

ADR AND THE CIVIL JUSTICE SYSTEM

Hon Justice Winkelmann

AMINZ

AMINZ Conference 2011 - Taking Charge of the Future

6 August 2011

MEDIATION IS NO SUBSTITUTE FOR CIVIL JUSTICE

Presenting a paper on this topic to a room full of mediators feels, as I stand here, an heroic adventure- like entering the lion's den. I have chosen this topic because in New Zealand we have seen a rapid growth in the provision of mediation services over the last 20 years, and because this growth has been accepted, more or less without question, as a good development. It is, I suggest, time to reflect upon the role of mediation, the good and the bad.

As in most things, our legal trends tend to mirror, but lag those in overseas jurisdictions. In fashion, the lag may be a season. In the legal sphere, the lag seems to be more in the region of a decade or two; and this is true of the growth in mediation. This isn't something I say in a critical way. In fact I think it is an advantage that we have in that, when reflecting upon the role of mediation, we are able to learn from the lessons of other jurisdictions.

I say, before I alienate you with the points I am about to make, that it is my view that mediation is a good thing. In many cases it has the potential to enable parties to reach settlements that they will be content with, and on some occasions to reach them with lesser expenditure of money and time than if they were to proceed to a full hearing through the civil courts.

Now I come to what may, in front of this audience, be the most controversial part of what I want to say to you- that is that mediation in all its forms is not universally good when viewed from the perspective of the litigant or the state. Moreover, although mediation has a place alongside a system of civil justice, it can only be as an alternative, or a complement to that court system and not as substitute or replacement for it. Civil litigation before the courts is not dead, or dying.

Adjudication of rights through the courts, whether in a full trial or in a summary form, does and should continue to remain at the heart of our system of justice.

In overview the points I wish to make are as follows:

1. A well funded, well functioning court system dealing with both criminal and civil cases is a critical feature of a society which exists under the rule of law. Indeed, it is a pre-condition to democracy.
2. However, negotiated settlement, that is settlement of disputes without resort to violence, is the principal means by which the vast bulk of civil disputes are resolved. Only a small proportion of disputes are ultimately resolved by a legally binding determination of parties' rights.
3. That is not a new feature of our system of civil justice. Cases have been settling at roughly similar rates for decades. That is true of our jurisdiction, and every jurisdiction we would wish to compare ourselves with.
4. A high rate of settlement is not to be considered a failing of any system of civil justice. In fact it can be considered a good indicator of a well functioning civil court system (although there need to be some caveats upon that remark which I will come to later), and indeed is critical to its on-going sustainability.
5. Cases settle in the shadow of the law - without a functional civil court system cases would not settle peaceably.
6. There is no research in New Zealand as to the impact of mediation on the rates of settlement. However, the preponderance of overseas research indicates that mediation has no or only negligible impact on the timeliness of disposition, the cost of litigation and even rates of settlement.
7. Notwithstanding that, disputants are being referred to mediation in greater and greater numbers by lawyers. Mediation is actively encouraged in judicial case management. We even have a judicial form of mediation, judicial settlement conferences. Given the evidence we do have as to the effect of mediation, we need to assess and reflect upon benefits that accrue to parties from mediation.
8. A final point I wish to make is that it is common to promote mediation services by reference to the perceived downsides of court proceedings, or what is commonly referred to in the literature, as an anti-litigation narrative. The less desirable adjudication of rights before a court is seen to be, the more desirable, and even inevitable, resolution

through mediation. However the anti-litigation narrative carries with it the danger of undermining the civil court system, by eroding confidence in it. Such an outcome is not in the interests of society as ultimately it will undermine the rule of law. It is not in the interests of the profession, a profession structured around the courts, and not in the interests of the providers of alternative dispute resolution services, as they operate and depend upon a well functioning court system for the services they provide.

