

2017

The Potential of Procedural Justice in Mediation: A Study into Mediators Understandings

Kathy Douglas
RMIT University

Jennifer Hurley
RMIT University

Follow this and additional works at: <http://epublications.bond.edu.au/blr>

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

The Potential of Procedural Justice in Mediation: A Study into Mediators Understandings

Abstract

Therapeutic jurisprudence, mediation and procedural justice are closely linked non-adversarial perspectives of law. Therapeutic jurisprudence aims to use the law to enhance individuals' wellbeing. Mediation provides benefits through its focus on the empowerment of parties. Procedural justice explains why disputants who experience validation and respect in a decision-making process are more likely to accept the outcome of a process even if they do not agree with the result. As a key platform of therapeutic jurisprudence, the benefits of procedural justice are accepted in the United States. However, the Australian legal system is yet to recognise the potential of procedural justice to assist courts to provide court users with an improved experience of the justice system. Procedural justice can occur in mediation but many mediators do not understand the potential of this kind of experience for parties. In a qualitative study exploring the practices of mediators conducted at the Victorian Civil and Administrative Tribunal, data analysis showed that mediators did not have a strong grasp of the concept of procedural justice. However, after being given a definition of procedural justice, the majority of mediators did endorse the theory and showed intuitive insights about the needs of parties to be heard and validated in a respectful, even handed process.

Keywords

neutrality, trust, respect, own story

The Potential of Procedural Justice in Mediation: A Study into Mediators Understandings

KATHY DOUGLAS* AND JENNIFER HURLEY**

Abstract

Therapeutic jurisprudence, mediation and procedural justice are closely linked non-adversarial perspectives of law. Therapeutic jurisprudence aims to use the law to enhance individuals' wellbeing. Mediation provides benefits through its focus on the empowerment of parties. Procedural justice explains why disputants who experience validation and respect in a decision-making process are more likely to accept the outcome of a process even if they do not agree with the result. As a key platform of therapeutic jurisprudence, the benefits of procedural justice are accepted in the United States. However, the Australian legal system is yet to recognise the potential of procedural justice to assist courts to provide court users with an improved experience of the justice system. Procedural justice can occur in mediation but many mediators do not understand the potential of this kind of experience for parties. In a qualitative study exploring the practices of mediators conducted at the Victorian Civil and Administrative Tribunal, data analysis showed that mediators did not have a strong grasp of the concept of procedural justice. However, after being given a definition of procedural justice, the majority of mediators did endorse the theory and showed intuitive insights about the needs of parties to be heard and validated in a respectful, even handed process.

I Introduction

The growth in alternative or appropriate dispute resolution ('ADR') over the last three decades has brought some major changes to the Australian legal system.¹ ADR, particularly the process of mediation, is regarded as contributing to increased participation and satisfaction in the justice system.² In recognition of these benefits for disputants, referral to ADR processes is provided in courts and tribunals in all Australian jurisdictions.³

* BA LLM (Monash), Dip Ed (Melbourne), PhD (RMIT), Associate Professor (RMIT University). The authors acknowledge the contribution of Clare Coburn, Jude Courtin and Becky Batagol to this article. The research that is discussed in this article was primarily funded by the Australasian Institute for Judicial Administration.

** BBus (RMIT), LLB (Hons) LLM (La Trobe), PhD Candidate (RMIT University).

¹ Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 5th ed, 2016) 17–23.

² *Ibid* 23–26.

³ *Ibid*.

With overarching values of justice, party autonomy and civil society,⁴ ADR is at the forefront of non-adversarial practices of law and is closely linked to two other non-adversarial paradigms:⁵ therapeutic jurisprudence ('TJ') and procedural justice ('PJ').⁶ These three approaches to law value a concept of justice that provides individual participation and satisfaction, without displacing the pursuit of procedural fairness and substantive justice.⁷

