



HERBERT
SMITH
FREEHILLS

HONG KONG
LEGAL WEEK
1-5 NOVEMBER 2021



律政司
香港特別行政區政府
Department of Justice
The Government of the Hong Kong
Special Administrative Region



HONG KONG MEDIATION LECTURE

NOVEMBER 2021





Modern Mediation: Equity's Heir?

Sala Sihombing¹

Introduction

Whilst seeing equity and modern mediation as forms of individualised justice is not new, there are characteristics which may suggest that mediation can be equity's heir in offering a new forum for equitable type redress and even novel remedies where none exist in equity. Ashburner's *Principles of Equity* explained that equity seeks to create a 'cathartic jurisdiction'², meaning a jurisdiction involving the release of strong emotions through open expression leading to relief. What could be more descriptive of the mediation process? Mediators seek to facilitate the sharing of perspectives to enable parties to meet their needs and find durable solutions. So far, so equitable.

Thomas Main, referring to arbitration and mediation as ADR, has stated that the:

...freedom, elasticity and luminance of ADR bear a striking resemblance to traditional Equity, offering relaxed rules of evidence and procedure; tailored remedies; a simpler and less legalistic structure; improved access to justice...³

In this presentation, I will suggest to you several ways in which modern mediation can be seen as equity's heir. Without doubt there are significant differences, however, there are also significant echoes. And beyond that, I will explore if modern mediation can provide remedies that even equity has not considered nor has the capacity to address.

As a law student, graduating in 1992, I remember being tickled by the idea that the application of equity could be revealed by an actual Chancellor's foot. The comparison is attributed to John Selden, a 17th century jurist, who referred to equity as a 'roguish thing' with one Chancellor having a long foot, the next a short foot and the third, rather worryingly, 'an indifferent foot'⁴. His criticism was that equity changes based on who is administering it, whose conscience is being considered. I hasten to add that I was, even at the time, an imperfect student of equity so for the purposes of this lecture, please accept my apologies for any inequities or errors.

This responsiveness to circumstance, a hallmark of equity, which has been criticised, is celebrated in mediation. As mediators, we work to assist parties to come up with their own solutions and address their own needs. The kaleidoscopic nature of mediated agreements is the purpose of the system rather than a bug.

Let me clarify that for the remainder of the presentation I will refer to modern mediation, as mediation. However, it is a distinct and separate beast from traditional or customary mediation. Modern mediation is based on certain foundational principles springing from the social justice movement of the last century as opposed to traditional mediation's often pronounced focus on harmony. I will also be using family mediation as a lens to consider the principles and realities of practice.

In order to assess whether mediation can function as heir to equity, I will examine the nature of mediation, and the foundations of equity. In addition, I will consider the similarities and differences to see if there are any areas of convergence. Lastly, I will explore if there are ways in which mediation could be said to be carrying on with equity's mission of unburdening consciences.

I appreciate this title may seem like a conceptual stretch, an obvious difference between equity and mediation, is that mediation is a process which facilitates negotiation, rather than being a jurisdiction administered by judges. However, within the bricks and mortar of mediation might there be echoes of the spirit that infuses equity?

Foundations of Mediation

To focus on mediation to begin with, these words, 'facilitated negotiation' are used routinely to describe mediation; however, we tend to use them reflexively and without always considering what it means for the parties. This is not a process where a wise, third-party decision-maker will deliver the answer or where highly trained professionals will make your case, and that reality is something with which even sophisticated

1. LLB (Hons) Bristol, LLM Pepperdine, Family and General Mediator, Solicitor non-practising (England and Wales, Hong Kong).

2. DENIS BROWNE, *ASHBURNER'S PRINCIPLES OF EQUITY* (Butterworth & Co. Ltd. 2d ed.) 39 (1933)

3. Thomas O. Main, *ADR: The New Equity*, 74 U.CIN.L.REV. 329, 330 (2005-2006)

4. JOHN SELDEN, *THE TABLE-TALK OF JOHN SELDEN: WITH A BIOGRAPHICAL PREFACE AND NOTES* 49 (Connecticut J.R.Smith) (1856)



parties struggle. The level of personal work and engagement required of both parties, is both the point and the challenge of mediation. As they navigate the process, the hope is that the parties can co-create a negotiated outcome.

When negotiations deadlock, it is often possible to use Christopher Moore's Satisfaction Triangle to understand and unlock the impasse⁵. Moore explained that in conflict, parties have needs which may be in tension with each other and that uncovering these needs can assist parties to find mutually acceptable solutions. Mediation's reliance on interest-based negotiation leads necessarily to the foundations and pillars of mediation practice. Mediators seek to assist the parties to a mutual understanding of their respective needs, fears and concerns, this necessitates an exploration of the procedural, psychological/emotional and substantive needs of the parties.

Mediation has concerned itself with meeting procedural interests and providing procedural justice. There is a significant body of research which supports the idea that participants in a process will determine if the process and outcome were fair based on their assessment of procedural justice. The elements required include having an opportunity to express yourself, being heard and listened to, and being treated with respect by the third-party decision-maker. Although mediation has long professed to provide this to parties, the reality is that this research is based on a distinctly different process administered by a third-party decision-maker and not a facilitated negotiation.

Encouragingly for mediators, Rebecca Hollander-Blumoff has researched negotiation and procedural fairness which is directly relevant to the parties' experience of mediation; and has shown that people's views about fairness correlate to their needs for procedural justice, ie, having a voice, being heard and being treated with respect⁶. This vindicates mediation's focus on the importance of voice and respect. There is some debate as to whether mediation should be including ambitions to deliver fairness or even substantive justice, but that is a topic for another day.