I would like to return to each of these points and expand upon them. I begin with constitutional principle and my first point:

- 1. A well funded, well functioning court system dealing with both criminal and civil cases is a critical feature of a society which exists under the rule of law. It is a pre-condition to democracy.**

Lord Neuberger put the matter this way:¹

The law's majestic equality is for civil justice of fundamental importance. ...equal access to justice for all underpins our commitment to the rule of law. It ensures that we live not under what Friedrich Meinecke characterised as a *'government of will [but under] a government of law'*. It ensures that any one individual citizen can come before the courts and stand before the seat of justice as an equal to his or her opponent-whether that opponent is another such individual, a powerful corporation or the state itself. We should not, in light of this, be too surprised to note that equality before the law, *isonomia* - of which equal access to the courts is one aspect - was for the citizens of Athens two and a half thousand years ago, the basis out of which democracy arose.

A well functioning system of civil justice is a pre-condition of not only democracy, but also of a community's economic and social well being. Disputants are not left to physical combat to sort out their differences. People and corporations can invest their money in enterprise in our country in the knowledge that if a dispute arises they may have resort to a non-corrupt court system to have their rights decided according to law, a determination which will have the force of law in every necessary sense.

¹ Lord Neuberger of Abbotsbury, Master of Rolls "Has Mediation had its Day?" (Gordon Slynn Memorial Lecture 2010, 10 November 2010), 2-3.

Moreover the product of our courts through published precedent is a set of rules which enables people and businesses to organise their affairs and conduct themselves and thus avoid conflict through a shared understanding of rights and duties.

And as I will expand upon shortly, it is also the backdrop against which disputes settle.

All of this leads me to the point made most forcefully by Dame Hazel Genn, that civil justice provides not only private benefits for the individuals who litigate before the courts, but is also a public good for the benefit of society as a whole.²

By this I mean that the existence of a right of access to the courts, and the publication of the court's decisions, provides the necessary framework for a civil and prosperous society. For these reasons access to civil justice is not then appropriately packaged as a service, and litigants characterised as our customers.

I come to my second point:

- 2. Negotiated settlement is the principal means by which the vast bulk of civil disputes are resolved. Only a small proportion of disputes are ultimately resolved by a judgment of the court.**

In New Zealand, around 10% of proceedings commenced by Statement of Claim are resolved through judgment following a full substantive hearing, and somewhere between 10-30% of disputes commenced by originating application. I must caveat these figures with an acknowledgment that historical statistics kept for the judiciary by the Ministry of Justice allow only a fairly rough and ready assessment of the rate at which general proceedings are tried. We can however be more confident that a further substantial number are resolved by judgment following a summary judgment hearing.

If disposition of a claim through adjudication is used as a measure of success, then, by these measures our court system is doing well if compared to Australia, England or America, where the rate of disposition through trial ranges between 1-3%.

- 3. My next point is that high rates of settlement are not a new feature of our system of justice. The vast majority of the civil case load has always settled.**

Although the way in which proceedings are disposed of through judgment may be changing (with a move away from full trial to summary disposition) there is no indication that the rate at which cases settle is increasing.

² Dame Hazel Genn *Judging Civil Justice (The Hamlyn Lectures 2008)* (Cambridge University Press, New York, 2010).

4. The fact of a high rate of settlement is not to be considered a failing of any system of civil justice. In fact it can be considered a good indicator of a well functioning court and legal system, subject to some caveats.

People come to court for two reasons; to have a judge determine their rights and remedies, and to invoke, in effect, the threat of the state's power of compulsion to encourage settlement. The processes of the court are routinely invoked as a means of producing settlement, and indeed our case management processes encourage parties to resolve their differences if they can achieve an appropriate settlement. We organise our work in the expectation that most cases will settle, and our courts could not cope if they did not.

Civil justice is an expensive public good and we attempt to ensure that only those cases that require a full trial receive one. Characteristics of those cases that proceed to a full hearing are typically, but not exclusively as follows; cases involving allegations of wrong doing against public bodies, that are legally or factually complex, or involve allegations of oppression or fraud, or where the dispute is the result of the breakdown of a previously close relationship of trust, or where the dispute is of significance to a wider group than the direct litigants.

5. Cases settle in the shadow of the law - without a functional civil court system cases would not settle peaceably.

We know that the mere fact of the issue of proceedings is sufficient to bring on a settlement. Last year the High Court, with the support of the Ministry of Justice, conducted a review of closed files to assess the behaviour of a representative selection of completed cases taken from the Auckland and Wellington High Court registries. From that review we learnt that approximately 30% of the civil case load will resolve through settlement even before a hearing date is allocated. The commencement of proceedings is enough to bring the parties to the bargaining table.

