Mediation as access to justice

Nina Khouri, Mediator, with the text of remarks delivered at the annual conference of the Arbitrators' and Mediators' Institute of New Zealand, held in Wellington | Te Whanganui-a-Tara on 24 August 2023, as discussant for a presentation by Daniel Kalderimis

It is my privilege as discussant to offer some remarks in response to Daniel's thoughtful paper. The first thing I'll say is that the Chief Justice sits on my shoulder too as a result of that speech (Helen Winkelmann, Chief High Court Judge "ADR and the Civil Justice System" (Arbitrators and Mediators Institute of New Zealand Conference, 6 August 2011)). I wasn't at the AMINZ conference in 2011 — I had a visiting professorship at a law school in Canada — but I have included the speech in the course materials for every dispute resolution course I've taught at the University of Auckland Faculty of Law since. There's a lot in the speech with which I agree, especially the constitutional significance and primacy of public adjudication in upholding the rule of law in a functional democracy. Mediation cannot and should not attempt to compete with that.

But what that speech misses is the value of mediation as a tool for improving access to justice. Now I acknowledge the speech was a long time ago now but it appears not much has changed. The recent *Improving Access to Civil Justice* report by the Rules Committee of the High Court acknowledges the dire state of access to justice for civil disputes in Aotearoa but does not discuss mediation as a civil justice tool at all (Rules Committee I Te Komiti Mō Ngā Tikanga Kooti *Improving Access to Civil Justice* (November 2022)). That doesn't make sense to me. There is no comparable jurisdiction that so comprehensively excludes mediation from the access to justice conversation as New Zealand. In contrast, for example, the United Kingdom Civil Justice Council has this week released the first part of its final report into the role of pre-action protocols (PAPs) in facilitating civil justice, including the role of pre-action mediation. The executive summary records (Civil Justice Council *CJC Review of Pre-Action Protocols: Final Report Part 1* (August 2023) at [1.3]):

> PAPs have come to occupy an increasingly important role in the civil justice system. They provide norms of conduct for parties to prepare their cases for the court system, but also provide an opportunity for the parties to avoid the court system altogether — and the cost, delay and stress that goes with it — by reaching a mutually agreed resolution to their dispute. [...] [P]roportionate court adjudication and mutually agreed fair dispute resolution [are] complementary rather than competing goals, and [...] PAPs can successfully contribute to both outcomes.

For further discussion about the place of mediation in New Zealand's civil justice system in contrast with the approaches of comparable jurisdictions, see Nina Khouri "Mediation" [2021] NZ L Rev 169 at 184 and following).

What can I offer in response to what Daniel has said about mediation as access to justice? Well, as a practising mediator I'm going to describe what actually happens in a mediation and attempt to articulate what sort of justice that process can offer. I will include in that attempt some "work in progress" thoughts about how the core justice values of tikanga Māori might fit in.

I acknowledge, of course, the need for different approaches in different cases and that mediators vary in their styles. What follows is how I conceptualise mediation and most often run the process in my practice.

THE MEDIATION PROCESS

The mediation process offers an opportunity for disputing parties to meet face to face in a flexible and relatively informal (compared to court) setting to resolve their dispute through agreement. The process is:

(a) voluntary — no one in the room has power to make anyone else do anything they don't want to; and

(b) confidential — everyone agrees that their discussions and any information they exchange are confidential and privileged, so that parties can speak freely without fear that something they say might compromise their formal legal position should it prove necessary to progress the dispute to adjudication. There are important limits to that protection — misleading and deceptive conduct in mediation will not be protected by confidentiality and privilege, for example (see Evidence Act 2006, s 57(3), and associated commentary on the exceptions to mediation privilege such as Nina Khouri "Mediation" [2021] NZ L Rev 169 at 194 and following).

The process takes place in-person or via videoconference. The pandemic has taught us that we can mediate effectively via videoconference. There are compelling reasons to continue mediating in this way despite the lifting of COVID-19 restrictions, including the savings (time, money, carbon) to be gained from releasing geographically distanced parties from the travel requirements of attending in-person.

The cases that I mediate are in the civil and commercial context, such as construction and infrastructure disputes, professional negligence claims, disputes with an insurance element (natural disaster, income protection insurance, product or professional liability insurance), claims against public

authorities, director and shareholder disputes and general tort, contract and equity disputes (including family trust and estate disputes). They are usually litigated cases where all parties are legally represented and the alternative to settlement is a trial in the High Court or an arbitration. They are most often scheduled for a one- or two-day mediation.