The foundational principles of mediation, or the Two Towers for Tolkein fans as named by James Coben, are usually described as self-determination and neutrality⁷. Without having the credibility that the jurisdiction of the courts provides, mediation has had to find its own path to legitimacy and these towers were intended to provide reassurance to parties that mediators would exercise their roles appropriately.

Nancy Welsh has highlighted that self-determination requires that the parties are at the centre of the mediation and that they remain the principal actors and creators⁸. It is their choices around participation, including communication and negotiation, which frame the party-centric process. It is also for the parties to decide on the substantive norms that will guide their decision-making and potential resolution. Certainly, in the training that I have received in Hong Kong, the UK, Australia, and the US, this has been an article of faith, that mediators need to be guided by party self-determination in their interactions with the parties.

5. CHRISTOPHER MOORE, *THE MEDIATION PROCESS* 128 (4th ed. 2014)

6. Rebecca Hollander-Blumoff, *Just Negotiation*, 88 (2) WASH. U. L. REV. 381, 416 (2010) also see Rebecca Hollander-Blumoff, *Formation of Procedural Justice Judgements in Legal Negotiation*, 26(1) GRP. DECISION AND NEGOT. 19 (2016)

7. James Coben, *Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self Determination and Neutrality*, 5 CARDOZO J. CONFLICT RES. 65, 73 (2004)

8. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1, 4 (2000)



We can see this in the way that we consult with parties as to the structure of the process and the way it will be conducted. This principle sounds laudatory, and it guides my practice and interaction with clients, however, it can be challenging in practice. As a mediator, we do not always think that parties are making wise choices, however, respect for this principle requires our obedience.

Last year, I mediated a couple where the short duration of the marriage, no children, and the equal financial positions of the parties, both in terms of earning capacity and assets, all suggested a clean break. However, the husband insisted on providing spousal maintenance and a future home for the wife. As a family mediator, I knew this was outside the range of typical legal outcomes, however, I also knew that if I really believed in party self-determination, people don't have to do things with which I agree. I assisted the husband to reality test his proposals, to consider his own long-term needs and to seek legal advice which he received and ultimately rejected. My role is not to usurp the parties' values with my own. The only principle in family mediation which overrides self-determination, is that there is an ethical responsibility to facilitate agreements which are in the best interests of the children. This applies in most jurisdictions, including Hong Kong.

Neutrality is often described as the second foundational principle of mediation, although Coben suggests it is ill-defined⁹. It is sometimes recast as impartiality, being freedom from favouritism or bias. However, in recent decades this concept of neutrality has received criticism. Practitioners and commentators have expressed concern that strict impartiality, perpetuates the existing power dynamics between the parties and therefore may enable domination by the stronger party over the weaker. In addition, Coben has criticised neutrality as a fiction which conceals the numerous process decisions and choices made by mediators to influence the parties towards settlement through, for example: agenda control, reframing communication, packaging information, and encouraging doubt to moderate positions¹⁰.

Kenneth Cloke has argued that for mediators, or anyone, neutrality is an unrealistic goal given that we come to any conflict with our own perceptions, ideas, and experiences¹¹. He argues that neutrality addresses the concern that mediators should be fair and free from selective bias. Cloke commends us to turn from neutrality to omni-partiality, in which we are on all the parties' sides at the same time¹². From his perspective, in the heat of the session, parties want us to be honest, empathic and omni-partial¹³.

The supporting pillars for these foundational two towers are: voluntary nature; confidentiality; creativity; flexibility; substance over form; interest-based negotiation; durability of solution and future-focus.

The voluntary nature of mediation, meaning that parties are free to choose whether to participate, has been shaken in the sense that civil justice reform in many countries has increasingly mandated attendance at mediation, if not mandated the quality of participation. However, this is still a principle adhered to by mediators and is still expressed as a goal of mediation processes. Certainly, parties still have the ability to terminate mediation, thereby exercising a type of negative voluntary control.

9. Coben, *supra* note 7

10. Coben, *supra* note 7

11. KENNETH CLOKE, *MEDIATING DANGEROUSLY*, 13 (1st ed. 2001)

12. *Id.*

13. *Id.* at 14

Confidentiality, on the other hand remains inviolate and strongly supported in Hong Kong, through judgments, practice, codes of conduct, agreements to mediate and our own Mediation Ordinance (Cap. 620). The protective cocoon provided by confidentiality enables parties to make proposals which they may not be willing to make outside mediation. In addition, the use of confidentiality within the mediation itself, to protect the caucus, enables mediators to work with parties to create doubt and reality test in ways that would be counter-productive in a joint session.

In mediation, the legal position may reflect a documented or technical reality, however through the process of exploration and negotiation, parties may decide that the strict legal interpretation is less important to them than a shared value, belief, or interest. This ability for parties to focus on the substance rather than the form of their dispute can lead to unexpected outcomes.

This ability to focus on substance over form can make space for flexibility. This can relate to the way in which mediation is conducted, for example, who will be present, how technology will be used, what documents and information the parties will rely on to make determinations and many more procedural decisions.

Flexibility and creativity can also be seen in the outcomes that parties co-create. Whilst other processes tend to focus on the substantive outcomes alone, mediation as an interest-based process considers the other needs of the parties. Intangible, even unexpressed needs can be just as important to the parties as the substantive outcomes.

