

RESTORATIVE JUSTICE IN THE CIVIL JURISDICTION

Always forgive your enemies. Nothing annoys them more. Oscar Wilde

Mediation and other forms of Alternative Dispute Resolution that explore needs and interests of the parties are becoming standard provisions in new legislation in areas of civil law that previously have been dealt with by way of rights and through Courts or Tribunals. Such legislative provisions have more than doubled in the last few years, although with little consistency of either nomenclature or process. Alternative (or as some argue “Appropriate”) Dispute Resolution processes have attracted considerable research and attention from a range of disciplines over the last 25 years. These changes have been paralleled by the increasing diversity of New Zealand society. This paper discusses some emerging themes in both theory and practice in the field, some of the issues to be considered in suitable legislative design, and their relevance to concepts of restorative justice.

INTRODUCTION

Providing systems of remedying wrongs - conflict resolution - for its citizens is a core function of government. In criminal matters government provides decision-making for all prosecutions (although private prosecutions can be filed), thus ensuring that any decision is based on justice, and not revenge. This is in contrast with civil litigation where there has always been a choice of public justice or private resolution through arbitration or other processes. Differences between the two systems include whether or not a binding precedent is established, public or private outcomes, choice of decision-maker and the costs of the process. Mediation which was formerly a traditional and only a private process has had a gradual adoption into mainstream free services to the public. An early example is the provision of mediation in New Zealand for collective bargaining as early as the 1890s.¹ The present system of statutory processes and remedies for personal grievances in employment situations such as claims for unfair dismissals is much more recent (1970s).² Before this provision, such matters were often dealt with by wildcat strikes with severe economic disruption far beyond the individuals involved. The last 20 years has seen such services extended in many areas on an ad hoc basis, but so far not extending to civil cases.³ In the

¹ Industrial Conciliation and Arbitration Act 1894, the specific section uses the terminology of “settlement of the issues”.

² See Chief Judge T. G. Goddard, *Mediation – Past Endeavours, Future Trends* 1993 Employment Law Bulletin Vol. 4 p 47

³ Although ADR is in its infancy, there have been remarkable changes in understanding and process to the point where histories are being written – see e.g. *Alternative Dispute Resolution in North Carolina*

industrial field cases are being filed at the rate of nearly 10,000 per year in what are essentially private disputes. Backlogs in other fields are increasing. This begs a number of questions such as does the existence of these processes mean large numbers of cases are coming to the surface that previously would have been dealt with (or suppressed) without tax-payer contribution? Or perhaps that people now have access to justice systems that fill a gap, thus contributing to a more harmonious society. In short, in the past access to free tax-payer funded dispute resolution was supply limited (by the availability of resources) but this now seems to be demand driven. The economic rationale for tax-payer funding is not clear cut in all cases. One might expect that the boundaries (if any) on the provision of free conflict resolution services for the people will become a matter of debate in the future, especially at a time when hearing fees in the courts have been increasing.

Conflict

All conflict is but different perspectives illuminating the same truth Adapted from **Mahatma Ghandi**⁴

Let me start by saying that conflict and disputes are not bad in themselves. They can trigger desirable change, focus on injustice, and in any event are inevitable. It is not my intention to focus on the various ways in which conflict⁵ can arise, but rather on the quality of response to such challenges.⁶ People have always responded to conflict in a variety of ways from “freeze, flight or fight” in which conscious thought is overtaken by primitive survival instincts; through to complex judicial systems in which highly skilled advocates argue on a party’s behalf for weeks at a time.

Whilst there are a number of conflict resolution strategies available, some are dysfunctional, such as “freeze, flight or fight”. Paralysis in the face of an oncoming train is unwise. Emigrating to Australia may mean no more than that you take your problems with you, and mortal combat has its risks.

Lee Dugatkin⁷ offers an intriguing insight into the behaviour of social group animals including goats, hyenas, primates and dolphins and the costs and advantages of reconciliation in their interactions. He suggests that

The different reconciliation styles of chimpanzees and bonobos could also offer a pointer to human behaviour. Bonobo society is particularly harmonious, and one way they achieve this is through reconciliation. This is a

(2003); and *A History of Alternative Dispute Resolution: The Story of a Political, Social and Cultural Movement* by Jerome T. Barrett and Joseph Barrett.

⁴ Ghandi’s insight was directed to war; but it suggested that this is an unnecessary limitation, and it is of general relevance.

⁵ See e.g. Christopher Moore *The Mediation Process: practical strategies for resolving conflict* Jossey-Bass 1996

⁶ Though there are some interesting framings of how conflict does arise - See Kenneth Cloke *Mediating Dangerously: The Frontiers of Conflict Resolution*. Examples include “Negative intimacy when positive intimacy is no longer possible”; “Conflict is the sound made by the cracks in the system, the manifestation of contradictory forces coexisting in a single place”.

⁷ Behavioural ecologist at the University of Kentucky. His latest book *Principles of Animal Behaviour* is published by W.W. Norton (2004)

*notoriously sexy affair...Chimps follow the usual pattern, with the loser trying to make amends. For bonobos, however, it is the winner, the individual wielding the power, who makes the first move. Now there is a lesson for us all.*⁸

The functional and legally allowable forms of conflict resolution are based on three areas: exploring interests and needs; pursuing legal rights; and exercising power. In the industrial field needs and interests are met when the parties (employer and employee) are able to work together for their mutual benefit; rights are where the institutions (Authority and Court) hand down decisions; and power is in the use of strikes and lockouts, or pressure of other kinds such as mobilising public opinion through the media. In this paper I do not examine the uses of power, although I note that there is legislative control over the way this may be exercised in some instances, such as the proscriptions around strikes and lockouts in essential industries.

A continuum of appropriate forms of needs/interest and rights based processes can be described as follows:

- Discussion - initial problem-solving where the parties sort things out at the first stage – it can be as simple as: “who does the dishes?” or “who takes the notes of the meeting” to complex problem resolution.
- Facilitation – where the parties problem-solve within the group and have the resources and ability to do so themselves – sometimes with the use of techniques for example brainstorming, whiteboard, or a skilled facilitator.
- Third-party fact finding – where the group requires some outside input (architect’s advice; legal opinion; more information) in order to be able to finalise their plans and agreements.⁹
- Negotiation – where the parties traditionally sit around a table, but are in control of the process, topics, outcomes, agreement, and concluding the process.
- Third-party negotiation – where for example lawyers or other advocates conduct the negotiation on behalf of their clients, often by telephone.
- Conciliation – a word that has been used generically for a large number of processes, but is used here in the more limited sense of when an outsider works independently with the parties to resolve issues (often emotional) that prevent them from meeting in negotiation, and so that they can return to the table.
- Mediation – again a description that covers a wide variety of styles and processes¹⁰ from facilitation to virtual arbitration, but with the common theme that an outsider assists the parties with appropriate processes to resolve their differences.

⁸ From *Kiss and make up* New Scientist 7 May 2005 p35, at p37.

⁹ Arguably the Waitangi Tribunal fulfils such a role, albeit with specific procedures and powers of recommendation. It establishes the historical record based on which the Crown and respective Iwi then negotiate a settlement.

¹⁰ See e.g. Carrie Menckel-Meadows *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices* Negotiation Journal July 1995, 217

- Med/Arb – a hybrid process that ends with the mediator making a decision for the parties if they cannot agree.¹¹ (But see discussion of risk in this process below).
- Arbitration and litigation – for this purpose being similar in that the process and outcome are determined by a decision-maker.¹²

The Court System and ADR System Development

Whilst renowned for conservatism (and valuable for that reason for keeping boundaries and principles intact) it would be a mistake to think that the law has been immutable for centuries. From the early days in England law was literally “fight” as in trial by combat, or “flight” as in self-exile. Later it became trial by champions; and duelling was available for private dispute resolution long after courts were established. There was tension between the King’s Courts (Kings Bench Division), and those of the Church (Chancery) based on the perception that rules were applied too rigidly by the former, giving rise to equitable and good conscience outcomes in the latter. Equitable rules in turn became more certain and therefore rigid, and so the two processes became closer over the years. When NZ established its systems, it combined those two Court structures into one, and then, whilst retaining the concept of common law, began to codify branches of the law through legislation rather than requiring the distillation of numerous case precedents.

