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Practical issues in mediation

Power in mediation – some reflections

Dimitrios Eliades

'Just as an initial power imbalance does not necessarily make judicial review an inappropriate forum, so too mediation should not be abandoned solely on the grounds of financial disparity between the parties. The question is how mediators should respond to this reality.'

Introduction

Parties in mediation or negotiation are in a power balance even before the processes commence. The shopping centre tenant and the landlord, the bank customer and the bank, the plaintiff in a personal injury claim and the insurer, are all examples of situations where an imbalance already exists.

This article will consider some areas where a power imbalance is likely to occur and how mediators might act in these situations; it also looks at a specific situation where the imbalance is so great that the mediation process is inappropriate as a dispute resolution method.

ADR provides a potentially more predictable method of resolving disputes than the formal justice system, because the parties actively participate in the outcome of their dispute.¹ As it is inherent in this process that the parties will have some direct contact with each other, the mediator must be responsible for detecting any factors that threaten the fairness and equality of any agreement.

Financial imbalance

A financially superior party may have an advantage in either the court adjudication process or in mediation. NADRAC has said:

In ADR, as in any other dispute resolution process, the participant with the greater resources who can hire a lawyer, afford to wait and to raise more issues will have an advantage over other participants.²

It is true that in mediation there is an assumption of equality between the parties. This is also fundamental to the judicial decision process. The critical question, however, is the extent to which equality in ADR must be present in any final agreement.

Despite the above assumptions, in practice equality may not be present at the beginning of the mediation, just as it might not be present at the beginning of the litigation process. In litigation the financially

stronger party may force the weaker party to incur costs through a stream of interlocutory applications. At trial, the stronger party can retain top lawyers and leading experts.³ Pincus J, during the period of his appointment to the Federal Court, made the following comment:

It is my opinion that nothing can be done to eliminate whatever advantage can be obtained by the richer litigant's access to the more expensive and therefore presumably more expert legal assistance.⁴

On the final judicial determination, however, the parties are equal before the judge.

So too in mediation there may be an inequality at the beginning, which in some circumstances must be dealt with by the end of the mediation. Alternately, the mediator must terminate the mediation because, in the mediator's view, inequality of the parties will not permit a fair agreement to be signed.

Just as an initial power imbalance does not necessarily make judicial review an inappropriate forum, so too mediation should not be abandoned solely on the grounds of financial disparity between the parties. The question is how mediators should respond to this reality.

Responding to power imbalances

It is the function of the mediator to facilitate the parties to reach agreement themselves. The mediator can attempt to use the processes of mediation to assist the parties reach a level of equality that allows them to arrive at an agreement. This may be done through improving communications, creating doubts as to positions, or just being an objective participant.

If the mediator wishes to create doubts about the respective positions of the parties, he or she may find an opportunity to do so in relation to a document or expert opinion of the stronger party. This will, however, ➤



➤ render it necessary to canvass the substantive issues in dispute.

The mediator must be careful that criticism of a party's material does not appear to compromise the mediator's objectivity. It is better to give *alternate possible constructions* of a document or provision, rather than express an obvious opinion.

This approach, however, may have limited effect in cases involving experienced litigants such as insurers. They already have an idea of their liability and damages exposure. There is, however, even for the experienced company, an element of risk, and this may be the factor that the mediator can use to encourage the insurer to reach finality through compromise.

The mediator must be cautious in cases between a claimant and an insurer. The insurer will have direct contact with the plaintiff and may use greater organisational skills, quality of counsel and familiarity with the process to intimidate the plaintiff into accepting a reduced amount.

The imbalance in power, however, may sometimes be more apparent than real. Take for example a tenancy in a shopping centre complex. The lessor could be a large corporation, while the lessee is a small trader. However, an application by the tenant to the Retail Tenancy Tribunal, if successful, has the potential for setting a precedent for payment to all tenants in the centre. This would tend to confer on the tenant more power than might appear.

In environmental disputes, public opinion will often support the smaller environmentalist. The larger corporation enters discussions knowing that the discussions are not held in a vacuum, but that the corporation's handling of the issues may be something that is publicly reported. This again would confer power on the apparently weaker party.

The mediator may attempt to balance power in relation to the information question, for example by limiting the amount of information to be used by the parties, thereby aiming at equality with respect to information access. The parties in mediation could also be encouraged to share knowledge. In addition, it may help the mediation if the weaker party is assisted in collating their material.

Imbalance due to cultural differences

Where parties are from different cultural backgrounds there is a risk of communication difficulties. Different nationalities, ideologies, countries of origin, political views or perceptions of the legal system may contribute to these difficulties and may lead to the ethnic participant accepting a proposal because it seems hopeless to resist.