Creativity can obviously extend beyond the unexpected to the use of more novel structures for arrangements. I remember working with a couple who were very child-focused and who were struggling with how to manage Christmas for their children who ranged in age from 4 to 12. They decided that they would spend Christmas Day together as a family, until the youngest child no longer believed in Santa Claus. The solicitor in me struggled with the uncertainty and potential for abuse of this “belief” as a criterion. However, as a family mediator, after reality testing, I supported these parents to put in place these arrangements which reflected their values, rather than objective standards. The discussion in mediation, empowered the parties to come up with something that was a unique solution to their circumstances.

The power of flexibility and creativity can be unlocked through the reliance on interest-based negotiation which informs mediation practice. The Satisfaction Triangle is like a metaphor for mediation. It is an invaluable tool in training and can often assist parties to develop a deeper understanding of why their negotiations are at an impasse and how to break it. The deep dive required to harvest these needs, fears and concerns is unique to mediation.

All the foundations and pillars come together in service of this goal to respond to the Satisfaction Triangle and to deliver a durable solution. As a mediator, success for the parties means not a settlement, but a durable solution. This means an agreement which can last and endure, that will meet enough of the parties’ needs to secure adherence. There is no point in rushing to an executed agreement, if the reality is that one side will spend all their time finding new and exciting ways to undermine the agreement.

If these are the principles and foundations of mediation, how does equity compare?

Equity’s Foundations

Main suggests that there are at least three definitions of equity¹⁴:

- The first being in the sense that people have a sense of what is moral, just, correct or fair. This echoes the belief that the exercise of equity can lead to catharsis, as the proper relations between the parties are re-established.
- He argues there is a second meaning which is akin to ‘natural law’. Equity shines a light on how the law should perform.
- The third is the reference to the ‘system of jurisprudence originally administered by the High Court of Chancery in England’. This system sought to apply the king’s conscience to the diverse situations presented to the Chancellor as the keeper of that conscience.

As noted by Brendan Brown:

The early ecclesiastical Chancellors thought that it was consistent with belief in a revealed Word which stressed, among other things, a golden rule, for them to translate moral and ethical rights into juridical rights.¹⁵

14. Main, *supra* note 3

15. Brendan F. Brown, *Lord Hardwicke and the Science of Trust Law*, 11 NOTRE DAME L. REV. 319, 321 at footnote 10 (1935-1936)



As Chancellors acted *in personam*, they were able to offer relief according to the application of conscience, the golden rule, and the principles of natural justice free from the strictures of the common law. Equity's origins then were as embodied in the Chancellor as the keeper of the king's conscience. This meant that equity could address needs which were beyond the scope of the common law. As expressed by Henry Smith, 'equity addresses a special class of problems – those of high complexity and uncertainty, which lack foreseeability'¹⁶. In the historical context, equity provided a mechanism to ensure that trustees did not act in contravention of their duties. As crusaders headed off to fight in the Holy Land, they sought security for their lands and heirs. Chancery required trustees to do their duty rather than line their own pockets.

As the equitable jurisdiction evolved, it was seen as a counterbalance to the potential injustice of the common law. In Hong Kong, we can proudly point to our innovative approach of combining the courts of common law and equity in the Supreme Court Ordinance 1844, in which the Supreme Court was ordained to be a Court of Equity¹⁷, some 29 years before the English courts would introduce the Judicature Acts 1873 and 1875. By this time there existed a well-established body of equitable principles and maxims. As Ashburner described it, equity is a 'cathartic jurisdiction', if someone will benefit from retaining property which:

...it is against conscience for him to retain, his conscience will be oppressed; and the court out of tenderness for his conscience, will deprive him of it, notwithstanding his resistance...¹⁸

If the focus in the 1930s was on the tender concern for unburdening the conscience of a party, the focus in modern equity is on preventing unconscionability. The court will step in to prevent an unconscionable outcome, whether that is with an order for specific performance or injunctive relief or other appropriate remedy.

Equity and Mediation: Differences

There are obviously fundamental differences between equity and mediation. Equity is a jurisdiction and is administered by judges. There is no voluntariness about equity, one is either taken to court or not, you cannot decide to opt out. At the end of the day, your outcome will be a judgment as opposed to a mediated agreement.

The equitable jurisdiction is exercised through the courts, and thus there is no opportunity to negotiate your own outcome as the judge will simply tell you the answer. Nor is there a chance to determine your own process choices and management. Indeed, if we consider Ashburner, you may not even have a choice as to the management of your own conscience, as the court will direct how it should have been exercised. Your resistance to being unoppressed may be noted, but it is not determinative.

16. Henry E. Smith, *Equity as Meta-Law*, 130 YALE LAW JOURNAL, 1050 (2021)

17. Supreme Court Ordinance, s. 14, (1844) (H.K.)

18. Browne, *supra* note 2



Virgo has highlighted the different types of conscience applied historically from: that of the Chancellor; to a subjective view of the defendant's conscience (ie, what he actually knew); to a principled view of conscience as a matter of judicial opinion, and lastly to a rhetorical conscience, in which the judge treats conscience as a rhetorical device to enable her to obtain a particular result¹⁹. Virgo further suggests that modern equity reflects a battle between one end of the spectrum in which conscience has no role and the other in which it is a smokescreen to enable judges to achieve desired results²⁰.