When I started in the law the Magistrates of the day spoke of their court¹³ as being “the people’s court” and placed emphasis on its accessibility. Over the years its jurisdiction increased to take over some of the lower end responsibilities of the then Supreme Court (later renamed the High Court), salaries increased and the legal costs of taking cases increased. Amongst the factors generating change was that law firms that were well rewarded by the conveyancing scale for house transactions, offered *pro bono* services in the Magistrates Court as a public service.¹⁴ (As a comprehensive service, this had its limitations. The NZ Law Society did take some initiatives in the Duty Solicitor Scheme, Visiting Solicitor Scheme to Prisons and free legal advice through Citizens Advice Bureaus. Community initiatives included Nga Tamatoa, and Community Law Centres.)) With the abolition of the conveyancing scale advocacy skills had to be charged for realistically and the Magistrates Court became priced out of the reach of many claimants particularly when small amounts were at stake. Duty solicitor and legal aid schemes were established as was an avenue for small claims through the (now) Disputes Tribunal. An essential feature was the attempt by the parties to resolve cases themselves, but with the mediator making a decision for them if there was no agreement. Subsequent legislation in other jurisdictions separated the mediation function from the decision-making process (Tenancy Tribunal) or specified

¹¹ There are other variants such as “peek-a-boo” mediation where a mediator is chosen for expertise in the area of dispute, and offers an opinion on what has been presented during the session. The parties can then take this view into account in a manner that is not binding but may be persuasive.

¹² There are a variety of differences in aspects such as choice of decision-maker, time frames for the hearing, how costs are borne, and formality of process. It is partly because of its comparative informality that arbitration is commonly included in the concept of alternative dispute resolution.

¹³ In the 1960s and 1970s the Magistrates Court was still the first point of entry into the judicial system in civil matters.

¹⁴ As many lawyers still do.

that a mediator could not sit on the same case if the case required a decision (Employment Contracts Act 1991).

Over the last 20 to 30 years there has been an explosion of legislation that provides for mediation services of various kinds driven one suspects as much as anything by the need to reduce the costs of litigation. Claire Baylis¹⁵ drew attention to the potential problems of such diversity and lack of consistent definition in 2000. She identified (with the assistance of summer clerk C. Johnson) some 30 statutes with varying provisions (see below). Since then, in early 2005, the Parliamentary Counsel Office commissioned their then summer clerk (Nuala McKeever) to prepare a list of statutory provisions for alternative dispute resolution. This showed that such provisions had grown to a total of 77 Acts¹⁶. Most of these statutes do not define mediation or the process, but instead have provisions variously called Adjudication, Arbitration, Conciliation, Facilitation, Mediation and Review. Some are mandatory, and only some have form and manner of process prescribed.

Some processes have evolved from situational imperatives. For example the mediation service of the Privacy Commissioner operates primarily by phone (due to geographical separation of the parties); the Human Rights Commission mediators interview the parties separately (their cases often involve harassment and this avoids the risk of further traumatising the victim); whilst the Employment Service mediators normally meet the parties for the first time when they are brought together on the day of the mediation (pressure of work and traditional practice). Some statutes or regulations provide for an appeal right from a mediator's decision. (Med/arb – see below).

Limitations of Courts and Tribunals

“May you be involved in litigation in which you know you are right.” (Old Arabian Curse)

Over recent years the Courts have come under increasing criticism for the high cost of litigation and their imperviousness to human feelings. Access to the High Court and above is beyond the means of all except the rich and the legally aided. This lack of accessibility has led to the creation of low level specialist Courts and Tribunals from which in some cases lawyers are excluded (Disputes Tribunal) and a greater emphasis on mediation for parties to resolve their own disputes (Watertight Homes Mediation Service)¹⁷. In some cases the adversarial process has been amended to allow for an investigative one, of which the Employment Relations Authority is a notable example.

¹⁵ Claire Baylis, see *Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions* VUWLR Vol.30 No.2 (June 1999) pp 279. Neither this, nor the Parliamentary Counsel Office commissioned study included such provisions made under regulations, (see e.g. the Commodity Orders).

¹⁶ Under some analyses this may not be complete. For example the list does not include the Health Act under which “officers” have the role of assisting mentally ill patients to be reintegrated into the community – undoubtedly a mediation function.

¹⁷ For descriptions of such systems see e.g. Spiller *Dispute Resolution in New Zealand* Auckland, Oxford University Press 1999; and Boule (NZ Edition by Jones and Goldblatt) *Mediation: Principles Process Practice* Wellington Butterworths 1998

The law is concerned with the past. Not the present or future. It may have a salutary consequential effect on future behaviour but only as a threat against repeat behaviours.

The law applies restitution primarily in the form of money. For people with emotional issues money does not meet the hurt, nor is it adequate to meet their assessment of personal pain. *Money becomes a metaphor for pain* and lotto numbers do not equate with that experience. Even if such remedies were to be ordered once the money is gone the pain is still there. Money may also have to take the place of revenge or punishment.

The law cannot provide unique outcomes, whereas agreement can.

Case study:

An employee left a pig farm for redundancy reasons, but claimed the process was unfair. One of her senses of loss was being unable to work with the animals. The agreement included the provision to her of “one healthy weaner piglet”.

The law is concerned less with the truth than provable facts. It is adversarial, not investigative, which means the decision maker is limited to assessing the selected issues put before her or him¹⁸. Credibility issues can be very difficult to sort out when competing parties have genuine but selective memories over past events and both appear with complete integrity. It can be described as an exercise to find out “*where the truth lies*” (pun intended.)¹⁹ The “game” is not so much the truth, but what can be proved to be true. David Lange, in his recent autobiography²⁰ describes his experience on his last day in the District Court when he successfully argued somewhat spurious points on behalf of two accused. He felt disgusted with how easy it was for him to do bad things.

The law is concerned only with rights. Interests and needs go far beyond these limitations and therefore both substantive and monetary outcomes from litigation are likely to be less satisfying or satisfactory to (usually) both litigants.

Case study: Two women were made redundant in similar circumstances. Both went to mediation where one settled for \$6,000 and an apology. Shortly thereafter she applied for and was appointed to another job. The other took the matter to the Employment Relations Authority and, after many months delay, received an award of about \$22,000 all up including a contribution to costs. After deduction of actual costs (for mediation, trial preparation, hearing etc.) her net return was about \$10,000. But the case had consumed her time,

¹⁸ Judges and lawyers are well aware of the “tricks of the trade”. In a recent farewell to a retiring and very successful advocate (U.S.) a Judge described in admiring terms how the lawyer’s cases represented “the greatest number of miscarriages of justice the Court had seen in the last 30 years.”

¹⁹ In discussing possible outcomes with parties in mediation I expand on the old example of “what is truth? If you see an egg end on – then it is round. From an angle it is obviously oval.” To which one can add: “For a chicken it is at least the start, if not the meaning of life; and for the judge it is what he/she ate for breakfast – scrambled!”

²⁰ *My Life* Penguin/Viking 2005

she had not been in good space to apply for a new job, and she remained angry with the employer and also about the outcome.

Some have argued that litigation brings out the “dark side” - the worst of people.

The traditional adversarial system separates you from all other people, and so it really disempowers you. Once you feel that you’re right and everyone else is wrong, you have an us-them attitude, a survivalist attitude. It allows you to say someone is bad. It really plays into your ignorance. It takes you to those places where you’re mean and angry and jealous²¹.

The International Alliance of Holistic Lawyers has as its logo the Goddess of Justice, Thema, but holding only one instead of two scales. She is weighing the soul of the individual party. The meaning is akin to the thesis (espoused by Kubler-Ross²² amongst others) that we are all here on earth to face challenges from which we must learn and grow. If we don’t learn then we will face the same challenge over again. The questions to be asked are not legal so much as: “Why is this challenge facing me? What in my background has led me to this point? How should I respond in a way that will enable human growth to occur for both me and the other? If I lose and learn a hard lesson now, will this enrich me in future dealings?” “Can I lose with dignity?” This International Alliance argues that the legal process doesn’t search sufficiently deeply. The issues placed before the courts are those brought by the parties. They can be symptoms of underlying needs and interests which, if exposed, could lead to mutual gain. If two parties are arguing over an orange, if the dispute is properly and safely explored it might be found that one wants the pith and the other the flesh of the orange. (This example is a standard in mediation training to illustrate this point.²³ It doesn’t answer the problem of when both parties want the whole orange!)