While the use of court-connected ADR processes such as mediation is likely to continue to grow,⁸ it is not certain that the values and goals of mediation will be progressed by court culture.⁹ The benefits of court-connected mediation such as that offered at the Victorian Civil and Administrative Tribunal ('VCAT') are said to be improved efficiency, reduced costs and enhanced outcome control for litigants.¹⁰ One key goal of mediation is self-determination, where parties negotiate to reach consensus rather than have a court decide an outcome for a dispute.¹¹ However, where court-connected mediation focuses on efficiency, self-determination may be undermined due to the process being dominated by lawyers with reduced opportunity for parties to engage.¹² To mitigate this risk, mediators can improve their practice through an understanding of TJ and PJ. TJ provides the philosophical underpinnings for an improved justice system through its concern with how law impacts on people's mental, emotional and physical wellbeing.¹³ Arguably, PJ is one of a number of theories that can explain how this might be done in practice. TJ is a philosophy of law that borrows from disciplines such as psychology and the social sciences, with the aim of developing a legal system that will improve the wellbeing of individuals. The focus of TJ is on reducing the negative aspects of the adversarial legal system.¹⁴ TJ is concerned with developing legal actors, principles and practices that value both legal and human concerns in solving legal problems with the aim of bringing about

⁴ Ibid 30–2; Laurence Boule and Rachael Field, *Australian Dispute Resolution: Law and Practice* (Lexis Nexis Butterworths, 2017) 125.

⁵ Michael King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) 95.

⁶ Ibid 27–9, 111–4.

⁷ Ibid; Boule and Field, above n 4, 126–39.

⁸ For example, VCAT has a strategic goal to expand its use of ADR: 'VCAT 2015-16: Annual Report' (Annual Report, Victorian Civil & Administrative Tribunal, 2016) 21.

⁹ Olivia Rundle, 'Lawyers' Perceptions on 'What is Court-Connected Mediation for?'" (2013) 20 *International Journal of the Legal Profession* 33, 34–6.

¹⁰ Victorian Civil & Administrative Tribunal, above n 8, 21–2.

¹¹ King et al, above n 5, 99–100.

¹² See generally Nancy Welsh, 'Making Deals in Court-connected Mediation: What's Justice Got To Do With It?' (2001) 79(3) *Washington University Law Quarterly* 787.

¹³ See generally David Wexler, 'The Development of Therapeutic Jurisprudence: From Theory to Practice' (2013) 68(3) *Revista Juridica Universidad de Puerto Rico* 691.

¹⁴ Arie Freiberg, 'Non-adversarial Approaches to Criminal Justice' (2007) 16 *Journal of Judicial Administration* 205, 207–8.

positive change in individuals.¹⁵ PJ and mediation have similar therapeutic-focused elements,¹⁶ the exploration of which offers insight into how mediators might improve the quality of their practice, through providing PJ, to enhance experiences for disputants.

The growth in ADR is a recognition of the high cost of litigation and the potential of processes, such as mediation, to deal with both legal and non-legal issues more quickly and informally.¹⁷ Consistent with the ethos of TJ, ADR processes, such as mediation, show how the justice system can be changed to improve the experience of court users by providing an alternative to litigation.¹⁸ In mediation, the disputants' ongoing personal interests and concerns are recognised alongside their legal rights.¹⁹ While mediation encompasses many different approaches with different goals,²⁰ it is generally accepted to include the attempt to solve disputes using the assistance of an impartial third party.²¹ In Australia, the mediator's role is limited to managing the process by which the dispute is resolved.²² However, where efficiency is a primary goal, as can occur in the court-connected context, the mediator might adopt an advisory or evaluative role that involves intervening in the content and outcome of the mediation.²³ Whichever model is used, it is recognised that a mediator's interventions in the process can impact on the experience of the disputants as well as the content and outcome of the mediation.²⁴ It is also acknowledged that the experience for disputants is related to the role that the mediator adopts, and that elements of the mediation process can affect disputants' participation, and perceived fairness and satisfaction in the process.²⁵

¹⁵ Susan Daicoff, in the United States, uses the term 'Comprehensive Law Movement' which encompasses a range of legal approaches that are 'humanistic' in focus. These approaches include therapeutic jurisprudence, procedural justice, preventative law, creative problem solving, holistic justice, transformative mediation, restorative justice, and collaborative law, as related paradigms: Susan Daicoff, 'Law as a Healing Profession: The "Comprehensive Law Movement"' (2006) 6(1) *Pepperdine Dispute Resolution Law Journal* 1, 1–2.

¹⁶ Rebecca Hollander-Blumoff and Tom Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] (1) *Journal of Dispute Resolution* 1.

¹⁷ Sourdin, above n 1, 89–92. Regarding the place of emotion in mediation as a non-legal frame of practice, see also Kathy Douglas and Clare Coburn, 'Attitude and Response to Emotion in Dispute Resolution: The Experience of Mediators' (2014) 16(1) *Flinders Law Journal* 111.