In respect of the balance that is not disposed through summary judgment or strike out, the sampling indicated that the rate of settlement increased dramatically from the setting down date. This suggests, as any student of human behaviour may suspect, that a looming trial date is the main driver of settlement.

Of course, parties are better able to settle their disputes if the law is certain and its principles well understood. So settlement may also be an indication that the law is certain and predictable.

But it would be naive to assume that the rate of settlement is all good news for our system of civil justice. High rates of settlement can also be an indicator that people have given up on the litigation system because they have exhausted their funds, or their energy in protracted litigation. It could be an indicator that the law is so unpredictable in its outcome, that parties would rather construct their own solutions, than take their chances with the court.

For a period there has been delay in the hearing of some civil proceedings which is attributable to the court system. One must accept this has, and perhaps continues to play a part in the decision to settle.

Some changes to scheduling practices have already been put in place in the High Court at Auckland, the busiest High Court centre. These changes have substantially reduced waiting time to trial for most litigation. The experience over the last year in relation to this is that standard non-complex cases are able to proceed very promptly through to hearing.

Interestingly, early indications are that those cases that have been given very prompt hearing dates have settled at higher rates than the general majority of the Court's case load.³

Although it is not part of the topic I am addressing today, the High Court, together with the Rules Committee, have organised a series of forums to provide the profession with the opportunity to engage with us on reforms designed to encourage a more proportional expenditure of resources in litigation, both of the parties and the court. The purpose of these reforms is to reduce barriers, such as cost and delay, where these result from court practice and procedure.

I acknowledge that the Court's statistics do not, and cannot measure instances in which proceedings are not commenced because of a lack of confidence, for whatever reason, in our system of civil justice. In the High Court however, we can take some comfort from a 66% increase over the last five years in proceedings commenced by Statement of Claim or Originating Application (I exclude from these figures insolvency proceedings such as bankruptcy and liquidation proceedings although there has also been a significant increase in those figures).

6. There is no research in New Zealand as to the impact of mediation on the rates of settlement. The preponderance of overseas research indicates that mediation has no or only negligible impact on rates of settlement.

³ This is however based upon a relatively small sample, and the effect of a fast tracked hearing on rates of settlement is something that we continue to monitor.

We do not know if mediation increases the rate at which cases settle. The data we have as to how the High Court's civil case load behaves provides no indication that the rate of settlement is increasing along with the growth in the use of mediation. Little in the way of research has been done in New Zealand in relation to civil litigation and none that I am aware of as to the impact of mediation on rates of settlement or related issues. In this country, and in many others, research in relation to mediation has been limited to collecting the views of the various stakeholders, as to why they mediate, and what their experiences of mediation are.

Some studies have been conducted overseas, that have assessed the impact of mediation on time to disposition and cost of the proceeding. The most significant is the Rand Study, a study ambitious in concept, and excellent in execution which was constructed around statutory reforms to civil procedure in the United States. Referring to this study in his Hamlyn lectures, Professor Michael Zander said:⁴

ADR is not some form of magic potion. The five year Rand Corporation study of civil justice reforms (in America), based on 10,000 cases in Federal Courts in 16 states, looked also at ADR (mediation and early neutral evaluation) schemes. The report found no statistical evidence that these forms of ADR "significantly affected time to disposition or litigation costs".

Against this is to be weighed a more recent, but also much smaller study in Ontario of mandatory mediation over a two year period. The results of that study led researchers to conclude that there were significant reductions in the time taken to dispose of cases and reductions in litigation costs, by virtue of a mandatory mediation scheme.⁵

But more support for the Rand analysis comes from Dame Hazel Genn's "Twisting Arms" study,⁶ in which she analysed the cost and delays associated with a group of mediated and a group of non-mediated cases. This led her to conclude:⁷

...that there is not strong evidence to suggest any difference in case duration between mediated and non-mediated cases. Similar proportions of each type of case were resolved within 2 years of issue.

⁴ Prof Michael Zander *The State of Justice* (Sweet & Maxwell, London, 2000) at 37-78.