The Courts of course still have their essential place. No-one is suggesting they be abandoned. They provide the ultimate resolution process when there cannot be agreement; they establish through precedent principles by which the community can operate; and they provide fundamental protection for human rights. They also provide the back-up enforcement systems to mutually agreed solutions resolved through other dispute resolution processes. Fundamentally they provide systems of integrity, procedural fairness (the rules of natural justice) and objectively sound outcomes that alternative dispute resolution services cannot necessarily ensure. Their future role in a world potentially dominated by alternative dispute resolution systems is however becoming a matter of debate.²⁴ Mediation in many situations is also conducted “in the shadow of the law”. It provides an alternative sanction to inertia (why come to a voluntary process if content with the status quo), and also provides indicators of likely outcomes within the judicial process.

²¹ From *Law that Heals* Barbara Stahura http://www.renaissancelawyer.com/law_that_heals.htm 7/04/03

²² See *The Wheel of Life: A Memoir of Living and Dying* 1997 Scribner (New York)

²³ See also J Rothfield *Is it really just about the money?* (2004) 15 ADJR 188

²⁴ See *A Place for the Courts in the dispute resolution process* Michael Redfern (2005) 16 ADRJ 79

What is Justice?

Some have argued that the application of the law has little to do with social justice and may indeed perpetuate the unjust systems that gave rise to the initial conflict.

What counts in legal decision-making are discrete provable facts relevant to the logically derived abstract principles - not humane, individualised decisions. Indeed the insistence on procedurally correct, context-free decisions by neutral, autonomous legal institutions, devoid of subjectivity and emotion is commonly portrayed as one of law's strong points, distinguishing it from more "primitive" systems where individuals allegedly suffer at the whim of despotic or arbitrary rulers.²⁵

In a relatively homogeneous society where people have similar backgrounds and expectations justice may be commonly understood in terms of expectations of likely outcomes. If society is made up of disparate groups who think in fundamentally different, even frighteningly different ways then there will be no consistency of what fairness might mean.

Virginia Phillips in her 1995 paper *Mediation: The Influence of Style and Gender on Disputants' Perceptions of Justice* discusses what "justice" means from the disputant's point of view. Reviewing the literature to that date she finds that justice means both satisfaction and fairness. Each element is composed of three related components: a procedural component relating to the process; a distributive component relating to the outcome; and an evaluation of the neutrality of the mediator (or judge) by the parties.²⁶ Each of these elements is readily identifiable in the Court system. The process is well established, and subject to review by higher courts if unfair (breaches of natural justice); likewise there are appeal rights if substantive mistakes are made; and care is taken in both selection and maintenance of the independence of the judiciary.

Thibaut and Walker developed a measure known as "satisfaction with the process" which is now the mainstay of evaluation of mediation and other forms of dispute resolution. This is critical to representing the participants' sense of procedural justice, and correlates well with their compliance with the outcome.²⁷

My own experience in discussing with disputants what they mean by "wanting justice" is that they express the desire for an outcome that is satisfactory to them. In some cases this is no more than the chance to have their say and know they have been heard, even if not agreed with.

Case study: A young man came to mediation the day before attending the District Court on a charge of theft as a servant to which he planned to plead guilty. His union represented him, and wanted the employer to recognise that it had not followed its own handbook for internal investigations over the

²⁵ Dennis R Fox *Psycholegal Scholarship's Contribution to False Consciousness About Injustice*. <http://www.uis.edu/~fox/papers/injustice.html>

²⁶ See also Van Gramberg *ADR and workplace justice: Just settlement?* (2003) 14 ADJR 233

²⁷ *Procedural Justice* Wiley, 1975 cited by Hedeem, T, *The Evolution and Evaluation of Community Mediation* Conflict Resolution Quarterly Vol. 22 1-2 Fall-Winter 2004 p120

incident, and was concerned in part about the employer getting it right in the future for the benefit of its other members of staff. Money would sink the message home; and the young man had debts. The employer was ready to recognise its mistake, wanted to avoid costly litigation that it thought it would win, but wasn't going to reward bad behaviour. When asked his needs the young man asked for the opportunity to apologise to his work mates who had supported him, and whom he felt he had betrayed.

Emotional Impact of Conflict

Case study:

A man had been injured in a work-related accident. At the time he had been working night shifts, which attracted a penalty rate of pay. On recovery he had returned to work, but on day shifts. The employer got him back on nights quite quickly, but at the time of mediation there was a claim for back pay of about \$400 for wages he might have earned had he gone back on night shifts immediately. The worker wanted the cash. The employer could not compromise on the principle that it was his right to allocate workers to different shifts as this would have major precedent impact. Paying the money would jeopardise that principle. In discussion at mediation the worker talked of the pain he had suffered and how difficult it had been to be at home unable to do much more than sit on the couch for some weeks whilst his wife was in the last stages of pregnancy. How many children? They had three others under the age of five – all at home. What was all this like for the two of them? He went very quiet for a while and acknowledged life had been tough. Would a counselling programme for the two of them help? In the end the employer was glad to pay for up to 8 sessions for the couple (about \$1,000) the worker could go home to his wife having achieved a real benefit; and the employer received the gratitude of the worker over a matter that might otherwise have festered.

Those from counselling professions have long recognised the great benefits of their processes in helping people cope with traumatic events in their lives. Conflict can have a traumatic effect on human wellbeing. In recent years physiological studies have shown that changes in the amygdala (that part of the brain that deals with strong emotion) are observable following counselling to resolve trauma.²⁸

A second element in the biological field is the view that some scientists hold that humankind is equipped with a gene for altruism as well as violence. Would we have advanced as a species to the extent we have without such an inbuilt capacity for working together? This theme is echoed in the social scientist debates over co-operative and competitive approaches to conflict resolution. Morton Deutsch²⁹ discusses the view that most conflict is conducted with a mixture of these two approaches, with success or not depending on the extent that the co-operative approach is to the fore.

²⁸ Van der Kolk *The Body Keeps the Score: Memory and the Evolving Psychobiology of Post-traumatic Stress* Harvard Review Psychiatry Jan/Feb 1994, 253

²⁹ *Social Psychology's Contributions to the Study of Conflict Resolution* Negotiation Journal October 2002, 307

Both restorative justice systems and mediation provide for parties to talk through their feelings, and this is often called “venting”. The advantage is that if people are bottling up anger or other distress then they will not be able to think rationally until that emotion is released. Moreover there are often better ways to address those feelings than offers of money. For example a genuine apology that is seen and accepted as such can have remarkable effects.³⁰ Gordon Hewitt and Rhonda Pritchard in their unpublished paper *Healing Grievances Model* 1992 offer a four step process in acknowledging the grievance and a further four step process for making reparation. These steps are echoed in the work of Rev M Fortune who works mainly with sexual abuse cases within churches:

Regret. - This is inadequate as merely saying you are sorry the victim is feeling bad.

Remorse – is no better – it is saying you are sorry you were caught

Repentance is acceptance and recognition that you were responsible; that there were other options; and other people might have made different choices in the same situation – so there are no excuses.

Reparation is restoring the victim to where they were before the incident and this can be to reinstate them to the position they held in society before the offence occurred so reparation may not be confined just to money.

The concept of doing a little more supererogation should be included, and there should be a genuine statement of intent to act differently in the future.

If these steps are taken, then it is up to the victim to consider accepting the apology as the perpetrator is now worthy of forgiveness. This may lead to reconciliation, and perhaps redemption. But if the victim rejects the approach and wants revenge or retribution, then the roles of victim/perpetrator can be reversed.

What Do Disputants Want from Any Dispute Resolution Process?

This is not a question that can readily be asked in a Court setting (save perhaps the Family Court) as the pleadings will have covered applications for specific outcomes within the Court’s jurisdiction. In mediation however the question “What do you want” is likely to receive a reply about what the disputants have been told they can expect from a court. “What do you want to achieve from this process?” will provoke more holistic responses around restoring the party’s good name; making sure their experience would not happen to anyone else; and getting matters resolved. In over 2000 cases I can remember just four in which the first and only thing desired was money, and they settled quickly for smallish amounts. Ian Macduff of the NZ Institute for Dispute Resolution and I adapted an acronym from one developed by Professor Mitchell of American University³¹ to encompass the range of answers to the “achieve” question. The acronym is ASPIRE where:

A stands for altruism: Those who come with a generosity of spirit and seek results beyond pure self interest.