¹⁸ King et al, above n 5, 98–100.

¹⁹ Daicoff, above n 15, 4.

²⁰ Rundle, above n 9, 34–5.

²¹ Sourdin, above n 1, 76.

²² 'National Mediation Accreditation System' (Standards, Mediator Standards Board, 1 July 2015) 2 <<https://www.msb.org.au/mediator-standards/standards>>.

²³ Boule and Field, above n 4, 268–9.

²⁴ Sourdin, above n 1, 249–50; Susan Douglas, 'Neutrality, Self-determination, Fairness and Differing Models of Mediation' (2012) 19 *James Cook University Law Review* 19, 25.

²⁵ Tania Sourdin and Nikola Balvin, 'Mediation Styles and Their Impact: Lessons from the Supreme and County Courts of Victoria Research Project' (2009) 20 *Australasian Dispute Resolution Journal* 142, 147–51; Rosemary Hunter, 'Through the Looking Glass: Clients' Perceptions and Experiences of Family Law Litigation' (2002) 16 *Australian Journal of Family Law* 1. Hensler provides a critique of party satisfaction: Deborah R Hensler, 'Suppose It's Not True: Challenging Mediation Ideology' [2002] (1) *Journal of Dispute Resolution* 81.

In 2008, a system of voluntary mediation standards was introduced through the National Mediation Accreditation System ('NMAS').²⁶ With an emphasis on the self-determination of disputants, the NMAS definition of mediation covers the many models practiced in Australia.²⁷ These models vary in focus from the process by which disputants are assisted to solve their dispute at one end of the spectrum, to the content of the decision or outcome at the other end.²⁸ In facilitative, narrative and transformative mediation, the focus is on empowering disputants in both the process and decision-making by providing them with the opportunity to voice their needs in a respectful process.²⁹ In contrast evaluative and settlement approaches are outcome-driven and focus less on the non-legal and personal needs of disputants.³⁰ For some in the mediation movement, the aim of mediation is as much about providing a supportive dispute resolution process and recognising the disputants' characteristics and ongoing personal interests as it is about protecting their legal positions and reaching a fair and mutually-agreeable decision.³¹ The facilitative model, which is the model used in Australia for most training, recognises non-legal interests but still focuses on settlement.³² The NMAS Practice Standards incorporate key elements of the facilitative model, such as maintaining impartiality and providing a process that allows party statements and interest based negotiations.³³

Although PJ has largely been discussed in the context of judges' practice in court, synergies between mediation and PJ have also been

See also Paula Baron, Lillian Corbin and Judy Gutman, 'Throwing the Babies Out with the Bathwater? — Adversarialism, ADR and the Way Forward' (2014) 40(2) *Monash University Law Review* 283; Peter Condliffe and John Zeleznikow, 'What Process Do Disputants Want? An Experiment in Disputant Preferences' (2014) 40(3) *Monash University Law Review* 305, 316–17.

²⁶ Mediator Standards Board, above n 23. The standards were updated in 2015.

²⁷ The definition of mediation provided by the NMAS is: 'Mediation is a process that promotes the self determination of participants in which participants, with the support of the mediator (a) communicate with each other, exchange information and seek understanding (b) identify, clarify and explore interests, issues and underlying needs (c) consider their alternatives (d) generate and evaluate options (e) negotiate with each other and (f) reach and make their own decisions': *Ibid* 2 n 1.

²⁸ The main models include facilitative, transformative, evaluative and narrative: Sourdin, above n 1, 77, 89–92. For detail of the transformative model, see Robert Bush and Joseph Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, 2nd ed, 2004); and for narrative mediation, see John Winslade and Gerald Monk, *Narrative Mediation* (Jossey-Bass, 2000).

²⁹ Douglas, 'Neutrality', above n 25, 30–7.

³⁰ Sourdin, above n 1, 78–86.

³¹ For discussion of the models, see Laurence Boulle, *Mediation Principles, Process, Practice*, (Lexis Nexis, 3rd ed, 2011) 44–46. For critique of court connected models, see Robert A Baruch Bush, 'Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades' (2008) 84(3) *North Dakota Law Review* 705.

³² King et al, above n 5, ch 7.