We start the process a few weeks before the mediation with a planning call between counsel. By this time my mediation agreement has been accepted by all parties, so that planning call takes place as part of the mediation on a confidential and privileged basis. Its purpose is to lay the foundation for a successful mediation. We cover basic housekeeping points (venue or videoconferencing logistics, start/finish times, COVID-19 protocols), who should be there, and what preparation is appropriate. Are you going to exchange issues/position papers so everyone knows what we're going to be talking about and can prepare effectively? What information are you going to send me in advance so you don't have to spend the first part of the mediation educating me? If experts are involved, should they be conferring beforehand? An ulterior purpose of this call is to begin to shift the working dynamic between the lawyers from the adversarial formal letter-writing interaction they've usually had to this point to the beginning of collaborative problem-solving.

With an agreed plan in place, we then work through that plan towards the mediation day itself. I have a private pre-mediation call with each party in the days leading up to the mediation where we talk about what to expect from the process and what's important to that party. Come mediation day, everyone (including the mediator) knows the issues for discussion, the key facts and supporting evidence and the legal arguments. As mediator, I also know the private priorities of the parties.

Every mediation day unfolds differently but we usually spend the first part of the day in joint session, discussing what happened (the facts), understanding the competing expert opinions (engineers, building surveyors, valuers, accountants and other professionals), and debating the legal analysis, predicting how a court is likely to decide the case. This is where the "shadow of the law" comes in; we need good legal precedents to make this discussion possible (Robert M Mnookin and Lewis Kornhauser "Bargaining in the shadow of the law: The case of divorce" (1979) 88 Yale LJ 950). A good joint session discussion about the merits of the case has elements of a mini-trial, a hot housing of the case over the course of a few hours.

We talk about what happens next in the litigation if the parties do not settle: the procedural steps (interlocutories, setting down, briefing evidence); likely timeframes to trial and judgment; likely costs to each party; how Calderbank offers might affect costs awards. This is where I feel the Chief Justice most heavily on my shoulder, warning against "anti-litigation narratives" that scare parties into settlement by emphasising the horrors of litigation. But it is powerful for the disputing parties to see their lawyers agreeing across the table what the alternative to settlement looks like.

Then we pivot to exploring potential solutions. This typically takes the form of a negotiation with offers and counteroffers. My job as mediator then becomes to progress that negotiation flexibly using joint sessions, private caucuses, counsel-only meetings and so on, to see if there exists an outcome that is acceptable to everyone.

The settlement outcomes we negotiate are sometimes simple payments of money from defending parties (defendants, third parties and so on) to plaintiff parties. These types of settlements usually reflect likely court outcomes but without the uncertainty and transaction costs of litigation (cost, delay, distraction from more productive work). Sometimes the settlement outcomes are fundamentally different to what a court could order: getting a construction project back on track; a new intergenerational ownership arrangement for a family farm; a renewed long-term relationship protocol between a forestry company and the iwi owners of the forest, for example. Sometimes an apology is part of the settlement, or an important step along the way to achieving a settlement.

There will only be a settlement if that settlement makes more sense to every party than their other options. The fundamental rationale of this mediation process is to provide an opportunity for strategic and informed decision-making about the dispute.

SO, HOW IS THIS JUSTICE?

Public adjudication through the court process resolves disputes according to the law's objective standards through the recognition and enforcement of legal rights and obligations. The adversarial process with its rules of civil procedure and evidence is designed to achieve equality before the law, regardless of power imbalances, with like cases being treated alike. In contrast, private settlement through mediation is characterised by a lack of formal procedure, relying on: (a) the cornerstones of confidentiality and voluntariness; and (b) the doctrine of contract through the agreement to mediate and the settlement agreement. At its core is a commitment to enabling disputing parties to choose the terms on which they resolve their dispute, acting in their own self-interest and in accordance with their subjective preferences.

Settlement choices can be guided by "non-legally relevant facts", such as the parties' commercial priorities or psychological needs (Carrie Menkel-Meadow "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 Geo L J 2663 at 2685). It helps to understand what caused the dispute in the first place before it was translated into a pleaded case, and what's important to the parties now in resolving it.