³⁰ See Carl D Schneider *What it Means to be Sorry: The Power of Apology in Mediation*. Mediation Quarterly vol. 17 Spring 2000; Paula M Young *Mediation and the Power of Apology: The Case of the Missing Snowman* Missouri Lawyers Weekly (April 2000); David Hurley *I’m Sorry – but I won’t Apologise- Practical Aspects of Apologies in Mediation* Unpublished Address to New Zealand Institute for Dispute Resolution July 2002

³¹ Professor Mitchell’s acronym was FIRE where F stood for Face. Ian and I thought the acronym unfortunate for a dispute resolution process, and did not cover all the issues we had experienced.

S stands for spiritual issues. In many intra or cross-cultural cases we may start with karakia or prayer; or the issue may be for one party their relationship with God in how they treat this other human being rather than justice between the parties. For others apologies, acceptance, and forgiveness have a spiritual component.

P stands for personal factors – such as face, mana or human dignity. It allows for cultural backgrounds. It can also represent the need to be heard; personal involvement in developing the outcome; and issues such as the need to feel justified about the pain they are feeling (where the other party or their lawyer is blaming them for the conflict.)

I is for instrumentality – the costs and risks of litigation

R is for relationships. Even if broken it may be important for a person to be able to walk down the street without having to cross the road if the other party is coming the other way.

E is emotions. This is a real issue in all conflict. The mediation process provides an opportunity for “venting” of feelings in a safe environment only after which a disputant can begin to think rationally about outcomes.

Case study:

Two men had come to mediation over the allegation that one had been unfairly fired. The response was that the employee had hit the boss. The matter had gone to the criminal courts on a charge of assault, but had been dismissed for lack of corroboration. All this had lasted over a year. The two men's sons had played in the same football team, and the parents had had to stand on opposite sides of the playing field for the whole season. After the lawyers had talked for the parties for some time, it was clear that there was impasse, but also that the parties' body language was of pain, and reaching out to each other. It was agreed that they would speak to the mediator alone. As soon as they sat down the employee leaned across the table and said “I know my lawyer is claiming \$7,000, but you know, I would accept \$1,000. The other stood and spoke for several minutes in a manner that was inarticulate but from the heart. The message was that “I'm hurting here too, and \$1,000 is too much.” He then sat down. What to do? What about treating the end of the employment as one where you both agreed to end it without allocation of fault? The employee looked up – “You know I would have accepted two weeks notice – what about that?” (He was a part-timer – about \$400). The employer got up, walked around the table and held out his hand. Then, as one, the two men put their arms around each other and wept on each other's shoulders. As they left they were heard promising to share a meal together.

As a forerunner to the next section I note that lawyers and advocates are formally trained in only one out of the six ASPIRE elements set out above. Equally of note is that most mediators in New Zealand come from a legal, management, construction industry or counselling background. To the extent that experience and training can influence a mediator's approach, it is arguable that outcomes for the same set of facts (whilst possibly all satisfactory to the parties) could vary depending on whether the mediator explores legal results, human growth, or practical and administrative issues. It is not the purpose of this paper to explore matters of accreditation, certification or training beyond noting that the first duty of a mediator is to make the process safe. That means the mediator must be a safe person, and that means self-insight. (Whilst I

believe fundamental to mediation practice, this view, or ability may not be thought to be universal.) To telescope an important issue to a sentence, I suggest that whilst one cannot avoid one's genes and life experiences and therefore be neutral, one can at least be self-aware and therefore practice impartiality.

Lawyers and Advocates

As long ago as the 1980s Riskin and Westbrook³² were writing about the “map references” that lawyers have for dispute resolution as being to identify a relevant rule of law, find provable facts that apply, and winning and losing measured in money. These they pointed out had little in common with mediation where the law is relevant only to the extent the parties agree (subject to lawfulness and ethical considerations), winning or losing are damaging to each side achieving dignity in the process, and the intent is to find solutions that mesh mutual needs and interests.

Today most lawyers graduate without the need to study jurisprudence – the theory of law in society. For some the practise of law is accordingly more about business than the old concepts of professionalism where the family lawyer was turned to for wise advice. There are many lawyers (and lay advocates) who display great skill and common sense in helping their clients through conflict, but also some who do not understand or pay attention to their client's psychological needs. Some do not distinguish their own needs (to feel they have got the best deal possible for their client) from the client's needs – to get a reasonable deal with dignity for both sides and to move on quickly.

Whilst this paper concentrates on those aspects of ADR that most closely adhere to restorative justice principles, this is not to overlook the fact that much negotiation is conducted in a manner calculated to be anything but openhearted. That dynamic is also receiving attention.³³

I suggest that in the future advocates of all disciplines will need wider, more holistic training than that imparted at the moment.

Levels of Satisfaction in Conflict Resolution

Maslow places justice and order in the level of B-needs (just below physiological needs) as one of a number of driving needs for “self-actualisers” to be happy. Without the presence of truth, goodness, beauty, meaningfulness and other meta-needs, then people can develop meta-pathologies such as depression, despair, disgust, alienation and a degree of cynicism.³⁴

So how is satisfaction achieved in any dispute resolution?

³² See Leonard L. Riskin and James E. Westbrook *Dispute Resolution and Lawyers* 1988 (West Group) part of the American Casebook Series

³³ See e.g. *Attorneys' Negotiation Strategies in Mediation: Business as Usual?* Elizabeth Ellen Gordon Mediation Quarterly vol. 17 No.4 Summer 2000; and John Wade – an article in the Bond University Email Newsletter: *Mapping the Deceptive Dance of Hard bargainers: What are the possible roles of mediators when supervising the dances of deception, delusion, and decision-making?* <http://www.bond.edu.au/law/centres/drc/newsletter>

³⁴ See e.g. Maslow – *Toward a Psychology of Being* (1968) and for a biographical note <http://www.ship.edu/~cgboeree/maslow.html>

The Courts and Arbitration In terms of disputant satisfaction with outcomes an externally handed down decision normally gives the lowest level of satisfaction as one party or the other will have “lost”. Certainly some may prefer not to take responsibility for a decision so that no one can blame them – but by and large there will have been cost despite this advantage. Winning can get the disputant the reputation for being litigious; losing can be ruinous. This is not to say that mediation and other forms of dispute resolution do not have their critics, both from feminist and judicial perspectives. See particularly Laura Nader³⁵, Maxwell³⁶, Deborah R. Hensler,³⁷ and Lisa B. Bingham³⁸.

A continuum for satisfaction with outcomes may be described as:

Settlement is where the parties agree to disagree but “cut a deal” for the sake of moving on and not dealing with each other again. This is the equivalent of a decision.

Agreement is more positive but may be limited to a single presenting issue (symptom?), and has the risk of repetition of the behaviours that gave rise to the problem in the first place.

Resolution is where all issues have been explored, resolved and the relationships restored. I understand such resolution to be the ultimate aim and outcome of a restorative justice system.

This leads me to emerging developments in other disciplines that are of direct relevance.

Philosophy: Phenomenology and the Law

Men are not conditioned to live by reason alone, but by instinct. So they are no more bound to live by the dictates of an enlightened mind than a cat is bound to live by the laws of nature of a lion. Spinoza

Phenomenology teaches us that people are the product of their genes and life experiences and have unique needs and interests. As the late Paul Ricoeur³⁹ said the critical questions to ask oneself are “Who am I?” and “What should I do with my life?” (Arguably people can spend too much time on the first question, when getting on with the second might help answer the first.) These questions predicate unique answers. Those individual answers can require unique solutions in the event of conflict.

Neuro-biology

³⁵ See e.g *Law in culture and society*

³⁶ http://dept.kent.edu/cacm/pwr_inaq.htm

³⁷ *Suppose it's not true: Challenging mediation ideology* 2002 J. Disp. Resol. 81-99

³⁸ Director of Indiana Conflict Resolution Institute see <http://newsinfo.iu.edu/sb/page/normal/274.html>

³⁹ For a description of his writings and thought see Dauenhauer, Bernard, *Paul Ricoeur* The Stanford Encyclopaedia of Philosophy (Winter 2002 Edition), Edward N. Zalta (ed.) URL=<http://plato.stanford.edu/archives/win2002/entries/ricoeur/>

Edward R Ergenzinger, Jr in his 2002 paper “Conversations with Phineas Gage: A Neuroscientific Approach to Negotiation”⁴⁰ has this to say:

In recent years a relatively neglected aspect of decision making and judgment has secured greater interest among scholars and researchers; the automatic, experiential, affect-based side of our mental life. Neurological research has highlighted the fact that the region of the human brain primarily responsible for rational judgment and decision-making cannot function properly without input from the region responsible for emotion. Much of the time this input and its influence may not even be noticed on a conscious level, but it nevertheless shapes our decisions and judgment in drastic ways. Although emotional influences have been analysed by legal scholars in areas such as jury deliberations, appellate advocacy, judicial decision-making and consumer products liability, there has been little or no direct discussion of the applicability of these findings to the field of dispute resolution.