³³ For example, s 7.5 states that mediators must give participants the opportunity to speak and be heard: Mediator Standards Board, above n 23, 11, 13–14.

recognised.³⁴ The psychology of PJ explains that decision-making procedures can affect peoples' attitudes and behaviours in relation to those procedures, the resulting decisions and legal institutions more broadly.³⁵ When people perceive a decision-making process as fair, they are more likely to be satisfied with the process, comply with the decision, and acknowledge the authority of the decision-making institution, regardless of whether the outcome is in their favour or not.³⁶ PJ research reveals a set of criteria that relate to an individual's subjective perceptions of, and reactions to, the process and the outcome of that process.³⁷ Noone and Ojelabi interviewed mediators and discussed ethical concerns including the nature of justice in mediation. They found that there was mediator support for procedural justice but also substantive justice outcomes.³⁸ Hollander-Blumoff and Tyler articulate the key PJ criteria that influence peoples' perceptions of fairness in decision-making processes and argue that these criteria apply to a range of ADR processes, including mediation.³⁹ These influential criteria are: the opportunity for disputants to present their own stories; neutrality; trust; and courtesy and respect. This article explores how these predictors of subjective fairness are connected with some models of mediation to illustrate how an understanding of PJ might improve mediators' practice across a range of mediation models.

In explaining what elements of a process lead to the subjective satisfaction of disputants, PJ has much to offer the discourse on the role of the mediator and the practice of mediation. Despite the similarities between PJ and mediation, and the potential for PJ to improve mediation practice and the experiences of participants, little is known about mediators' understanding of PJ, or whether they are likely to promote the use of PJ in their practice. This article presents the findings of a qualitative study of mediators' practices in VCAT. Using Hollander-Blumoff and Tyler's PJ criteria to analyse the findings, mediators' understandings of PJ are explored and it is argued that mediators' knowledge of PJ theory has the potential to provide disputants with improved experiences of the justice system.⁴⁰ This article is set out as follows: Part II explains PJ theory, the

³⁴ Tom Tyler, 'The Psychology of Disputant Concerns in Mediation' (1987) 3(4) *Negotiation Journal* 367; Hollander-Blumoff and Tyler, above n 17, 1–15. See also Noone and Ojelabi where they link procedural justice and mediation in the context of access to justice: Mary Anne Noone and Lola Akin Ojelabi, 'Ensuring Access to Justice in Mediation within the Civil Justice System' (2014) 40(2) *Monash University Law Review* 528.

³⁵ E Allen Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Springer, 1988) 63.

³⁶ John W Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (L Erlbaum Associates, 1975); Tom Tyler, 'Procedural Justice Research' (1987) 1(1) *Social Justice Research* 41.

³⁷ Tyler, above n 36, 48.

³⁸ Noone and Ojelabi, above n 35, 540.

³⁹ Hollander-Blumoff and Tyler, above n 17, 5–6, 12–18.

⁴⁰ This criteria was chosen for this analysis as it represents consensus amongst PJ researchers as to the key elements that predict subjective fairness. Hollander-Blumoff and Tyler also place the effectiveness of PJ specifically in the context of ADR: Hollander-Blumoff and Tyler, above n 17.

connections between PJ and mediation and the potential for mediators to improve their practice through applying PJ; Part III explains the methodology used in the research; Part IV presents the findings and provides an analysis that adopts PJ elements; and Part V concludes with the recommendation that further research could reveal more about ways PJ theory might enhance mediators' practice and improve the experiences of disputants.

II Literature Review

A *Procedural Justice*

For some time, there has been growing recognition that the theory of PJ is valuable to the legal system as it provides a framework to critically engage with the satisfaction of parties.⁴¹ PJ has been studied in a broad range of decision-making processes,⁴² from those that are linked to courts, such as court-connected mediation,⁴³ to processes outside of courts, such as mediation in schools.⁴⁴ PJ provides a psychological understanding of peoples' subjective judgments about the fairness of a decision-making process. PJ research shows that being able to tell their story in full during a process and being treated with respect by a third party can sometimes be more important to people than the ultimate outcome of a legal hearing or a dispute resolution process.⁴⁵ People wish to feel heard by the authority figure of a third party when engaged in dispute resolution of some kind.⁴⁶ If a litigant believes that a process accords with PJ, they will be more likely to 'live with' the decision and thus also to carry out any court orders.⁴⁷ The increased likelihood of decision compliance where PJ is present is a result of people perceiving the process to be legitimate, and consequently the outcome to be worthy of acceptance.⁴⁸ PJ and procedural fairness are often used interchangeably in the literature to refer to both objective and subjective procedural fairness.⁴⁹ However, the theory of the psychology of PJ is distinct from the legal concept of procedural fairness that

⁴¹ Stefan Machura, 'Introduction: Procedural Justice Law and Policy' (1998) 20(1) *Law and Policy* 1; Tyler, above n 38.

