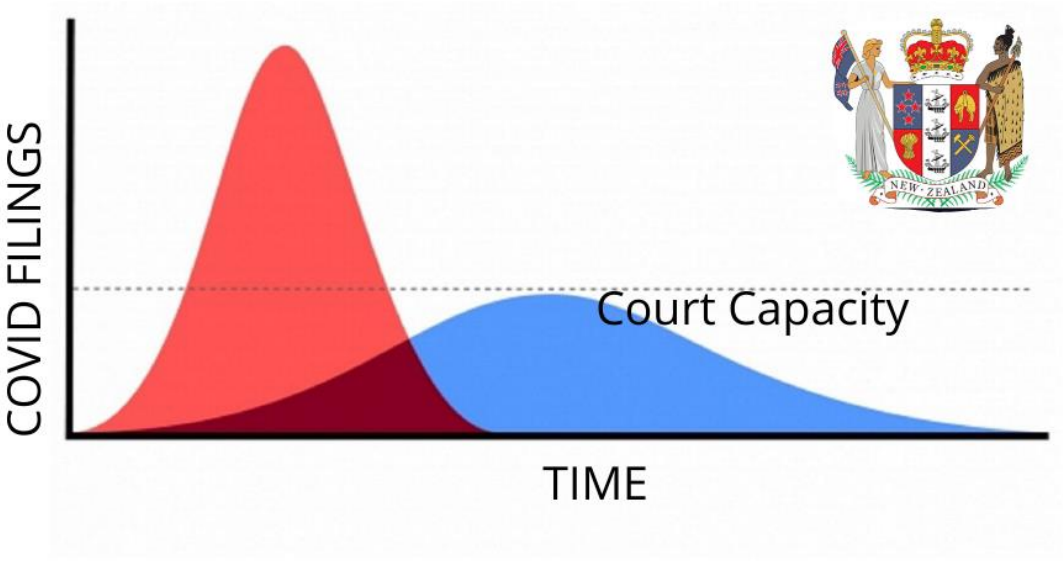


How Mediation Will Help Flatten the Curve in New Zealand's Civil Courts

- Published LINKEDIN on April 23, 2020

Geoff Sharp
International Mediation // Asia Pacific + Europe

There is anticipation building around what our civil courts will look like once we leave Alert Level 4 next week and beyond. And there is a dawning realisation that "beyond" maybe longer than we think as the world lives with COVID for some years.

Will there be in person (suitably distanced) hearings, with judges and counsel and witnesses in the courtroom? Or will we adopt remote hearings where all the

players participate online for some matters, or more realistically will the lasting legacy of all this be a hybrid model where some are in the courtroom and some are online… are some cases worthy of a courtroom, while others a computer?

The Surge

COVID fallout will be severe, we can all agree on that. Disputes will flourish, not straight away but in the months, and in some cases years, after restrictions end. The pressure on our civil courts will come from a surge of cases resulting from global and domestic economic activity falling off a cliff and the recession widely tipped to follow.

Unlike the two previous surges - the leaky building crisis and Canterbury earthquakes - the deluge of cases this time will not be issue-specific - it won't be water ingress and it won't be physical damage - it will be a time-compressed range of commercial issues like we have not seen before - from leases to insurance claims and coverage disputes to construction to disrupted supply chains and more, and COVID legal issues will be remarkably similar around the globe.

So, whatever the success or otherwise of discrete out-of-court systems set up to deal with these previous crises (like the Weathertight Homes Resolution Service and Greater Christchurch Claims Resolution Service), it will not work this time but mediation will remain, as it has historically, a faithful workhorse in the aftermath of a national crisis.

COVID claims will primarily fall to the High Court which will have to find ways to deal with increased volumes as cases make their way through the system – it will take time for most businesses to asses claims and, like the earthquakes, the surge will take a while to manifest, but we will see it coming from the registry data.

The High Court's Response

Along with rigorous scheduling, double/triple bunking to avoid wasteful holes in the court calendar as cases settle last minute, more directive case and issues management to deal with bloated proceedings and maybe even more courtrooms and more judges working more hours, mediation is an important piece of the puzzle to flatten the curve of the impending demand on our courts.

We know that a one or two-day mediation has the potential to resolve a dispute otherwise set down for hearing over weeks and sometimes months – mediators see it day in and day out. Two days of mediation for a ten-week trial is not unusual.

Mediation Will Assist (but now it needs help from the courts)

I have long been an advocate of keeping the courtroom and the mediation room entirely separate, leaving a mediation savvy profession in New Zealand to opt for mediation in appropriate circumstances. To be honest, that has historically worked at the top end of town, but there has always been a raft of mid-range civil cases that should be mediated but are not. This is where much of the pressure will be.