Conversely in mediation, each party is guided by their own conscience. If a party's conscience is not engaged, then they are entitled to continue being oppressed. It is not within the power of the mediator or the other party to compel their conversion. Sometimes when working with parties, they will be horrified that the conscience of the other party has not been engaged. They will seek to influence the other party to express remorse, or shame, or guilt for their actions and behaviour. I have seen few apologies in mediation and fewer parties who are impacted by their regret to make more generous proposals. Whether married or not, the parties generally both feel that they 'endured' the relationship, as a party explained this to me last month. As both have 'endured' the relationship, then often neither sees themselves as the villain but as the victim.

One of the challenges of defining the mercurial nature of equity is whether it is a process or a system²¹, meta-law²² or as Lord Millett described it a 'state of mind'²³. Equity may continue to defy categorisation; however, mediation is definitively a process. Any mediator who has mediated their first case, comes to understand very quickly the reason for the love of process so often described by practitioners. The process is the *raison d'être* for parties coming to mediation. Process both braces and supports mediators.

Equity and Mediation: Echoes

With all of these clear differences, where might equity and mediation chime? Nolan-Haley saw the potential for mediation to be equity's heir and has suggested that ADR:

*...processes would give parties the opportunity to create their own mosaic of justice, personalised and individualised justice, not unlike the fairness remedies that equity courts had historically provided.*²⁴

Another way in which mediation and equity may be more alike than anticipated, is that the concerns raised for their well-being and continued existence are strangely similar. Roscoe Pound expressed concerns about equity's loss of core values in 1905 and concerns remain about equity's loss of vitality²⁵. In a similar way, Nolan-Haley has argued that Pound's concerns for equity resonate with concerns about ADR with its unhealthy prioritisation of settlement without adjudication²⁶. And yet both equity and mediation continue to flourish and find new forms of expression in the 21st century.

I would suggest that there are fundamental ways in which equity and mediation are brothers-in-arms. One way which is specific to Hong Kong, is that in our jurisdiction,

19. Graham Virgo, *F.W. Guest Memorial Lecture 2016 Conscience in Equity: A New Utopia* 15, 6 OTAGO L. REV. 1 (2017)

20. *Id.*

21. Philip A. Ryan, *Equity: System or Process*, 45 GEO. L. J. 213 (1956)

22. Smith, *supra* note 16

23. The Rt Hon Lord Millett PC QC, *The Common Lawyer and the Equity Practitioner*, 6 UK SUP. CT. YEARBOOK 175 (2018)

24. Jacqueline Nolan-Haley, *Does ADR's "Access to Justice" Come at the Expense of Meaningful Consent?* 33 (3) OHIO ST. J. DISP. RES. 373, 375 (2018)

25. Roscoe Pound, *The Decadence of Equity*, 5(1) COLUM. L. REV. 20 (1905)

26. Nolan-Haley, *supra* note 24



mediated family agreements are through the magic of consent summonses turned into consent orders. Therefore, unlike for most mediated solutions, in Hong Kong, the application of equity and the usage of family mediation will get you to the same result, a court order.

Sternlight suggests that parties are looking for three benefits from a dispute resolution mechanism:

- Substantive justice by delivering a substantively fair or just result
- Procedural justice by meeting the procedural justice criteria including voice and dignity, and
- A system that enables them to meet any emotional/psychological goals²⁷

If this is what parties seek, regardless of the mechanism, how can we assess if mediation can provide what equity can provide, and vice versa? One way to assist with illuminating these goals and to consider how mediation can provide equity is by reference to the Satisfaction Triangle. Just as in mediation, we seek to uncover the procedural, emotional/psychological and substantive needs of the parties, so does equity seek to consider these needs, in its own way and for its own purposes.

The focus is certainly different and designed to achieve a different end as between equity and mediation. In equity, understanding these elements helps to establish whether the equitable jurisdiction needs to step in to prevent unconscionability; whereas in mediation, this focus is the rationale for the process to assist parties to achieve a durable solution.

Considering, each in turn, in terms of substantive interests, equity and mediation both seek to meet these needs. Equity seeks to provide substantive outcomes through equitable remedies and mediation seeks to meet substantive interests through durable solutions.

In order to provide substantive justice, equity relies upon its maxims, including the maxim, '*equity looks at the substance not the form*'. From my perspective, this is directly transferable to mediation. Just as equity will seek to achieve justice even if technicalities might suggest an alternative outcome, in mediation, substance is always more important than form. In mediation, rather than stick to technicalities, mediators work with the parties to explore all the relevant factors, even if some may be irrelevant in the courts.

I remember working with a couple who had a prenuptial agreement both viewed as legally binding. During mediation, it became clear to both parties that the financial impact of following the prenuptial agreement would be significantly detrimental to the wife. In a separate session, the husband expressed to me that in his view the prenuptial agreement was preventing him from making what he considered to be a 'fair' arrangement. They both decided to ignore parts of their prenuptial agreement in framing their financial arrangements to reflect their shared values and each party's interests. To consider this through an equitable lens, the husband's conscience was not willing to rely on his legal rights as contained in the prenuptial agreement.

27. Jean Sternlight, *ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 NEV. L.J. 289 (2002-2003)



To refer to another maxim, just as in mediation, we seek to put in place a durable solution, so too '*equity does not require an idle gesture*'. If a remedy would be useless, vain, or futile then equity will not grant the remedy. In mediation, there is no utility in putting into place agreements which will not be adhered to, hence the practice of reality testing agreements. In addition, parties will reject agreements which they know to be futile or useless. In mediation, we try to ensure that agreements are practicable and meaningful by stress-testing them and by preparing for contingencies.