⁵ See Genn et al. *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure* (United Kingdom Ministry of Justice Research Series 1/07) (May 2007) at 9.

⁶ *Ibid.*

⁷ Genn, *Twisting Arms*, at 70.

Recently, Master of the Rolls, Lord Neuberger, commented on the work of Dame Hazel in her “Twisting Arms” study, and on evidence submitted to the Jackson Cost Review,⁸ which showed that 95% of personal injury claims settled without formal mediation. He concluded from this that if the evidence from these two reviews could be generalised, it was suggestive of a conclusion that in most cases formal mediation did not increase settlement rates.⁹

The impact of mediation on time to disposition, cost and settlement rates (and indeed of judicial settlement conferences) may be an issue to be usefully addressed in the Otago Legal Issues Centre study into Civil Case Progression that was launched earlier this year. Given the level of resources invested in mediations and into judicial settlement conferences, research into the effect of these techniques is highly desirable.

7. Notwithstanding the lack of evidence that mediation reduces costs, delays in disposition, or increases the rate of settlement, cases are being referred to mediation in greater numbers by lawyers. Mediation is actively encouraged in judicial case management. So why do we do it, and what does that tell us about the characteristics of a good mediation, and conversely a bad mediation?

There can be no doubt that we do actively promote mediation, as a profession, and as a judiciary. In some countries, mediation is compulsory before there is a right of access to a court hearing of the dispute.

Are we correct to promote mediation? To take the case for settlement first - settlement allows the parties to reach an agreement as to how their dispute is to be resolved. It acquires its legitimacy from the consent of the parties, rather than from the definitive adjudication of rights.

What of the case for mediation? We can be confident that to the extent that it assists the parties to come to a truly consensual settlement of their disputes, it can be beneficial. But only in so much as it is a truly consensual settlement of the dispute. As I have outlined, we can be far less confident that it delivers the cost and speedy disposition benefits often claimed, or indeed that it increases the chance of settlement.

⁸ Lord Justice Jackson *Review of Civil Litigation Costs: Final Report December 2009* (The Stationery Office, Norwich, 2010).

⁹ Neuberger, at 9.

Mediation is often said to facilitate the generation of more creative solutions to disputes, yet most mediated settlements simply involve a transfer of money, and of course depend upon the courts for the enforcement of the solutions. A relatively small number of settlements are actually creative or provide a different solution from what would be available in court.¹⁰

I suggest then that the principal benefit to be derived from mediation is that the settlement will be constructed by the parties for themselves and freely consented to. I acknowledge of course that in individual cases there may be other benefits that flow, but I think we should be hesitant in asserting those other claimed benefits as a general rule in light of the body of research gathered to date.

This in turn, I suggest, gives us a clear indication as to the matters we should be especially concerned with in terms of the form that mediation takes.

There are techniques used by mediators that are consistent with the objective of consensual and individualised justice. The sense that the meeting of the parties takes place within a neutral environment and in accordance with a set of rules can provide the necessary reassurance to allow such a meeting to occur. Also of great benefit to the parties is the focus and refinement of the issues that the dispute is really about that can take place in the course of the mediation. Even where settlement fails, that exercise will reap benefits for the parties in saved costs, and a shorter trial.

However, there are also practices that imperil the quality and hence the benefit of the mediation process.

First, it is apparent that there are mediators for whom a significant (if not primary) focus is achieving settlement. When mediators sell their services by reference to the percentage of settlements they achieve, the inevitable inference is that the mediator has developed a personal stake in the settlement of the case that comes before him or her. And that I suggest is improper.

¹⁰ Genn, *Judging Civil Justice*, at 113.

I know from experience as Counsel that it is an established technique to keep the parties in the room for however long it takes to get a settlement. Sometimes settlements are reached in the early hours of the morning by which time the parties will be exhausted, and their decision making impaired.

Quite apart from the quality of the decision making, such a pressured atmosphere will exacerbate the risk present in any negotiation of a dispute, that the dispute will be settled in accordance with the existing power imbalance between the parties. That may of course be the very power imbalance that led to the dispute in the first place.

