pride and humiliation suffered. The focus is on money because it is seen to be a tangible benefit to the claimant which will help to assuage the claimant's pain. However, to totally assuage pain can take unrealistic sums. The advantage of mediation is that a skilled mediator, working with underlying concerns may be able to facilitate the parties exploration of imaginative solutions that directly address psychological interests. A genuine apology<sup>8</sup>, for example, may go some way towards bridging the gap between the claimant's initial claim, what the payer is prepared/able to pay and what fairness indicates should be paid.

We believe that the value of mediation lies in its ability to deliver outcomes which satisfy the real needs of the parties. Mediation recognises that conflict is not free from emotion and that people are as interested in emotional and psychological outcomes as in money.

The following case studies are given to increase awareness of the outcomes that can be achieved in mediation. The writers hope that such examples will assist practitioners to appreciate what mediation can offer and be equipped better to advise their clients on it.

### Case Study 1

A worker suffers serious injury at work for which the employer has responsibility. The employee is left with permanent chronic pain. Termination for inability to work is handled unfairly. At mediation a 14 point agreement covers an apology and recognition of responsibility, an agreement to get it right in the future, an agreed statement to staff, agreed publicity (to warn other workers), a farewell dinner to clients and colleagues, a farewell presentation gift to reflect many years of loyal service, a reference, actual legal costs and a significant figure related to levels of exemplary damages but reduced to reflect the employer's ability to pay, as well as the costs of litigation and litigation risk. In closing, the claimant stated that the money did not really matter and that the most important result was the presentation gift (as a reminder that her life once was valuable and that she had made a real contribution).

### Case Study 2

A dispute between a development company and residents on land adjoining the proposed development land. The developers seek access to the development land from adjoining properties. An agreement is reached on how this might be achieved when the developers validate the concerns of the adjoining

landowners namely - the loss of privacy resulting from the development, the potential damage to neighbouring property, the risks associated with workmen entering the properties. The agreement reached makes provision for compensation for loss of privacy to allow neighbours to establish screening, a sum of money is set a side by the developers to meet any potential claims for damage to neighbouring properties and terms of supervision of workmen are included.

### Case Study 3

Claim for exemplary damages arising out of breach of fiduciary duty. Claimants are able to agree to accept a considerably lower figure than stated in the claim after receiving apologies for errors made, acknowledgment of harm done and admission of responsibility towards the claimants.

These case studies illustrate outcomes which addressed all three dimensions of the dispute, namely substantive, procedural and psychological.

It should not be assumed that outcomes of this kind are the only successful outcomes in mediation. The writers consider that there are a range of successful outcomes. This can include the cost effective resolution of issues along lines similar to that achieved in litigation.

However, success is not to be measured only in terms of the tangible output of the mediation (eg the dollar value to be paid to the claimant) or the number of substantive issues resolved. Rather, it is to be judged by the parties' level of satisfaction with the process and what was achieved in it. The durability of settlements achieved in mediation can be contrasted with the aftermath of an adjudicated outcome; often involving appeals or review, liquidations, insolvency, contempt of court or further disputes.

No more may happen in a mediation than that the parties gain a clearer definition of the issues. This in itself may provide the impetus for renewed settlement negotiations after the mediation, or, for an agreement on limiting the number of issues for trial. Similarly, all that may happen is that the tension between the parties is reduced and dialogue restored. Again this outcome can be of real significance to the parties and pave the way for a new approach to the conflict.

This is what mediation offers. Its potential, which is perhaps largely untapped in New Zealand, is to stimulate new ways of thinking about conflict and to assist people to develop more effective strategies to deal with it.

Parties in mediation determine their own outcomes. With a skilled mediator's assistance, they can work constructively to have all their needs addressed in a mutually satisfactory outcome. Litigation, by definition, excludes party self-determination and judicial decision-making focuses only on the rational application of rules of law to past events. At

its best, litigation provides a determination of legal rights and wrongs. It may give one party a sense of vindication and validation of their position, but often leaves both parties dissatisfied with the outcome, cost and delays.

Our experience is that parties may be looking for a more profound outcome than simple vindication of their legal rights. They are looking for a satisfactory outcome which accommodates their sense of justice and fairness. Most disputes are complex with right and wrong on both sides. Mediation can enable the parties to find ways to mesh their mutual interests, as the parties themselves are far better placed than any external decision maker to fine tune such a solution.

A party's sense of justice is often affected by their assessment of the fairness of the process by which the dispute is resolved. Direct participation in the mediation process meets this requirement of fairness and enables the parties to achieve a result which they perceive to be just.

### Footnotes

1. Deborah Clapshaw is a mediator (Advanced Panel LEADR and AAMIN2) and dispute resolution consultant. She teaches dispute resolution at Auckland University Law School and is Deputy Chair of LEADR New Zealand Inc. David Hurley is a part time member of the Employment Tribunal and private mediator. He is an Associate member of AMIN2, Advanced Panel member LEADR and a member of the Society of Professions in Dispute Resolution.
2. For the purposes of this discussion, the writers treat litigation and arbitration similarly. Although there are differences, arbitration is viewed by the writers as the private counterpart of litigation.
3. "The schools of critical legal studies and feminist jurisprudence have shown that our systems of law can be a formal alien process of little relevance to the bewildered participant. Biases are ingrained within a system which purports to be "fair and responsible" to all, but the very definition of "reasonable" is often at stake". See Scott Beattie "Is Mediation a Real Alternative to Law? Pitfalls for Aboriginal Participants" February 1997 ADJR 57.
4. A cynical view is that litigation is not so much about the truth but what each party can prove to be the truth.
5. Substantive issues are those relating to money, physical resources, time and legal rights. Procedural issues relate to the way the dispute is to be resolved. Psychological issues relate to the human element, the need to be trusted, the need for respect and recognition, relationship issues.
6. See the discussion on satisfactory outcomes by Virginia Phillips in "Mediation: the Influence of Style and Gender on Disputants' Perceptions of Justice" 1996 *NZ Journal of Industrial Relations* 21 (3)297-311.
7. Parties in conflict often focus on an issue which is representative of the underlying conflict rather than the real issue of concern. This occurs when they are unable for some reason (perhaps lack of perceived alternatives) to articulate the underlying problem. For example, a couple married for some years argue about whether there should be one shampoo bottle in the shower cabinet (her view) or two (his preference). They both use the same shampoo. The argument takes them to a mediator who "unpacks" the underlying issue as her wanting a very close sharing relationship, while he wants a large measure of independence. Once the real issue is defined, the couple can work on resolution. If the underlying issue can be addressed directly in ways that the parties find meaningful, money no longer carries that additional burden and financial claims can be resolved on a realistic basis.
8. Just how real the apology is can be gauged by the recipient.