Overall, the equitable jurisdiction is one which has prized flexibility and creativity. By applying the conscience of the court, equity has been used to achieve such disparate goals as guide US lawmakers in creating their federal copyright legislation, the creation of new equitable injunctive remedies eg, Anton Piller orders, Marevas, etc, or even decide the fate of frozen embryos.

Mediation remains a highly creative process. The ability to find solutions is limited only by the creativity of the parties. In Hong Kong in the family context, this is somewhat circumscribed as parties will need to obtain a consent order. Therefore, a mediated solution must be capable of being reduced to orders and undertakings and then being approved by a judge.

If we then consider procedural needs, I think in various ways there are significant similarities between equity and mediation. For example, looking again at an equitable maxim, "*he who seeks equity must do equity*" is easily applicable in the mediation context. If a party seeks to mediate, they must 'do mediation'. If a party refuses to provide disclosure or to negotiate in good faith, or to engage in the necessary discussions, it is a certainty that they will not achieve their goals in mediation. Each party holds the other accountable for their actions in the mediation, and parties are quick to react to any perceived bad faith actions, up to and including termination of the mediation process.

As a court-administered process, equity has the benefit of meeting procedural justice needs under the court umbrella. Mediation and equity each focus on procedural justice, albeit through different modes. As noted previously, in Hong Kong, the family mediation process is designed to provide procedural justice, and this is enhanced by the additional benefit that mediated agreements must be approved by the Courts.

In the maxim, "*equity will not assist a volunteer*", a volunteer is someone who has not given consideration for a bargain. Family mediation echoes this principle in the reality of the negotiation process. A party who does not come to the table ready to negotiate will find that the other party is seldom prepared to negotiate against themselves. I have had parties who struggle with negotiation and who find constructing counter-proposals baffling. As a mediator, I often reiterate that it is always acceptable to say no to a proposal, and that it is more powerful to say 'I don't agree, but I could agree if you could change x, y, z'. In mediation, we remind parties that you have "to give, to get" which could well be the equivalent maxim in mediation to the equitable maxim.

Lastly, the most amorphous and least technical need is emotional/psychological needs. How could equity be seen to be concerned with emotional/psychological needs? Smith argues that criticising equity for being weak due to arbitrariness is incorrect, and that instead we need to appreciate that 'equity is part of the law's response to the world's inevitable complexity'²⁸. In this sense, equity and mediation are in lockstep. Both accept that people and life lead to subtleties, outcomes, and inter-relationships for which the common law cannot always provide a just answer.

In the *Earl of Oxford's Case*, Lord Ellesmere stated that:

The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.²⁹

28. Smith, *supra* note 16

29. Lord Ellesmere, *Earl of Oxford's Case* (1615) (21 Eng. Rep. 485 (Ch.))

Nothing has changed. Our actions have become even more diverse and remain infinite. Emotional/psychological needs relate to how parties feel about the conflict, and their experience and interactions. This focus on the organic and specific inter-relationships between the parties can be seen as a way of addressing the emotional/psychological needs of the parties.

For example, in *Cooke v Head*, a case of cohabitants, Lord Denning noted that Ms Cooke ‘filled a wheelbarrow with rubble and hard core... she worked the cement mixer which was out of order and difficult to work’ and in doing ‘much more than most women’ earned an increased share of the proceeds of sale of the bungalow³⁰. Whilst Ms Cooke’s direct financial contribution would have entitled her to a 1/12th share of the proceeds, Lord Denning’s reliance on the reality of their relationship and each parties’ views of their contributions enabled him to find a constructive trust and she received 1/3rd share.

Only a few years later in *Eves v Eves*, Lord Denning was able to find that a woman who had made neither a financial contribution, nor done more than most women, was still entitled to equitable relief, as he put it:

...a few years ago...equity would not have helped her. But things have altered now. Equity is not past the age of child bearing. One of her latest progeny is a constructive trust of a new model. Lord Diplock brought it into the world and we have nourished it.³¹

Thus, equity found a way to address emotional/psychological interests, as Ms Eves explained “we were husband and wife, and I did trust him”. This is similar to what we would do in mediation. We would take note of the legal ownership of a property, and then explore, what did everyone understand around the purchase, the financing, the use, and maintenance of the property? This could well lead to an emotional argument around an understanding, or a belief that was encouraged or not by one party in the other. Or it could be that regardless of legal rights, one party has an emotional attachment to a property, which if addressed could contribute to an overall settlement. What is key here is the similar focus of equity and mediation on the personal nature of the relationship being considered, as understood, and demonstrated by the parties.

On the most basic level, equity seeks to put right what has gone wrong between the parties, equity finds ways to make what seems unjust and unfair, fair. Fairness may exist as an objective standard, however, for parties in conflict, it is also a deeply felt subjective reality. Through exploration, mediators work with parties to increase their understanding of each person’s perspective on what is important and what would be seen as an acceptable solution ie, what feels fair. In the same way, equity will examine the inter-relationship between the parties to prevent unfair outcomes.

Mediation’s ‘Equitable’ Remedies

What remedies can mediation envisage which not even the most creative equitable jurisdiction can deliver? There have been suggestions that mediation appears to extend equity by placing decision-making in the hands of participants³². This idea has been echoed by Main who distinguishes mediation from equity as the mediator relies not on their own conscience, but the conscience of the parties³³. This hyper-focus on individualised justice is what allows mediation to offer parties different remedial opportunities to equity.