The linkages with phenomenology are obvious. It gives some insight into why personal involvement in decision-making is generally preferred over that of an outsider. Why risk another’s perception of justice when you can work things out with the other party?

This theme has also been taken up by legal scholars (though without reference to the Ergenzinger paper) in “*Complexity, Conflict Resolution, and how the Mind Works.*”⁴¹ In this paper the writers advance and discuss four ideas: First that the mind is inherently embodied. Secondly, that thought is mostly unconscious; and thirdly that communication about abstract ideas is largely metaphorical. Finally they discuss that human beings are feeling beings with thoughts, not thinking beings with feelings. They point to the importance of the scientific method (that can lead to the unravelling of the human genome), but that complex adaptive systems (such as understanding immunology) are resistant to analysis, description and prediction using traditional analytical tools.

Complex adaptive systems- among them the human mind, an ecosystem, or a community of individuals – represent a wholly different set of systems from those that are merely complicated and cannot be understood with traditional analysis. (See also Ruhl⁴²

The authors offer no answers to the implications of how to replace the traditional approach of objective, linear reductionist analysis with something more appropriate. Instead they argue that “...true wisdom is in the question not the answer”. But they point out that for mediators (as for decision-makers) the task is to understand the reality of conflict when “...it is being dynamically co-formed by the disputants both internally and interactively. How does the formula change when a mediator is introduced and the parties and the mediator are jointly co-forming the conflict

⁴⁰ E. Ergenzinger *Conversations with Phineas Gage: A Neuroscientific Approach to Negotiation Strategy* www.mediate.co/articles/Ergenzinger.cfm

⁴¹ Wendell Jones and Scott H. Hughes in *Conflict Resolution Quarterly* vol. 20 Summer 2003

⁴² *Thinking of mediation as a complex adaptive system* in *Brigham Young University Law Review* http://www.findarticles.com/p/articles/mi_qa3736/is_199701/ai_n8741985

reality⁴³. They go further and suggest that the training of mediators with metaphors such as “the tools of trade” is outdated and ask what we should replace them with? They further argue that a revolution in thinking has begun and it may be as far-reaching in its effects as the Age of Enlightenment. So we can be explorers of this new world, or defenders of conventional wisdom (flat-earthers?).

In treating the brain as a “complex adaptive system” however, there are further consequences and insights to take into account. Robert D. Benjamin⁴⁴ posits that people take their cues in approaching conflict from national and international stages. Even what they saw on television the night before mediation may affect the way in which they approach the process. If on the world stage, negotiation is failing to make a difference in say the Israel/Palestinian conflict, then why would it work for them? Perhaps they think it is time to draw a line in the sand. Mediators should be aware of this factor in daily work *to assure that neither they nor the people with whom they work are sucked into the nihilistic vortex of no-negotiation.*⁴⁵

Restorative Justice

Gabrielle Maxwell⁴⁶ has identified four key elements of a restorative justice process as being:

- The involvement of those affected by the offence
- The empowerment of those involved in the decision-making
- Acknowledgement and repair of harm
- The reintegration of those affected into their society in ways that restore the harmony of the group.

She states that *“It is about changing hearts and minds. It is about putting matters right, it is about healing and forgiveness, it is about a new start. And it provides an alternative set of values that can underpin social relationships between people in all areas of community life.”*

Whilst the language used is directed to the criminal area, the principles are readily applicable to the civil scene.

Conflict arising in interpersonal relationships (family, employment, and neighbourhood) can generate feelings of betrayal, hatred, violence (verbal and physical) harassment and bullying to name a few of the “offensive” behaviours that can occur. Likewise civil case conflict will normally involve emotion. Even if a party is a company or other institution, some individuals’ actions will be under review.

Normal mediation practices can address all the four key restorative elements identified above.

The linkages between restorative justice, conflict transformation and trauma healing have been discussed by Howard Zehr⁴⁷ and he suggests some ten lessons from exploring these issues holistically rather than independently:

⁴³ Jones and Hughes op.cit

⁴⁴ *The Geo-Political Factor in Negotiation* www.mediate.com/pfriendly.cfm?id=1042

⁴⁵ Benjamin op.cit.

⁴⁶ Unpublished paper 2005

1. *An experience of victimisation and even trauma is involved in most situations of conflict and wrongdoing.*
2. *Most, if not all, situations of conflict and harm involve questions of justice and injustice, and situations of injustice frequently involve trauma.*
3. *Processes to resolve harm of conflict often must find ways to explicitly address both needs and responsibilities. Too often, resolution processes focus on the former and not the latter.*
4. *Personal and communal narratives (referred to as story and “restorying”) play critical roles in conflict resolution, trauma recovery and restorative justice.*
5. *Successful resolution and transformation often turns on the creation of empathy of one another by the participants.*
6. *Humiliation or shame plays a role in most conflicts, traumas, and harms. ...processes ... often require proactive steps to remove or transform shame.*
7. *Both restorative justice and conflict transformation reflect a common set of values ... which include respect, humility, empowerment, and engagement ... (and) can be seen as reflecting an underlying worldview based on a sense of interconnectedness.*
8. *Structural injustices and problems play a role in many crimes, conflicts and traumas. Both fields are in danger of overlooking or even perpetuating such injustices by individualising conflicts and harms.*
9. *Both fields are susceptible to unconscious biases – of gender and culture for example.⁴⁸*
10. *... Both fields are susceptible to forces of co-optation and diversion that can sidetrack them from their intent. ... (this requires) conscious vigilance on the part of practitioners and advocates.*

Such processes however do need a range of skills and knowledge for advocates that lie outside those of traditional rights based systems. There are recent developments in these areas as well.

Therapeutic Jurisprudence and Related Initiatives

David Wexler⁴⁹, who has training in both psychology and law, has introduced the concept of *Therapeutic Jurisprudence*, a title that might be thought an oxymoron. Briefly he observes that the experience of law of a litigant or accused person will be affected by the treatment received with his or her interaction with all the people involved in the process. This impact can be either therapeutic or the reverse. If such results are observable, then they are worthy of study, and adoption of those behavioural changes that enhance positive outcomes, and reduce negatives (such as recidivism.) His web-site has links to many articles that have been published in furtherance of this insight. Likewise lawyers are exploring many alternative styles of

⁴⁷ *Commentary: Restorative Justice: Beyond Victim-Offender Mediation* Conflict Resolution Quarterly vol.22 no.1-2 Fall-Winter 2004 p 305

⁴⁸ ‘Bias’ may be an overstatement here. Conflict can be gendered in terms of how the different sexes typically report differently on how they have dealt with it. This is different slant on conflict, and there have been a few feminist critiques of the dominant male model. See Holt and DeVore op. cit.

⁴⁹ See the primary website www.therapeuticjurisprudence.org

practice of which the *Renaissance Lawyer* website⁵⁰ has a comprehensive list and description.

*Collaborative law*⁵¹ is a new idea based on traditional processes of joint meetings between parties and their counsel. Apart from prescriptions about the process it has one major difference – namely that the lawyer who handles the direct negotiations should not be the one who handles the litigation if that is required. This is not the place to discuss the advantages and disadvantages of such a scheme, but among the subtleties of such a situation, there will be a desire by the lawyers involved to achieve resolution, which otherwise might not be evident to the same extent.