Many people of different cultural backgrounds prefer to remain silent in certain situations. They may be suspicious of the mediation process because in their native country disputes could only be settled by judicial pronouncement, or they may feel they cannot express their claim or concerns. Silence by a party may be misinterpreted as acquiescence to the other party's argument, with damaging consequences.

To address an imbalance, the mediator could structure the mediation to allow each party the opportunity to state their position or response without interruption. The mediator may also consider separate sessions with the parties. This will have the advantage of not only interrupting the domination by the stronger party, but also of allowing the mediator to have a more open discussion with the weaker party.

The mediator may discover in caucus that in the respective party's native country an uneducated person could never win in a dispute with an educated person. Caucus meetings can empower the weaker party by rehearsing techniques to be used in open session.⁵

The mediator must also be mindful that a party may be using their cultural difference as a tactical advantage. One advantage is that the language 'difficulty' will slow down the process, which is more suited to the party with the language difficulty. This tactic could frustrate the other party. Here it may be prudent to have a family member or friend with the relevant language ability attend the mediation. This person may liaise with an independent interpreter appointed for the mediation. This achieves two things:

(1) the party with the different cultural background is more at ease knowing that their full case is properly being represented; and

(2) the non-ethnic participant can have confidence in the objective role of the interpreter.

Gender imbalance

In the case of family law mediation involving property issues, it is not unusual for the husband to have control of the couple's financial information, assets, liabilities and income. This leads to an imbalance in the husband's favour. Unlike the litigation process, the wife does not have the advantage of the discovery process or contempt of court orders to obtain necessary information.

Moreover, through his involvement in the workforce, the male may have developed personal skills useful in negotiation, which constitute a form of power. This skill will enable him to articulate his arguments, which may intimidate the wife.

The mediator can take steps to address these imbalances. Where the parties have advocates, it would be expected that the advocates would not interrupt while statements are being made. In the case where there are no advocates, the mediator can balance the dynamics in a number of ways, for example by limiting the time for speaking, so that each party has an equal time to make a statement and an equal time to respond.

The mediator can separate the parties into private meetings in order to get candid responses on issues which a party does not want to reveal in an open meeting. The mediator can make inquiries of the husband as to assets, liabilities and income. Although this is not a discovery process, the husband may be more willing to reveal this information to an objective third party in a private environment.

Normally confidentiality binds these private discussions. However if the husband has deposed in the litigation to his assets, omitting what he has revealed to the mediator in confidence, then the husband has committed an unlawful act. Some mediators include in their mediation agreement a provision that confidentiality does not bind them where the subject of the information given to the mediator involves acts or omissions that are unlawful.





'... violence, or the threat of violence, can cause a serious power imbalance. Violence is about control. It is impractical to suggest that in a few hours, or several sessions, the mediator can address issues in a relationship that may have existed for a number of years.'

➤ Despite the above scenarios, each mediation should be approached without preconceptions about power. A man may be disadvantaged if he is afraid that his wife will deprive him of access to their children. Similarly, a woman after separation may wish to maintain a good relationship between the children and their father and agree to accept less property in order to keep the relationship between the children and the father intact.

Violence against women and mediation

The most serious imbalance is likely to arise where there is violence or threatened violence or abuse. The imbalance could be so great that it makes the dispute unsuitable for mediation for a number of reasons.

One of the preferred preconditions for mediation is the willingness of the parties to come together to resolve the dispute. Inherently, this involves the parties compromising their optimum positions. In the case of the perpetrator of the violent acts, any compromise with the victim must improve his position from the legal perspective. For example, if the court is told that the parties have resolved their differences, this may make a court more lenient in the imposition of its penalty for violent acts.

It is my view that fear and apprehension which is caused by violent behaviour may be something that can be countered by the mediator through a system of structured strategies. Some of these strategies may include increasing the number of meetings over a long period, strict adherence to terms of contact between the parties, and communication between the mediator and each of the parties between mediation meetings.

However violence, or the threat of violence, can cause a serious power imbalance. Violence is about control. It is impractical to suggest that in a few hours, or several sessions, the mediator can address issues in a relationship that may have existed for a number of years.

Mediation is not, in this situation, a viable alternative to the judicial process. Courts can make protective orders against the violator to prohibit contact with the victim. The issue of violence is a complex one, which must be dealt with sensitively,

and not through an inflexible system which is applied ad hoc to all cases. Violence against women is a crime, and must be dealt with accordingly.