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Settlement choices are also guided by the law, both in the sense of predicting how a court is likely to decide the case (hence the concept of settling in the shadow of the law) and aiming for a better outcome than that, and also in the sense of taking place within certain legal parameters. That's where the legal and ethical obligations of counsel and the mediator come in; we owe duties to the parties to keep them legally safe, making well-informed decisions in circumstances where they have

decision-making capacity (see Nina Khouri "Mediation" [2018] NZ L Rev 101 at 102 for discussion about the obligations of counsel and the mediator to protect the parties against bad decisions made under pressure). The settlements I see are not just unprincipled, reluctant compromises dictated by power dynamics (compare Hazel Genn *Judging Civil Justice (The Hamlyn Lectures 2008)* Cambridge University Press, New York 2010) at 117: "[t]he outcome of mediation is not about just settlement, it is just about settlement ...").

As such, in justice terms the mediation process reflects a commitment to the Western liberal concept of the autonomous individual in a democracy.It also reflects a certain postmodern scepticism about the possibility of discerning the right answer — the truth — through the judicial process, preferring to let the disputing parties find that answer for themselves. (See further Carrie Menkel-Meadow, "The trouble with the adversary system in a postmodern, multicultural world" William and Mary Law Review, 38 (1996) 5-44, 5, cited in Genn, above at 84; Judith Resnik "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio St J on Disp Resol 211 at 260, citing Marc Galanter & John Lande "Private Courts and Public Authority" (1992) 12B Stud In L Econ & Soc'y 393, 412–413).

WHAT ABOUT TIKANGA MĀORI?

Te Aka Matua o te Ture | the Law Commission (led by Justice Whata) is about to release a comprehensive report that examines tikanga Māori and its place in Aotearoa New Zealand's legal landscape, recognising that tikanga has been gaining recognition steadily in our courts and statutes. [Postscript: Now released as Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023.]

I've been thinking about how the core values of tikanga Māori, or more fundamentally of te ao Māori, might find expression in the mediation process. A couple of points to make first though. I am not tangata whenua. I am a fifth generation New Zealander of Lebanese descent on my father's side and first generation Swedish on my mother's side. But I am a proud member of "Ngāti Aotearoa" and I care about our civil justice system. I acknowledge the risk of pakeha co-opting tikanga inauthentically or tokenistically for their own purposes (Annette Sykes "The myth of Tikanga in the Pākehā Law" (Nin Thomas Memorial Lecture 2020, University of Auckland Waipapa Taumata Rau, 5 December 2020)). I also acknowledge the fact that there is an established tradition of tikanga Māori in other fields of mediation, such as resource management disputes, family disputes and in Te Kooti Whenua Māori | the Māori Land Court (see, for example, the new mediation provisions in Te Ture Whenua Maori Act 1993 | Maori Land Act 1993 incorporated by Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020). I'm talking about civil and commercial mediation where any discourse about tikanga Māori is new.

So I seek your patience as I feel my way through this and your forgiveness if I make a wrong step. I hope what I venture below will be treated as a starter for conversation and not any sort of attempt at an authoritative statement. I also acknowledge Tunisia Set Ārena, In-House Counsel at Te Rūnanga-Ā-Iwi-Ō-Ngāpuhi and new AMINZ Council member, for the guidance, support and prodding they are giving me along the way.

Here we go. Please note I'm not talking about practices such as karakia, hākari and waiata that one might incorporate into a mediation process. Instead, I want to focus on four fundamental or core values of tikanga Māori that we might think of as "justice values". These are kaitiakitanga, manaakitanga, rangatiratanga and whanaungatanga (I acknowledge Maurea Consulting and the resources from its flagship Te Kaa course in the identification and explanation of these four core values (see <//www.maurea.co.nz/te-kaa>). I also acknowledge the debate about what the core values of tikanga Māori are. See, for example, Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1 at 3).

Kaitiakitanga

Kaitiakitanga is, loosely, the obligation of guardianship. It is often talked about in the context of the connection between people and the natural world but it is wider than that. I see kaitiakitanga obligations in my legal and ethical duties as mediator to run a safe mediation process for the parties. To make sure that the mediation does not make their dispute worse and that they make well-informed decisions that are right for them, in circumstances that support good decision-making. So, for example, I require the parties to my mediations to be legally represented and will adjourn a mediation where I consider a party no longer has decision-making capacity (for example, if it's late at night and they're too tired to think clearly). We touched on this earlier.