I do not think it too bold to suggest that the outcome of mediation is often shaped by the particular power balance between the parties. In fact, mediation can increase the power of the strong over the weak, magnifying power imbalances and opening the door to coercion and manipulation by the stronger party.¹¹ Sometimes the power imbalance will be simply a monetary one. A technique commonly employed by mediators to drive settlements is to emphasise the cost of litigation. Sometimes claims of costs are quite simply overblown, and this technique of course, favours the party with the deepest pockets.

Owen Fiss has identified three common dynamics in mediated settlements when there are disparities in resources between parties:¹²

- The poorer party may be less able to collect and analyse information needed to predict the outcome of litigation and be disadvantaged in the bargaining process;
- The poorer party may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment even though he realises he would get less now than if he awaited judgment in court;
- The poorer party might be forced to settle because he does not have the resources to finance the litigation, to cover his own projected expenses, such as his lawyer's time.

To this, I would add the poorer party may well be represented by counsel less experienced in the dynamics of the mediation, or even the practices of the particular mediator.

¹¹ Genn, *Judging Civil Justice*, at 90

¹² Owen M. Fiss *"Against Settlement"* (1984) 93 Yale L.J 1073, at 1076.

Whilst it has to be said that a party's resources may influence the quality of its representation in court, a judge can lessen the impact of distributional inequalities between the parties (so as to "do right to all manner of people" as per the Judicial Oath.)

Where I suggest that care should be taken in mediation is with the use of tricks of the trade and the processes of mediation, to drive settlement irrespective of the dynamic that is operating in the room, and irrespective of the quality of the settlement. Certainly it is appropriate to encourage the parties, in weighing up their options, to discuss with their counsel how much litigation will cost them, but spare the tub thumping about the cost of litigation. And when a party is being worn down by the process or even tired, that is surely not the time to secure the settlement, but rather to take a break, adjourn to another time or to call it a day. Fundamentally, I suggest that mediators should step back from committing to achieve settlement, and focus on creating an environment in which good and lasting settlements can be reached. Encouragement to settle should never become pressure (however applied), nor should technique be allowed to become manipulation.

8. Turning then to my final point, the promotion of mediation services through an anti-litigation narrative.

The promotion of mediation by directly or indirectly undermining the civil justice system is dangerous. The case for mediation is often made not so much on the strength of its particular benefits but by setting it up in opposition to court adjudication and promoting through it an anti-litigation discourse which suggests that litigation is always expensive, unpleasant and unnecessary.¹³

The narrative paints adjudication and mediation as being diametrically opposed. Mediation is said to be quicker and cheaper and more flexible. It is promoted as being able to achieve settlements in a wide range of disputes and being capable of achieving creative solutions that could not be reached in court adjudication. Mediation is also promoted as having the power to repair damaged relationships. In contrast, court-adjudication is typically characterised as beset by delay, inefficiency, excess cost and stress. In addition, mediation is depicted as offering win/win solutions, rather than the win/lose situation that will result if parties allow the courts to adjudicate their dispute.¹⁴

¹³ Genn, *Judging Civil Justice*, at 80.

¹⁴ Genn, *Judging Civil Justice*, at 82.

Dame Hazel Genn has identified the risk that this anti-litigation discourse will justify the diversion of resources away from a system of civil justice in favour of mediation and other forms of ADR. To the extent that occurs, access to justice is imperilled. Moreover, all peaceful forms of resolution are undermined when the shadow of the law is diminished.

I do not for a moment suggest that there is any intention to mislead on the part of those who make these claims for the benefits of mediation. The supposed benefits have been so widely spoken of, and so seldom, if ever questioned, as to become accepted wisdom. What I hope I have outlined is the reasons why the claims for mediation should be put more modestly, in the interests not only of accuracy, but also in the interests of our system of civil justice

To conclude, there are multiple ways and forums for resolving civil disputes. It is to be expected in a complex developed society that parties have the ability to choose which form will work best for them to resolve their dispute. To the extent that mediation assists parties to reach consensual settlement of their disputes in an unpressured environment it is a valuable supplement or alternative to our courts. But we must keep in mind wider societal interests. Resolution through adjudication of rights will always remain at the very apex of the pyramid of cases. Our society requires that it also remain at the heart of our system of civil justice.