⁴² Tyler, above n 38.

⁴³ Tom R Tyler, 'A Psychological Perspective on Mass Tort Claims' (1990) 53(4) *Law and Contemporary Problems* 199; Amy D Ronner, 'Songs of Validation, Voice and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles' (2002) 71 (Fall) *University of Cincinnati Law Review* 89.

⁴⁴ Noa Nelson, Dikla Shechter and Rachel Ben-Ari, 'Procedural Justice and Conflict Management at School' (2014) 30(4) *Negotiation Journal* 393.

⁴⁵ Tyler, above n 38.

⁴⁶ Tom R Tyler, 'What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22(1) *Law and Society Review* 103.

⁴⁷ *Ibid.* For a discussion of procedural justice in relation to the ADR process of restorative justice, see Tom R Tyler, 'Restorative Justice and Procedural Justice: Dealing with Rule Breaking' (2006) 62(2) *Journal of Social Issues* 307.

⁴⁸ Tyler, above n 38; Hollander-Blumoff and Tyler, above n 17, 13.

⁴⁹ Boule and Field, above n 4, 133–4.

encompasses principles and rules designed to ensure that individuals are treated fairly in decision-making processes according to objective measures.⁵⁰ PJ does not displace objective procedural fairness, but rather has a separate and complementary dimension that enhances the provision of justice to individuals.⁵¹ The use of the term ‘PJ’ in this article refers to subjective fairness as perceived by disputants.

Hollander-Blumoff and Tyler articulate four aspects of PJ that researchers have repeatedly found to be critical to people experiencing PJ in both formal, rules-based decision-making settings such as courts, and less rules-based dispute resolution procedures such as mediation.⁵² These elements explain what is required for a fair process as perceived by individuals. Firstly, people value the opportunity to present their own story.⁵³ People want control over the process that leads to decisions that affect them, and this can partly be achieved through the opportunity to voice their case.⁵⁴ Direct participation in the process is linked to the individual’s self-determination and empowerment.⁵⁵ Secondly, people value neutrality in the process. Neutrality can be fostered by an authority figure who is impartial, transparent, consistent in applying rules and even-handed in considering the views of both parties.⁵⁶ Thirdly, people want to experience trust. The presence of trust involves an authority figure who acts in good faith and listens to and validates the views of the parties.⁵⁷ Lastly, people care about how they are treated. People want to be treated by an authority figure with courtesy and respect in a process that values their dignity.⁵⁸ Additionally, people want their legal rights to be respected.⁵⁹ These four factors, that influence a person’s subjective evaluation of a decision-making process, can be linked to the aims and

⁵⁰ Justice Alan Robertson, ‘Natural Justice or Procedural Fairness’ (2016) 23(3) *Australian Journal of Administrative Law* 155. For a discussion on the distinction between subjective and objective fairness, see Lind and Tyler, above n 36, 63–76; Tyler, above n 35, 372.

⁵¹ Hollander-Blumoff and Tyler, above n 17, 5.

⁵² *Ibid.* There are many nuanced definitions of PJ that stem from Thibaut and Walker’s early articulation of PJ and reflect the variety of decision-making contexts in which PJ has been studied: Thibaut and Walker, above n 37. See, eg, Tyler, above n 38; Steven L Blader and Tom R Tyler, ‘A Four-Component Model of Procedural Justice: Defining the Meaning of a “Fair” Process’ (2003) 29(6) *Personality and Social Psychology Bulletin* 747. Nancy Welsh, Donna Stienstra and Bobbi McAdoo articulate five PJ characteristics in their research on judicial settlement conferences, a process similar to mediation: the opportunity for voice, respectful treatment, even-handed treatment or neutrality of forum, trustworthy consideration by the decision maker, and overall perception of fairness: Nancy Welsh, Donna Stienstra and Bobbi McAdoo, ‘The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions’ in Tania Sourdin and Archie Zariski (eds), *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters, 2013) 57.