To deal with the problem in a private forum encourages the view that punishment can be avoided by the perpetrator if he conducts himself appropriately in a mediation environment. There is a risk that some women may feel that mediation does not provide the opportunity to have the events 'aired' publicly, as they would in a court before a judge. The violent nature of the actions causing the dispute makes it undesirable to be dealt with through mediation. Acknowledgement of and repentance for violent acts must be a prerequisite to any resolution of the matter.

Conclusion

Power imbalances are a reality of the mediation process. The mediator must attempt, as soon as possible, to ascertain where the power lies in the relationship, and from that point determine the steps that can be taken to adjust that imbalance.

In many cases, this may appear obvious. However, the mediator should constantly be mindful that there might be non-obvious factors that can influence the parties, and give rise to an unfair agreement. ●

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Endnotes

1. 'ADR is seen as having the advantage that the participants can make their own decisions about how they deal with their dispute, can do it at their own pace and according to their own understandings of what the dispute is about.' National Alternative Dispute Resolution Advisory Council (NADRAC), *Issues of Fairness and Justice in Alternative Dispute Resolution* discussion paper, Canberra, November 1997 p 20.

2. As above, p 57.

3. 'Of course, imbalances of power can distort judgement as well: resources influence the quality of presentation, which in turn has important bearing on who wins and the terms of victory.' Goldberg S, ➤



➤ Sander F and Rogers N, *Dispute Resolution*, Little, Brown and Company, Boston 1992 p 245.

4. Pincus C W, 'Judge Asks Why Old Methods are Still Used to Resolve Disputes' (1988) 23 (No10) *Australian Law News* 11.

5. Steer L, 'A Study of Family Mediators' (1995) ADRJ 165 at175.

Readings on power in mediation

Alexander R, 'Family Mediation: Friend or Foe for Women?' (1997) 8 ADJR 255.

Astor H, 'Feminist issues in ADR' *Law Institute Journal* 65 January/February 1991 p 69.

Astor H and Chinkin C, *Dispute Resolution in Australia*, Butterworths, 1997.

Behrendt L, *Aboriginal Dispute Resolution*, Federation Press, 1995.

Boulle L, *Mediation: Principles, Process, Practice*, Butterworths, 1996.

Brown H and Marriott A, *ADR Principles and Practice*, Sweet & Maxwell, London, 1993.

D Bryson, "'And the Leopard Shall Lie Down with the Kid": A Conciliation Model for Workplace Disputes' 1997 ADRJ 245.

Clarke G R and Davies I T, 'Mediation — When Is It Not An Appropriate Dispute Resolution Process?' 1992 3 ADRJ 70.

Davis A and Salem R, 'Dealing with Power Imbalances in the Mediation of Interpersonal; Disputes' *Mediation Quarterly*, 17.

Davis R, 'Why are Plaintiffs Losers in Negotiations?' *APLA Update*, April 1994.

Field R, 'Mediation and the Art of Power (Im) Balancing' 12 QUTLJ 264.

Goldberg S, Sander F and Rogers N, *Dispute Resolution*, Little, Brown & Co, Boston, 1992.

Hardy S, 'Online Mediation: Internet Dispute Resolution', 1998 ADRJ 216.

Harris R, 'The Mediation of Testamentary Disputes', 1994 ADRJ 223;

Kelly M, 'The Benefit of the Doubt', 1998 9 ADRJ 89.

Keltner J, *Mediation — Toward a Civilised System of Dispute Resolution*, ERIC Clearing House, 1990.

Klug M, 'ADR: Trends and Directions in Commercial Disputes', 1997 8 ADRJ 172.

Law Reform Commission, *Multiculturalism*

and the Law, Report No 57.

Mack K, 'Alternate Dispute Resolution and Access to Justice for Women' (1995) 17 Adelaide LR 124.

Mangopoulos J, 'The Role of the Mediator', 1988 IJ 22.

Mayer B, 'The Dynamics of Power in Mediation and Negotiation', (1987) 6 *Mediation Quarterly*, p 75.

Moore C, *The Mediation Process*, Jossey-Bass, London, 1987.

Mulcahy N, 'Conciliation and Race Complaints', 1992 ADRJ 20.

National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution*, discussion paper Canberra, November 1997.

National Committee on Violence Against Women, *Position Paper on Mediation*, 1991.

Prindable P, 'Is Mediation an Alternative in Commercial Lease Dispute Resolution', 1994 ADRJ 99.

Rogers B, McCafferty B, *Dispute Resolution for the Queensland Legal Profession*, Queensland Law Society Incorporated, 1997.

Steer L, 'A Study of Family Mediators', 1995 ADRJ 165.

Young S, 'Cross-Cultural Negotiation in Australia: Power, Perspectives and Comparative Lessons' 1998 ADRJ 41.

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