From my perspective, the areas of qualitative difference align around five themes, being: voice, empowerment, multiple perspectives, a focus on harvesting interests and future focus. Each of these benefits is distinct from that offered by equity and spotlights mediation’s party-centric nature. Each may also be seen as a type of remedy, albeit they are typically seen as benefits deriving from the mediation process.

In considering the following elements as ‘equitable mediation remedies’ I am referring to the first type of equity, as defined by Main, being that which is seen as moral, just or fair³⁴. I hasten to add that just as a party may resist the unburdening of their conscience by equity, a party may resist a moral, just, or fair arrangement in mediation.

Voice

Mediation is unique in providing parties with the opportunity to express themselves as they choose, free from an advocate’s eloquence or cross-examination. This ability to use one’s own words is a key part of meeting the parties’ procedural needs. This use of voice is facilitated by enabling direct communication with the other party, for example, asking your own questions directly of the other party. The immediacy and intimacy of being able to ask questions and respond with information across the table can satisfy needs that other processes ignore. For some parties this will be the only chance for direct communication.

30. The Rt Hon Lord Denning MR, *Cooke v Head* [1972] 2 All ER 38 (CA)

31. The Rt Hon Lord Denning MR, *Eves v Eves* [1975] 3 All ER 768 (CA)

32. Richard Saudry et al., *Inside the mediation room – efficiency, voice and equity in workplace mediation*, 29 (6) INT’L. J. HUM. RESOURCES MGMT. 1157, 1160 (2018)

33. Main, *supra* note 3

34. Main, *supra* note 3

In family mediation, we often go through, in what can be excruciating detail, financial disclosure. I recall working in many cases where the concerns about hidden assets or failed disclosure were assuaged as the parties sat at the table and discussed statements and documents. Recently I was working with a couple where the financially disempowered and anxious spouse was able to go almost line by line through bank statements to determine the nature of payments in and out. This would not have been entertained in court; however, the process allowed the anxious spouse to have their specific questions answered and to agree to a resolution. More importantly, it enabled her to feel empowered, that she had a right to the information, that she had a right to understand it and that she had an opportunity to communicate directly to the other party how worried she was about some of the transactions. This intangible benefit can enable people to move on and find agreement and is unavailable within the court process.

In an extreme example, I worked with a couple whose divorce had been finalised twenty years ago and who had not communicated since then. The wife was seeking a variation of the court-ordered spousal maintenance and the parties came together for their mediation. It was an extraordinary session, to say the least. However, even in this case, the parties were able to communicate and find a solution. Voice provided them with a remedy twenty years later to end their relationship.

Communication during mediation can also perform an important part of closure as the relationship ends. I am keenly aware of this fact when I work with parties who have no children and will have no contact going forward. Sometimes the mediation session is the last time they will be in communication with each other. It can be an intensely emotional experience for the parties, and I have seen people seize this last chance to speak to the other person about their shared experience. Generally, this will consist of an acknowledgment of the positives in the relationship, their shared history, and some expression of regret for this unanticipated ending. These last communications can be an important part of ritualising the end of the relationship and enabling the parties to process respectful closure.

Voice can provide many different positives and directly relates to empowerment.

Empowerment

Empowerment of the parties is not a goal of any other process. Mediators have a philosophical belief that people have the resources within themselves to solve their own problems. We believe that the people who are living with the conflict have the best information to be able to find the most appropriate solutions. This belief leads to process choices in mediation which focus on enabling the parties to share and shift perspectives, to explore information and options, and to participate in a collaborative process of finding solutions.

As mediators we work to model and explore modes of communication and problem solving to equip parties to resolve their own disputes in future. I am not aware that any other process looks to equip parties with problem solving skills for their next conflict, other than in the negative sense of learning where their legal risks lie. Mediation actively seeks to enhance the parties' ability to communicate and negotiate the next time they are in a dispute.

In the ideal world, mediation gives parties skills and tools they may have been unaware of. I recently had a couple return to discuss a newly planned relocation following their original separation mediation in 2018. At the time in 2018, one party was engulfed in rage and was almost incapable of communicating constructively. We included communication guidelines in their co-parenting agreement which apparently were working for the most part. At this recent session, I was struck by the difference from the earlier sessions.

The husband returned and although he was aggravated by the statements of his former wife, he was able to listen, seek clarification and express his own perspective. Partly, I think he was able to do so because time heals, and his rage had dissipated. However, I also noticed that he was now able to construct options and listen to a different perspective in a new way. He used the co-parenting communication strategies they had agreed to, during the original mediation, perhaps subconsciously. Following the co-parenting guidelines had improved his ability to communicate and negotiate. This remedial benefit, to equip people to manage their next dispute, with tools from the current one is a benefit that only mediation seeks to provide.

In addition, the foundation of self-determination is realised through the remedy of empowerment. Joseph Stulberg has expressed the view that empowerment through exercising choice is not simply symbolic but is critical to enable someone to be themselves³⁵. In mediation, this goal of empowering parties to make their own decisions encompasses taking charge for their own outcomes. It may be that for some parties, it is years since they have been able to make choices based on their own individual values and beliefs. Importantly, Stulberg comments that self-expression also entails a person being responsible for outcomes³⁶. Being accountable for our triumphs and our failures is part of individuation.