But COVID changes everything. These extraordinary times call for our courts to partner mediation, integrating mediation with the court's own process and providing stick and carrot type incentives to mediate.

Certainly, mandatory mediation is not the answer but in my view **a combination of judicial persuasion and cost sanctions is.**

First, we need judges to (pro)actively consider the suitability of mediation during case management and encourage parties to consider it – often by accommodating a mediation window in the trial timetable. To some extent, and depending on the judge, this happens now but it needs to be given life and formalised. A consistent approach across the High Court is needed.

Second, if a party to litigation is invited to mediate and is found to have unreasonably declined, there should be cost consequences.

This combination of judicial prompt, ignored at one's peril, together with the knowledge that declining an invitation to mediate from another party in the litigation will have cost consequences, is a measured approach suitable to the times.

In England, with pre-action protocols, the Civil Procedure Rules and the Jackson reforms all promoting the use of ADR, courts have repeatedly found a failure to mediate may constitute unreasonable conduct and therefore risks a negative costs award (the *Halsey v Milton Keynes General NHS Trust* line of cases).

In Halsey, the Court of Appeal identified six factors that may be relevant to the court's consideration of a refusal:

(a) the nature of the dispute

(b) the merits of the case

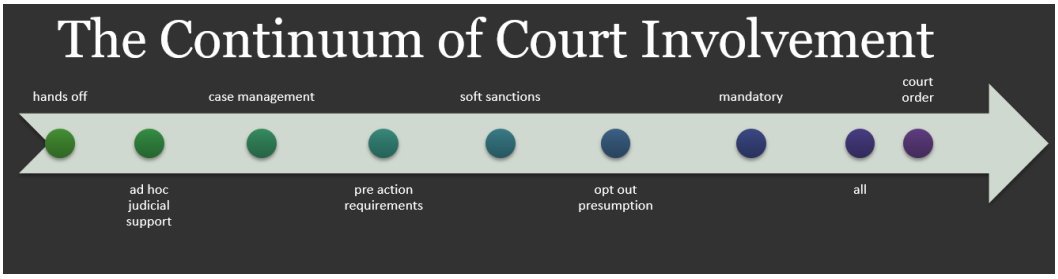
(c) the extent to which settlement methods have been attempted

(d) whether the costs of the ADR would be disproportionately high

(e) whether any delay in setting up and attending the ADR would have been prejudicial, and

(f) whether the ADR had a reasonable prospect of success.

So, while mediation is not mandatory in England and Wales - and while there are views both ways on the wisdom of costs sanctions - if the trial judge subsequently finds that there should have been an attempt at mediation, costs consequences will usually follow – and that is whether the refuser won or lost. Singapore's Supreme Court Practice Directions also provides for cost sanctions against a party unreasonably refusing to accept an 'ADR Offer'.



Conclusion

More radical measures would not suit the New Zealand environment. They include **mandatory mediation** and an **opt-out presumption,** where all cases coming before the court are referred to ADR by default unless the parties opt-out (in the Singapore State Courts there is a "Presumption of ADR" which is responsible for the resolution of thousands of cases annually).

Proactive encouragement and imposition of costs sanctions, perhaps with a more nuanced reformulation of Halsey, is what our system needs right now.

Geoff Sharp
International Mediation // Asia Pacific + Europe
Published • 4d
5 articles
How Mediation Will Help Flatten the Curve in New Zealand's Civil Courts: While being proud of the permissive mediation culture we have built over the last two decades in New Zealand, a carrot and stick approach is now needed as our courts prepare for a surge of COVID filings in the months and years ahead. Many jurisdictions have grappled with the extent to which their courts should get involved in the mediation of litigated cases. Many different approaches have found favour around the globe, with diverse programs being implemented in courts from Hong Kong to Florida and places in between.

Reactions

19 Comments on Geoff Sharp's article
Most Relevant

Bill Wood QC 1st degree connection 1stInternational Commercial Mediator

4d
Just to give some scale I was mediating with a big London insurance coverage firm today who said they had received a thousand new instructions on COVID issues in the last week, mostly business interruption claims and many very substantial.

Paul Sills 1st degree connection

4d

I agree with your observation that it is in the mid-range civil cases where mediation has the least traction. The top end seems to take care of itself. We need to get the message to the Courts and to the market that mediation is an incredibly effective process for these mid-range disputes. Getting them in front of a mediator early I think is the key – and I support your comments on a tighter relationship between the Courts and mediation services to ensure this happens. With initial disclosure in our courts and with the courts going back to a detailed and directive initial case and issues management conference I think mediation can happen soon thereafter.