Communication and Linguistics

Whilst the theory and practice of communication is not new, its importance in both being the source of much conflict and the logical means of resolving same are becoming more recognised. The basic concepts of “encode” (formulating words that you think will be understood by the recipient), “transmit” (the means of communication) and “decode” (what the recipient makes of the message) are clear enough; together with “attribution error” (where a person assumes a meaning based on their own life experience which varies from that intended by the speaker (resulting in miscommunication)). Recognition of the importance of metaphor is another issue in the light of the neuro-scientific approach discussed above. Metaphor is a useful strategy to ensure communication through shared experiences, but it is easy to make mistakes. For example men often use metaphors of war, physical sports and sex, all of which may be of little relevance, or may even be offensive to women. The conscious use of universal metaphors such as journeying, geographical features, mazes and prisms of light have a greater chance of success.⁵² Words have their own power. For example the English word “enemy” comes from the Latin *in* (not) *amicus* (friend) – *inimical-enemy*. The meaning – not a friend. In Maori the word is also made up of two words – *hauriri* – *hau*-friend, and *riri* –angry. That is – angry friend. The Latin denies a relationship whilst the Maori acknowledges both relationship and emotion.

Case study:

A senior manager had fallen out with the Board of Directors and Chief Executive. Mediation occurred at a crisis point when the parties saw no outcome other than termination of employment and litigation. The employee didn't want to leave for a variety of reasons, but they included impact on his superannuation rights for himself and his wife. The employer didn't want to lose a good performer or have to face replacement and litigation risks and costs. Working through the complaints each had of the other a clear pattern emerged. Each, over a series of about seven events, had acted in a way they had thought either innocuous or helpful. But the other had interpreted their motives as being underhand and malicious. One of the most powerful tools of a mediator is to observe and then name what is going on in the process. Such dynamics are called “attribution error.” Naming the issue was the “Ah Ha!” jaw-drop moment for both sides. What could they do about it in the future?

⁵⁰ See www.renaissancelawyer.com

⁵¹ See Marilyn Scott *Collaborative Law: A New Role of Lawyers* (2004) 15 ADJR 207

⁵² For a valuable analysis of how mediators can use language usefully or not see Dale Bagshaw *Language, power and mediation* (2003) 14 ADJR 130

“Well we could check it out with each other I suppose.” Six months later feedback was received that the relationship was fully restored.

Emotional Intelligence and NLP

Emotional intelligence is based around three personal competencies: developing self-awareness; developing an ability to regulate one’s own thoughts and behaviour; and to motivate oneself following setbacks. These dimensions lead to social competencies of improved empathetic responses to others and the ability to develop healthy relationships.⁵³ These are all important skills for a mediator and can help in recognising deficits in the parties in conflict, and suggesting future outcomes. The ideal mediation is one in which underlying issues are identified, and the parties are thereby equipped to avoid future conflict arising from the same sources.

Neuro Linguistic Programming provides principles of communication, how we take in and process information, how our minds work and how we make meaning of what we hear. It places a major emphasis on reading body language, and addresses issues such as the mediator’s and parties’ states of mind in mediation. Natasha Serventy⁵⁴ tells the auto-biographical tale of a lawyer who believed strongly in litigation and third-party negotiation, then became entranced with mediation, and subsequently convinced of the importance of NLP in the practice of mediation.

Healing and human growth through conflict resolution is another research area. Hoskins and Stoltz⁵⁵ describe a research programme in which the parties had experienced long-term conflict in the workplace. Three to six months later they were asked to explain how the process affected their beliefs, values, expectations and behaviours and to reflect on how they had changed since mediation. Findings included that change (in terms of personal change) does not happen in the mediation but may well appear in the months following. There are some useful insights for mediators in such on-going relationships around support systems for the individuals, and also a similar emphasis on the importance of the use of metaphors that has been described above.

External analysis can give a rather different impression of disputants’ motivations. Tyler R. Harrison⁵⁶ in his article *Victims, Targets, Protectors and Destroyers: Using Disputants Accounts to Develop a Grounded Taxonomy of Disputant Orientations* describes the experience within an Ombuds Office in a large American University (35,000 students). The article highlights the need for differing strategies to be used by mediators in dealing with different individuals and to recognise that some may potentially move from one identified category to another. For example he states that *...the discourse of destroyers suggests they take the grievance very personally and are more likely to strike out in retaliation if the opportunity arises. This would suggest a strategy that avoids face-to-face confrontation (or the use of the legal system.)* *Future research should also focus on what leads to the different characterisations of the dispute by the disputants. For example, victims, targets, and destroyers all seem*

⁵³ Scherier *Emotional Intelligence and Mediation Training* Conflict Resolution Quarterly vol. 20 No 1 Fall 2002; and Reader Response – Shearhouse CRQ vol.20 no 4 Summer 2003;

⁵⁴ In ADJR *NLP for Mediators: Understanding and Influencing Yourself and Others*

⁵⁵ In Conflict Resolution Quarterly vol. 20 no.3 Spring 2003 *Balancing on Words: Human Change Processes in Mediation*

⁵⁶ Conflict Resolution Quarterly vol.20 no 3 Spring 2003

more likely to attribute the other's actions to malicious intent, than are information seekers, exception seekers, protectors and enforcers. The discourse of victims, targets, and destroyers often portrays the other as malevolent, and the motivations attributed to the other disputant are more egregious.

Spirituality, Mindfulness, and Presencing

The great religions have always been involved in dispute resolution and over the last 40 years or so particularly, the Mennonite and Quaker communities in the USA have developed very advanced and sophisticated treatises and training manuals in mediation, but the theme of spirituality has also moved away from a purely religious basis. Linda Lazarus chairs the Spirituality Chapter of the Academy for Conflict Resolution and writes of a conversation with Professor Leonard Riskin on the topic of *mindfulness* – or staying in the moment – and its value to mediators.⁵⁷ This concept has many links with Eastern religions and values.

Presencing is a capacity developing process for enabling new ways of learning to inform future action. Some seven capacities⁵⁸ are described. *Suspending* is arguably akin to mindfulness in that it is “seeing our seeing” namely appreciating the limitations in perceiving what is, and allowing for new possibilities. *Redirecting* is seeing matters from a holistic whole, which leads to *letting go* of the old vision. *Letting come* is being open to new options, which leads to *crystallising* those opportunities. *Prototyping* is experimenting with the new, and *institutionalising* is the adoption of the new way. The book has many spiritual references and allusions which enhance the messages and is valuable in that the process as described follows a course that can be experienced in many mediation sessions. Ultimately it describes an impasse breaking code. Carrie Menckel-Meadows discusses a similar creative process in her book review that covered (among other creative dispute resolution issues) the design of new supermarket shopping trolley, and drew parallels with harnessing the same energy in finding new and unique solutions in conflict resolution.⁵⁹ That is not to say that spirituality does not have an important place in helping people think deeply about conflict and its resolution. For example the Bushmen of the Kalahari have had very sophisticated conflict resolution processes in place for thousands of years due to the risk of a small community losing two members over violence. When both are equipped with poisoned arrows each has the potential to inflict an inevitable but lingering death – which gives the victim time to reciprocate. Some 50% of all conflict within the group is resolved at the first stage of creating a spiritual environment and then exploring interests, then rights and then power. But if unsuccessful through to

⁵⁷ See *A Conversation with Professor Leonard Riskin about Mindfulness, Dispute Resolution and Mindfulness Resources for Mediators*. www.mediate.com/pfriendly.cfm?id=1695

⁵⁸ See Senge, Scharmer, Jaworski and Flowers *Presence: Human Purpose and the Field of the Future* Published by the Society for Organised Learning Inc. March 2004 at page 225

⁵⁹ Review Essay *Negotiating with Lawyers, Men, and Things: The Contextual Approach Still Matters* Negotiation Journal, July 2001, p257. Her paper reviews three books, two directly in the mediation field (Mnookin et al *Beyond Winning: Negotiating to Create Value in Deals and Disputes* Cambridge Mass.: The Bellknap Press of Harvard University Press, 2000; and Kolb and Williams *The Shadow Negotiation: How Women can Master The Hidden Agendas That Determine Bargaining Success* New York: Simon and Schuster, 2000) and the third in industrial design (Kelley and Littman *The Art of Innovation: Lessons in Creativity from IDEO, America's Leading Design Firm* New York: Doubleday, 2001). The review has valuable comments and insights inter alia into the thinking processes of advocates and participants and how both they and the context of the dispute affect outcomes.

that stage the process is recycled through interests, rights and power until agreement is reached.⁶⁰