I have worked with many couples where they were high school sweethearts and then face the challenge of separating in their 50s or 60s. For parties whose entire adult existence has been as part of a couple, finding ways to self-realise and to express themselves can be

35. Joseph P. Stulberg, *Mediation and Justice: What Standards Govern?* 6(2) CARDOZO J. DISP. RESOL. 213, 229 (2005)

36. *Id.*

challenging but rewarding. I remember speaking with a party who had been in relationship since secondary school and was now divorcing as a 62-year-old. Rather than focus on the uncertainty and difficulties, she had worked with a counsellor and was relishing making her own decisions and finding ways to support her self-expression; her own values and her voice. The mediation became a continuation of that journey to re-establish herself as an individuated adult and to claim her own space. Her confidence in her ability to navigate her future grew as she was able to negotiate her arrangements.

Multiple perspectives

In civil cases, the past and the assignment or apportionment of blame are critical. Even for equity, *'he who comes must come with clean hands'*. The examination of the behaviour, facts and context of the past are all important. Whilst this may require understanding the past inter-relationship, the goal for equity in doing so is, to prevent unconscionability, to make a value judgment as to the appropriateness of the behaviour.

In mediation, we accept a world where multiple perspectives exist concurrently. It is almost as if we have accepted the multiverse as a reality. Rather than seek to establish the legitimacy or correctness, in mediation, all of the perspectives of the past exist simultaneously. This can be seen as mediation's adoption of the post-modern view of truth as 'provisional and layered' which rejects binary thinking³⁷. As a family mediator, I have lost count of the times that it seems as if parties are describing different relationships during their respective intakes. Recollections of events can seem diametrically opposed to reality.

The parties' perspectives of the past inform the mediation process and the parties' responses to each other, but they do not overwhelm it. In a way this can be liberating for parties. The work of meeting the evidential burden in other processes can be all-consuming. Although this is how the past is clarified for legal purposes, it does not help to illuminate how the parties will move forward. In mediation, we encourage parties to draw the metaphorical line in the sand and focus their energy on moving forward.

Being able to release the need to be 'right' and to prove this to a judge can enable a party to refocus their mental energy and resources on their future. Unlike court processes, mediation has no need to determine who is right, or in what proportion blame should be assigned. Jonathan Hyman suggests that the parties in mediation can consider justice in the absence of the 'right' answer as the goal is to consider perspectives only as a necessary step to finding agreed solutions³⁸.

As a litigator in the last century, I recall observing the stress experienced by my clients who became so focused on the 'rightness' of their story that their own needs were sublimated to this crusade. In family mediation, I often work with parties whose focus on the battle means they have forgotten the rationales for the fight. Mediators model both conceptual flexibility in terms of perspectives and focus on the priorities self-identified by each party.

To counter this 'fog of war', Robert Emery suggests that parties time travel – in five, ten or even fifteen years, what will be important?³⁹ He uses the example of spreadsheets to prove what 50/50 time with a child should look like. In 5, 10 or 15 years, he asks, will your child remember that you helped them learn how to swim or will they remember your carefully crafted proof of what equal time should be?⁴⁰ In mediation, if parties can give up on being right, then we can work on what is achievable, and for their children what is in their best interests. This benefit is truly remedial for parties – it can free them from their focus on what is only a means to an end. Specifically, I have seen this enable parties to reconnect with what is important to them, how will they feel at the end? What will their lives and those of their children look like?

Does this fight over who did what when move you closer to achieving your goals in mediation or not? This can mean needing to let go of seeking vindication or punishment. Whilst they certainly have their place and value, in mediation we preference helping parties to focus on achieving their goals and moving forward. This requires not acceptance of the other party's perspective, just acceptance of the fact that they have a different perspective.

Harvesting Interests of the parties

One of the foundational texts for mediation is the principled negotiation technique outlined by Fisher and Ury⁴¹. Although it has received its fair share of criticism over the years and has been revised, the central tenet of interest-based negotiations remains intact. Unlike rights-based processes, litigation, arbitration and even equity, the focus is on what are the underlying needs, fears and concerns which drive the parties' positions, and which can provide options for resolution.

37. Ellen Waldman et al., *Mediators and Substantive Justice: a View from Rawl's Original Position*, 30(3) OHIO ST. J. DISP. RESOL. 391 (2016)

38. Jonathan Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6(1) CARDOZO J. OF CONFLICT RESOL. 19, 52 (2005)

39. ROBERT EMERY, *TWO HOMES, ONE CHILDHOOD* 296 (1st ed. 2016)

40. *Id.*

41. ROGER FISHER ET AL., *GETTING TO YES*, (2^d ed. 2003)



In equity, the court seeks to find remedies which will provide redress beyond what the common law can provide. Equity does explore the parties' perspectives; however, this is merely a means to an end to discern where the unconscionability lies. Therefore, the focus for this examination in equity is to address the conscience, which may be related to interests, but is not synonymous with them.

In mediation, the exploration and harvesting of parties' needs is an integral part of the process. As anyone who has attended mediation training knows, we need to mine the iceberg, to mix metaphors. At Pepperdine we used to say – go below the line to find the interests beneath the positions, or as my mediation professor, Jim Craven used to say, "harvest the needs".