Manaakitanga

Manaakitanga is about caring for a person's mana, both holistically through mana-enhancing behaviours and physically in the sense of providing care and hospitality. A mediator can treat all parties in the mediation with dignity and respect regardless of their social status or the legal merits of their position. It starts from the first moment you meet the parties in the way you greet and welcome them. How you help with language barriers or disabilities like hearing impairment. Allowing everyone to be heard without interruption. Respecting and accepting the decisions they make at the end of the process. And practical hospitality obligations; making sure every party has their own breakout room that is warm and private where they can speak freely with their lawyers and ensuring everyone receives food they can eat throughout the day to keep their energy levels up. Don't serve a ham and cheese croissant for morning tea to Hindu or Muslim or Jewish parties, for example, or to a vegetarian.

Rangatiratanga

Rangatiratanga is about leadership, and the right to self-governance, autonomy and control. Tino rangatiratanga, *absolute* rangatiratanga, relates to sovereignty, self-determination and independence. In mediation the defining principle is that there will only be a settlement if all parties freely agree to it. The goal of the mediator is to empower the parties to make good decisions that are right for them; to empower their self-determination in the face of an alternative where a stranger (a judge or an arbitrator) will decide the outcome for them.

Whanaungatanga

And finally, whanaungatanga. Whanaungatanga is what

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scenario would apply in the context of a person holding the power to appoint trustees. However, perhaps defects that are 'slips or irregularities in appointment' are within the scope of s 100 of the Trusts Act?

Application to s 100 of the Trusts Act

If the Court's approach to s 158(a) of the Companies Act 1993 and its predecessors is accepted as persuasive, a similar approach could be taken to interpreting a 'defect in appointment' under s 100 of the Trusts Act as follows:

a where the defect is that the 'trustee' was not appointed by the correct appointor, s 100 of the Trusts Act would not save an act of the invalidly appointed 'trustee'. This is also consistent with the common law position that a trustee *de son tort* cannot validly appoint a trustee;

b where the defect is a 'slip or irregularity in appointment', the purported trustee's acts would be saved by s 100 of the Trusts Act.

if the court takes a similar interpretive approach to that taken by the New Zealand courts in relation to s 158(a) of the Companies Act 1993 and its predecessors, the application of s 100 of the Trusts Act may be relatively narrow.

Any other validly appointed (or improperly discharged) trustee must also act, where unanimity is required. Failing that, s 100 of the Trusts Act is not apt to validate the act.

In conclusion, if the court takes a similar interpretive approach to that taken by the New Zealand courts in relation to s 158(a) of the Companies Act 1993 and its predecessors, the application of s 100 of the Trusts Act may be relatively narrow. However, the exact scope of the provision still remains to be determined. ❐

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Justice Joe Williams describes as "the fundamental law of the maintenance of properly tended relationships" (Justice Joseph Williams, above at 3). It focusses us on the importance of relationships and our interdependence. Mediation involves two, three, four, sometimes many parties (or whole communities) working together through a structured process to find a settlement with which they can all live. Sometimes that settlement enables relationships to continue; I see this in franchise and shareholder disputes and construction disputes (especially where the build is still happening). Sometimes the settlement opens the possibility of healing a relationship, not right now but perhaps in the future; I see this in family trust and estate disputes. And sometimes the parties will not interact again but the dispute is resolved in a way that enables everyone to move on with their lives and businesses peacefully within our wider community.

Whanaungatanga also resonates in good working relationships (often long-term relationships) between counsel, and between counsel and the mediator. These relationships are astonishingly important in helping a dispute settle at mediation.

CONCLUSION

So, where does all this get us in terms of understanding what kind of justice the mediation process can offer? How do we reconcile the essential interconnectedness of whanaungatanga with the Western liberal concept of the autonomous individual that I said earlier is a fundamental concept of mediation? Well, I'm a mediator so I'm allowed to say both concepts are true. Because both serve a useful purpose. And that purpose is what I consider to be the fundamental purpose of our civil justice system: as a *modus vivendi*, a way to make living together possible.

The COVID-19 pandemic has highlighted vividly how we are all connected with one another in both terrible and beautiful ways (Rev Clay Nelson, Auckland Unitarian Church, Ponsonby, Auckland, August 2021). But as we head into the coming general election, we see the ideological differences between citizens of Aotearoa brought into stark relief, against a backdrop of increasingly polarised and disinformed social discourse generally. To join Daniel in citing John Rawls, the civil justice system enables the peaceful resolution of disputes and facilitates "a stable and just society among free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical and moral doctrines" (John Rawls *Political Liberalism* (Columbia University Press, 1993) at xviii). The mediation process is a tool for achieving that and is a critical part of a functioning civil justice system. What can we do as a mediation community to improve access to the justice it offers? ❐