Other Indigenous Processes and Values

It would make an interesting thesis topic as to why the early British social system of feudalism evolved a rights based dispute resolution process rather than one based on interests. Some might say that it reflects the need for the privileged powerful group in charge of the legal system to protect property rights. Most indigenous systems are needs and interests based and involve all persons affected and that can be the whole community. Examples include Hawaii,⁶¹ North American Indians⁶², and Bushmen of the Kalahari,⁶³ Australian Aborigines⁶⁴, and the tangata whenua.⁶⁵

Many of the values practised are of universal human relevance. Joe Epstein⁶⁶ describes twelve values of North American wisdom that would have equivalence in other countries. They are illustrated with proverbs or short stories as follows:

- Listening *Blue Jay noticed that bear had not said a thing. Finally, Blue Jay asked bear why was she so silent and bear replied 'I'm listening and learning. I don't need to talk; I already know what I know.'*
- Respect *Respect for all forms of life, unfortunately, is not common value in many cultures today. It is easier to respect someone stronger, faster, or richer. Likewise it is easier to respect someone who is like us in every way possible. Respecting someone with different beliefs, different dress or different customs, or something entirely different from us is not easy.*
- Generosity *Generosity is a good thing to have as we are all travellers on this earth*
- Humour *Humour is one of the most powerful tools that the Creator has given human kind*
- Compassion *Human beings cannot understand another's life until they have carried the weight of that person's burdens, listened to that person's words, felt that person's pain, observed that person's actions, and walked along that person's path, sharing the other's greatest longings and aspirations. Understanding those things, we must then be able to sleep at that person's fire, sharing every part of the other human being's dreams and nightmares.*
- Silence *Silence was meaningful with the Lakota, and his granting a space of silence before talking was done in the practice of true politeness and regard for the rule that 'thought comes before speech'*

⁶⁰ See William L. Ury Negotiation Journal Oct. 1995 Vol.11 no. 4 p 379

⁶¹ See Bruce E. Barnes *Conflict Resolution Across Cultures: A Hawaii Perspective and a Pacific Mediation Model* Mediation Quarterly Vol.12 No.2 Winter 1994

⁶² See Special Edition of Mediation Quarterly Vol.10 no.4 Summer 1993 *Native American Perspectives in Peacemaking*

⁶³ Ury, op.cit.

⁶⁴ See Karen L. Pringle *Aboriginal Mediation: One Step Towards Re-Empowerment* ADRJ Vol.7 no.4 Nov. 1996

⁶⁵ It is recognised internationally that the case conferencing method was originated in NZ and based on Māori customary processes.

⁶⁶ *Native American Wisdom: Lessons Learned from Mediation*
www.mediate.com/pfriendly.cfm?id=1715

- Nonverbal communication *The wise individual looks and hears the unspoken signals that scream for the need to be recognised. The gentle and sensitive listener is adept at the art of creating safety and space for sharing that allows others to express their needs*
- Atonement *The sincere desire to deal fairly with others. To admit our shortcomings and to make amends where needed is the mark of a person worthy of trust*
- Trust *The art of speaking harmoniously is a bit more difficult because people who are honest and direct tend to forget that brutal honesty is not always appreciated. If sensitivity is paired with intelligence, we are using our power of perception to notice where we can bring harmony in a potentially upsetting situation. Respecting the vulnerability of those who trust us to be honest and gentle is the key to the art of speaking the Truth in Harmony.*
- Healing *Part of healing was the way she listened...she always reacted with sympathy and compassion. So it isn't just the treatment that heals it's the hands on understanding and cooling that sometimes make the mediation do its work. In truth, the caring and attention are part of the medicine*
- Wisdom *being wise, having wisdom, is knowing what to do with what you know, when to do it, and how to do it. Or sometimes a person must know enough to do nothing.*
- Peacemaker *A person who can take the ordinary and illuminate it, invoking deep feelings in others often is called a creative genius. The Ancestors call those who carry that talent The Gifted Ones*

Quoting Kenneth Cloke,⁶⁷ Epstein argues that “mediators who will not take the risk of bringing **“a deep and dangerous level of honesty and empathy”** to the dispute resolution process leave a void in the circle of justice.”

I am indebted to my colleague and fellow mediator Tauiiili Paul Stowers for noting that these themes are repeated in Pacific cultures such as the Samoan ritual of *ifoga*. This has the following elements:

- It is spiritual
- It expresses genuine feelings and acts of remorse
- It involves family
- It is an accepted ritual
- It empowers the victim's family
- It seeks forgiveness
- It brings reconciliation
- It re-establishes harmony
- It provides closure⁶⁸

⁶⁷ From *Mediating Dangerously: The Frontiers of Conflict Resolution* Jossey-Bass 2001. Whereas mediators are taught that the first duty of a mediator is to provide a safe environment, Cloke quotes Goethe *The dangers of life are infinite, and among them is safety.*

⁶⁸ P. Stowers *Cultural Differences from an Anecdotal Perspective* Unpublished training paper to Wellington Mediation Team, Department of Labour

I have seen many of these values incorporated into mediations with Maori, both intra-culturally and cross-culturally. I am also aware of many whakatauki (proverbs) that would illustrate similar values. I would love to see the identification of such principles and how they should be illustrated from within Maoridom.

Designing Processes – the Elements

It has often been observed that good theory goes hand in hand with good practice and vice versa. There needs to be more interchange between researchers and practitioners. Lipsky and Avgar argue this point and explore what such research might entail in the future.⁶⁹ They posit that the first generation of dispute resolution research was at a societal level – legal questions and the implications for our legal system and social justice. The second (mid 1980s) was at the macro-organisational level – internal mechanisms of dispute resolution in non-union settings. The third generation they argue is at the micro-organisational level – the operation of procedures and processes and their relative effectiveness. This has included for example a comparison of facilitative, evaluative and transformative types of mediation.⁷⁰ The challenge for the next generation of researchers, they believe, will be to synthesise the disparate theories and empirical findings of the first three generations. Questions arise such as “*has the transformation of employment dispute resolution in the US strengthened or weakened employee rights and (the) system of social justice?*” They note that in the US there has been a dramatic shift to private dispute resolution away from public forums. Some commentators (see Hon. Patrick E. Higginbotham⁷¹) have expressed concern about this phenomenon, especially regarding the decrease in precedents and diminishing skills of trial judges and lawyers. There has been no rigorous analytical research on the implications of this trend. They also believe that there should be examination of micro-variations in dispute procedures on macro-level outcomes such as recruitment, retention, employee performance, productivity, employee satisfaction and even profits and other bottom-line measures.

As a minor comment on “facilitative” mediation as opposed to “evaluative” (see footnote 70 below) I offer the suggestion that there can be a half-way house. That is “analytical” mediation (although purists would see this as evaluative in any event). I see no point in a mediator offering advice. It exposes one to charges of negligent advice, or blame for the outcome. But sometimes a party does not have enough knowledge to make a wise decision. Here I think there is an argument for a mediator to indicate areas of concern that a party will have to overcome at litigation, but without making a recommendation. An example might be a claim for constructive

⁶⁹ *Commentary: Research on Employment Dispute Resolution: Towards a New Paradigm* Conflict Resolution Quarterly vol. 22 no 1 Fall-Winter 2004

⁷⁰ “Facilitative” can be described as a “pure” form where the mediator helps the parties by staying only with the process – even so far as facilitating the common rules under which the parties will negotiate. “Evaluative” is where the mediator offers more than information on what might happen in court and effectively becomes an advice-giver. “Transformative” is based on the work of Folger and Bush in *The Promise of Mediation* in which they explore the ways in which helping the parties recognise the others position, and then enabling them (includes power balancing) to negotiate effectively leads to transformation of the conflict, and even the parties themselves. The US Postal Service has adopted the transformative style for all internal mediations. These styles require very different approaches from the mediator.

⁷¹ *The Disappearing Trial and Why We Should Care*
<http://www.rand.org/publications/randreview/issues/summer2004/28.html>

dismissal (where the employee has resigned for allegedly good cause) where the onus of proof is on the employee to show why they had to resign; as opposed to a dismissal where the onus is on the employer to justify the sacking.

Practical Implications

As indicated at the start of this paper, initial problem-solving is by far the cheapest and most effective way to resolve conflict. Programmes that equip potential disputants with communication skills, and skills in understanding emotion and its management are the most cost effective, but may be the least apparent when successful.

However requiring the parties to talk to each other is a normative step. Where this is not possible having an intervener (conciliator?) to facilitate a safe environment becomes basic.