How does this provide a remedy to parties? Often when I work with clients, they are laser focused on their positions ie, the tangible, quantifiable outcomes, which they want. However, the needs, fears and concerns which underlie these positions are often hidden from them. These intangible factors may relate to deep-seated fears from childhood, or more immediate concerns based on the impending future. By helping parties to understand and clarify their needs, we are able in mediation to create more and different options. Menkel-Meadow has even suggested that mediation's focus on uncovering needs and interests doesn't just create the opportunity to discover more options but to create better quality solutions⁴².

Helping each party to understand why a position is important to them and to the other party can illuminate other possibilities. I worked with a couple who had an old run-down summer house which they went to each long holiday. During the mediation, the wife insisted on retaining the property in her sole name. The husband refused point-blank. In exploring the interests underlying these positions, it became clear that the parties had failed to understand each person's interests. The discussion quickly escalated as each reiterated their positions. In separate meetings, the interests became clear. The wife believed that having the house would mean that the children would continue to spend summers with her, whereas the husband who had managed the upkeep was concerned that there were insufficient financial resources to maintain the house and provide each with accommodation. By harvesting these interests, we were able to focus on what each saw as their priority, the agreed to have one more summer with the children and then to jointly sell the house.

Conflict can create obstacles to seeing things clearly. This focus on harvesting interests graces the parties with the remedy of clarity and opportunity.

Future-focus

Lastly, the past and blame are a closed book in mediation. The mediation process honours those who choose to draw that line in the sand and find answers to the questions that will frame their future. Acknowledging the past and context is important, but this provides the springboard for an inquiry into how life will be lived? How rights and obligations will be organised? Acknowledging that the past has not worked, and that the planned future has vanished is not easy and mediators may spend significant time working with the parties to enable this shift in orientation.

How does mediation manage to maintain this laser focus on the future? Even when the parties, as they frequently do, would prefer to remain mired in recitations of the wrongs of the past? I think one way is that mediators genuinely believe in the multiverse. Our training in the psychological and cognitive processes enveloping parties in conflict, enables us to embrace the reality of multiple perspectives.

42. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: the Structure of Problem Solving*, 31 UCLA L. REV. 754, 760 (1984)

This acceptance of multiple perspectives means that we can engage with the future without being married to the need to choose a past. If all perspectives about the past are valid then in a sense, they become less important than what happens next. To find pathways out of the conflict, to enable parties to move on with their lives, to experience a world where conflict is in their past, is a goal for all mediators.

Lon Fuller expressed the view that a central quality of mediation is

..its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship...This quality of mediation becomes most visible when the proper function of the mediator turns out to be...helping them to free themselves from the encumbrances of rules and of accepting, instead, a relationship ... that will enable them to meet shared contingencies...⁴³

When working with co-parents, we enable warring adults to accept the reality of the end of their adult, intimate relationship, and the continuing nature of their co-parenting relationship. Family mediators work with co-parents to create guidelines and contingencies that can shape their new paradigm of co-parenting.

It is especially true for co-parents in family mediation, that much of the point scoring and evaluation will be forgotten at the end of the day. I recall one parent who counted the hours a flight was delayed as their children sat on the tarmac flying back and forth between their parents to maintain a court-ordered access schedule. The argument became which parent was to bear the risk of delayed flights? The reality that their children were flying back and forth and that their children were the ones spending hours on the plane was something that we were finally able to discuss in mediation.

Obsessing over quantity, be it hours, overnights, or delayed flights, as opposed to ensuring the best interactions with a child, is a trap that some parents fall into. It is why family mediators work with co-parents to visualise a future where their child is an adult, or graduating, or getting married. Will it matter then how many overnights you had in a month? Or instead, will it matter that your child felt loved and supported? Future-focus enables parties to move beyond the petty time-counting and envisage a future where both can attend a child's graduation or special event.

As a remedy, future-focus gives parties the gift of a future, free from the conflictual present. I have seen several parties use the mediation as their opportunity to design a future for themselves. This can lead to an acknowledgement that the future they can create for themselves may meet their needs more than the planned future they have lost.

Conclusion

To conclude, equity's acceptance that people continue to find diverse and infinite ways to create relationships with each other, is neatly reflected in mediation's implicit understanding that life is more complex than any one person's perspective. Equity's quest to understand these inter-relationships and to deliver justice when the common law will not, finds its corollary in mediation's attempt to give parties the opportunity to craft solutions that are meaningful to them.

It seems as if equity and mediation continue to display a vigorous and sustained belief in their relevance, despite the naysayers. Their critics may label both equity and mediation as roguish things; however, they survive and thrive as they respond to the needs of our uncertain and unforeseeable inter-relationships.

Beyond that mediation provides what, to borrow from Lord Denning, we might call 'new model' remedies: voice, empowerment, harvesting of interests, multiple perspectives, and future-focus. If the court of equity had remained separate, then perhaps it would have created these remedies itself. In the sense that mediation and equity consider the substantive, procedural and emotional/psychological needs of the parties, mediation can be seen as equity's heir. In the 1970's, Mnookin and Kornhauser suggested that divorce mediation was bargaining in the shadow of the law, perhaps it is just as apt to say that modern mediation is bargaining in the shadow of equity⁴⁴ However, if equity does decide to sink into decadence, as foreshadowed by Roscoe Pound⁴⁵, then mediation stands ready to provide parties with the opportunity to apply their own conscience to find solutions.

43. Lon L. Fuller, *Mediation-Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971)

44. Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979)

45. Pound, *supra* note 25



For a full list of our global offices visit [HERBERTSMITHFREEHILLS.COM](https://www.herbertsmithfreehills.com)