…see more

Paul Sills 1st degree connection

4d

One last point - I agree we do not need to make mediation compulsory– that is a step too far – but it should be the rare civil or commercial case that gets to trial without having been through the process I think. My favourite point on the concerns about mandatory mediation is this: Giles J in the Supreme Court of New South Wales in the decision Hooper Bailie Associated Ltd v Natcon Group Ltd said this: “Conciliation or mediation is essentially consensual, and the opponents of enforceability contended that it is futile to seek to enforce something which requires the cooperation and consent of the party when cooperation and consent cannot be enforced… The proponents of enforceability contended that this misconceives the objectives of alternative dispute resolution… What is enforced is not cooperation and consent, but participation in a process from which cooperation and consent might come.”

…see more

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4d(edited)
Thanks **Paul** I'd be interested in your thoughts about this - other ways in which mediation can pull a heavier load coming out of Covid?

Jennifer Egsgard 1st degree connection 1stMediator at Egsgard Mediation

4d
Hi Geoff, Great post. I'm working on a paper on the history and structure of mandatory mediation in Ontario that might interest you - I'll email it now.

Jennifer Egsgard 1st degree connection 1stMediator at Egsgard Mediation

3d
Hi Denise, I would be happy to share it. Kindly send me your email in a private message, and I will send it your way! Best wishes, JEnnifer

Geoff Sharp

2d
Jennifer Egsgard it's a great article. Many thanks for sending it to me.

Sarah Cates 1st degree connection 1stHumanist, Employment Lawyer & Mediator

4d
Geoff Sharp The uncertainty of life at the moment is certainly likely to be a driver of resolution. Has that been your experience in recent weeks?

Geoff Sharp YouInternational Mediation // Asia Pacific + Europe

3d
Sarah Cates I have heard that said recently, but I have to say it is not my experience. I recall mediating in the days immediately following 9/11 and there was not a noticeable shift in the level of collaboration. In some ways, people were uncertain and took firmer positions than normal...

Jonathan Rodrigues 1st degree connection 1stMediator | TEDx Speaker | Co-founder, The PACT | LL.M. Mediation & Conflict Resolution

4d
Thank you sharing Geoff, great insight. Beside the compressed range of commercial issues, do you reckon, in this modern world, there would be public suits against the governments for lack of preparation - that would be a delicate matter for those who have lost loved ones.

Geoff Sharp

4d
Jonathan, I can definitely see investor/state claims arising out of COVID. In some jurisdictions there could be suits along the lines you describe. Presumably in negligence, but in NZ anyway they would face real headwinds legally.

Denise Evans 1st degree connection 1stPrincipal, Dispute Resolution at FairWay Resolution Limited

3d
Actually it should be the certainty that you will participate in the decision and be in control of the outcome that is the driver for people to resolve disputes through mediation. I agree we should apply the same mentality- go early and go hard be committed to a successful outcome and that should flatten the curve
Unlike Denise Evans' comment1 Like1 Like on Denise Evans' comment
2 Replies2 Replies on Denise Evans' comment

Paul Sills 1st degree connection 1stInternational Mediator | Barrister

3d
Denise - in your experience how best to get that message (and a very good message it is) out to the parties who are about to be in dispute and who would benefit from mediation assistance in the weeks and months to follow. Us knowing how we can help needs to be translated into them knowing we can help and them wanting us to help.

Denise Evans 1st degree connection 1stPrincipal, Dispute Resolution at FairWay Resolution Limited

3d
Paul Sills people need advice and reassurance from their lawyers, accountants and business advisers that they can stay in their bubbles and actively collaborate and problem solve. We need to shift the focus from who's fault it is to how can we fix it. This is how we are doing Covid-19. The message is there is no stigma attached to having Covid-19 just need to know who else might need to be involved in sorting the problem.

Caroline Silk 1st degree connection 1stPrincipal at Silk Legal

3d

Well said - there are even greater pressures in the criminal jurisdiction, that was already struggling with the caseloads. We have the most opportunity now to be creative and assist the burden in the Courts and still achieve access to justice. I look forward to more and better use of ADR.

Paul Sills 1st degree connection 1stInternational Mediator | Barrister

4d
Great article Geoff and a point well made

Tiana Epati 2nd degree connection 2ndPartner at Rishworth, Wall & Mathieson

3d
Cate Brett