Peter S. Adler and Christopher Honeyman⁷² have recently identified the common values and political beliefs of most conflict management strategies as follows (American context):

- i. *Inclusion of the fullest possible diversity of voices and viewpoints*
- ii. *Participation in both the formulation of the process and the content of discussion*
- iii. *High quality information and data, including grappling with scientific and technical uncertainty and the limits of current knowledge*
- iv. *Questioning and critical inquiry to reveal, understand, and test key underlying assumptions*
- v. *Mutual listening and understanding as bedrock for productive dialogue, the invention or practical reconciliation of competing ideas, and the hunt for practical outcomes*
- vi. *Fair decision rules that do not tilt the playing field or the marketplace of ideas*
- vii. *Transparency so that the tradeoffs are understandable to those affected by but not present for decisions*
- viii. *Accountability so that those who are making decisions participate in their implementation*
- ix. *Amendability so that decisions can be adaptable to new information or changed conditions*
- x. *Assent/Consent/Acceptability so that new ideas can move forward with the highest levels of political traction*
- xi. *Implementability so that solutions are pragmatic and do-able.*

These form a useful basis for assessment of processes, but I note the ADR Committee of the Wellington District Law Society has under action a project for developing a set of guidelines for policy makers and others involved in such new legislative provisions. Pele Walker (Executive Director of LEADR NZ⁷³) has been preparing that paper and I note from the current draft the following principles:

⁷² *Some Radical Thinking on Centrism, Politics, and the Future of Conflict Management*

<http://www.mediate.com/pfriendly.cfm?id=1776> August 2005

⁷³ Paper not yet available.

- *Strive to keep decisions in the hands of those closest to the problem*
- *Seek not only the rational but also the reasonable*
- *Seek to ‘supplement’ not replace the legal system*
- *Anticipate and try to prevent escalation of the dispute*
- *Explicitly assess the alternatives to using ADR and negotiation forums*
- *Provide options that will enable/empower parties to negotiate and solve problems by satisfying interests, rather than capitulating to positions*

The implications of these principles should result in processes that place primary responsibility back on the parties to work it out themselves; and if that is not possible to provide services that make it safe for them to do so. In limited circumstances decision-making through informal processes such as arbitration may be appropriate but the court system is likely to be the last resort. I turn to consider briefly one alternative that has been referred to above – med/arb.

Med/Arb – its Problems

Much has been written on this process over recent years. It does give the advantage that the problem will be determined after the parties have had a chance to agree. It is a process that is available under the Employment Relations Act 2000 and has been used there, but in under 1% of the cases filed. My own view is that there are dangers in blurring the line between two good processes and thereby possibly damaging both. A mediator cannot properly caucus with one party because a decision-maker should not breach the rules of natural justice - to see one party in the absence of the other. It removes the ability to be quite challenging if the party then thinks you have lost impartiality and “gone over to the other side”. An arbitrator is unable to properly test conflicting evidence in mediation – some witnesses may not be present. My experience is that if parties can agree for me to decide in the knowledge that there are no appeal rights, and that I may not have to give reasons for the decision, and they have to hand over their right to decide to a stranger, then they may as well decide on the main issues themselves. If they can agree on that much, then a little more time in mediation will normally end in their achieving substantive agreement on their issues. The decisions I have made have been either a pure arbitration process, or I have given a public decision for the parties (after they have made it themselves) where, for whatever reason, it is better for the mediator to “take the blame” for the decision, rather than the parties.

Other Process Issues

From the discussion above, there are a variety of issues that need to be addressed in any dispute resolution design. These include:

- Does the mediator require any special qualifications or training?
- Is the mediation/conciliation process to be voluntary or compulsory?

- Is confidentiality to be a feature and if so how is this provided for?
- Is privilege to be a feature and if so how is that provision made?
- Who are the likely parties and will the process include multi-parties?
- How will results of any agreement be enforced?
- What happens if no agreement is reached?
- Will the mediator be entitled to give advice? Or provide an analysis?
- Should the ongoing nature of relationships predicate a transformative approach?
- How will the interests (if applicable) of the public be protected?
- What name will be assigned to the process that will avoid confusion for participants and lawyers/advocates?
- Will parties be entitled to be represented? And if so by whom?
- What is the cultural context in which the service will operate and how does the community involved normally resolve conflict at the moment?
- What technological facilities (video-conferencing etc.) will be required? What are the special ethics/rules of keeping the process transparent in such circumstances?
- Is it to be a free service? Filing fee? Or full rates?
- Are there factors in the New Zealand psyche that indicate a particular process will be acceptable?
- Will a process from overseas necessarily fit with the New Zealand approach?
- What research should be undertaken in assessing success in reaching defined goals? (Traditional measures of efficiency, satisfaction, and perceived fairness may be overtaken by goals of substantive justice, empowerment and recognition, and interest based problem solving.)⁷⁴

Conclusions

Restorative Justice and other ADR processes have much in common, and much to learn from each other. One of the themes of this paper is that research into conflict, its causes and means of resolution, is being conducted by a number of disciplines, but without a great deal of interchange between them. When it occurs it does not necessarily cover all applicable sources – a criticism of which this paper may also be subject. Such a holistic view is however, an important element of restorative justice, and indeed this conference.

What we now know is that humankind comprises “feeling beings who think” (or perhaps creatures who think and feel) and that the part of our brain that thinks cannot operate without input from the part that feels emotions. This insight challenges the basis of decision-making processes such as the courts, which are designed to apply objective logical judgment in the absence of emotion. This is not to say that the Courts are not an essential part of the dispute resolution process, but can be seen more as a last resort.

We know that people perceive “justice” as occurring where the process is procedurally fair, the outcome substantively sound, and where the decision-maker is

⁷⁴ See *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases* Roselle L. Wissler Conflict Resolution Quarterly vol.22 no.1-2 Fall-Winter 2004 p. 55; and the commentary of John Lande *Commentary: Focusing on Program Design Issues in Future research on Court-Connected Mediation* in the same issue of CRQ p. 89.

seen as unbiased. A diverse community will perceive different outcomes as being “fair”. So systems for the future should allow for the fact that each case may require unique outcomes to meet the parties’ ideas of substantive fairness. This is more likely to be achieved where they are involved in the outcomes.

Secondly the process must be fair, open and transparent. This will mean more attention to how processes are provided rather than the generic name of “mediation” being applied to a variety of processes.

The issue of the third-party being impartial is not automatic. According to Dame Joan Metge⁷⁵ takawaenga (mediators in the māori community who operated as a link between the tribal group and an outcast) were chosen for their standing, skills and knowledge. John Paul Lederach writes of the efficacy of “insider partial” mediators, who may be more appropriate negotiators in some cultures or conflicts.⁷⁶

The issues of training, certification, and accrediting of all involved including advocates become important.

In New Zealand mediation services are being provided more by government agencies than private mediators, although statistics for the latter would be impossible to identify. Anecdotally, there are few mediators able to work full time in that capacity, although it is an important adjunct to other work for a significant number of others.

Mediation is being used more in trial programmes in the Family Court, the Watertight Homes Resolution Service and soon in the Maori Land Court. The notions of “harm” and “trauma” are clearly relevant in these contexts.

One question that may arise in the future is whether a plethora of mediation services attached to many government departments, each with other agendas and responsibilities is as desirable as a single independent mediation service available for use in all disputes and for all courts and tribunals.

The current omission of a free mediation service from private civil litigation may be explainable for economic reasons (why should the taxpayer subsidise such processes) but this appears inconsistent when it is provided for in so many specialist areas in the private civil dispute field (for example Tenancy, Employment, Family, Human Rights, Privacy complaints, Disability Commissioner, etc.).

One of the key issues to be resolved will be the interface between the courts and the other dispute resolution services that evolve.

We especially need to be conscious of the closeness of tangata whenua (and other cultural communities) universal values to restorative justice principles and the contribution they can make – especially in contributing to the design of inclusive processes.⁷⁷

*To te kanohi tona kite
To te hinengaro tona kite
To te mauri tona kite*

(The mind, the eye and the soul
Each has its own perspective)

⁷⁵ *New Growth from Old* op.cit.

⁷⁶ http://www.beyondintractability.org/m/insider_partial.jsp

⁷⁷ See Dame Joan Metge *Korero Tahi: talking together* AUP, 2001

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