⁵³ Hollander-Blumoff and Tyler, above n 17, 5.

⁵⁴ Lind and Tyler, above n 36, 9.

⁵⁵ Boule and Field, above n 4, 266.

⁵⁶ Susan Douglas, ‘Constructions of Neutrality in Mediation’ (2012) 23(2) *Australasian Dispute Resolution Journal* 80, 81–2.

⁵⁷ Hollander-Blumoff and Tyler, above n 17, 5–6.

⁵⁸ *Ibid.*; King et al, above n 5, 13–14.

⁵⁹ Hollander-Blumoff and Tyler, above n 17, 5–6.

methods of some models of mediation. These links illustrate how the promotion of PJ could improve the quality of decision-making processes and practices in other models of mediation, such as the evaluative approaches of court-connected mediation. The following discussion explores where PJ is likely to be present in mediation and identifies models of mediation that could benefit from adopting PJ practices.

B Procedural Justice in Mediation

Hollander-Blumoff and Tyler argue that some elements of PJ are important in mediation, particularly voice and courtesy and respect, while the roles of neutrality and trust in fostering perceptions of subjective fairness are less clear.⁶⁰ As part of their training, mediators are usually taught to use techniques aimed at satisfying disputants' non-legal as well as legal interests.⁶¹ However, it has been suggested that, in some Australian courts, these techniques are not always used by mediators and this inconsistency impacts on disputants' perceptions of fairness.⁶² As mediation includes a range of models that vary depending on a number of factors, including the aim of the mediation and the individual characteristics and skills of the mediator,⁶³ it is important to distinguish between the models that provide PJ and the models that could be improved to provide enhanced experiences for disputants. This is especially so given the 2015 amendments to the NMAS which have removed neutrality as part of the mediator's role, while increasing the prominence of disputant self-determination as a key goal of mediation.⁶⁴ It has been argued that these changes will require mediators across the range of mediation models to develop new understandings about their role.⁶⁵

1 Opportunity to present own story

The first key element of PJ is the opportunity for an individual to tell their story, also known as voice. Importantly, voice can contribute to an empowering mediation experience for the disputants.⁶⁶ The concept of voice in both mediation and PJ requires that each disputant's story be heard and validated.⁶⁷ This requires the opportunity to speak without interruption and an authority figure who listens with genuine interest.⁶⁸ The significance of giving disputants the opportunity to talk about their stories is reflected in the NMAS, which require mediators to provide participants

⁶⁰ Ibid 12–3.

⁶¹ Sourdin and Balvin, above n 26, 144.

⁶² Ibid.

⁶³ Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis, 3rd ed, 2011) 224.

⁶⁴ Susan Douglas provides a critique of these amendments: Susan Douglas, 'Ethics in Mediation: Centralising Relationships of Trust' (2017) 35(1) *Law in Context* 44.

⁶⁵ Ibid 46.

⁶⁶ Sourdin, above n 1, 81–2.

⁶⁷ Ronner, above n 44, 94.

⁶⁸ Boulle, above n 64, 238.

with opportunities to speak and be heard, and to ‘articulate their respective interests, issues and underlying needs’.⁶⁹ The opportunity for disputants to tell their stories is most likely to be provided in facilitative mediation, which emphasises opening statements and party dialogue.⁷⁰ Where facilitative mediators guide disputants to voice their concerns, disputants can use this opportunity to express their subjective needs.⁷¹ Transformative mediation also emphasises disputant discussion of the situation and events that gave rise to the dispute.⁷² Narrative models, which are said to be premised on the strength of the participants’ language to frame the meaning of a dispute and how it can be solved, also appear to be the ideal environment to enhance PJ through voice.⁷³

2 *Neutrality*

The second PJ element is neutrality. One of the tenets of mediation has traditionally been the notion of the neutral third party.⁷⁴ The neutrality of the mediator is part of the ‘legitimising framework’ that places mediators alongside decision makers in courts and tribunals.⁷⁵ Neutrality in mediation can be critiqued for two main reasons: firstly, a mediator cannot be absolutely neutral due to their worldview affecting the unfolding story of the mediation; and secondly, mediator neutrality is not appropriate where there is a power imbalance between disputants, because a failure to intervene may exacerbate this power imbalance.⁷⁶ Field argues that neutrality is a difficult conceptual concern for mediators because they are unclear about its meaning and the interventions that they can ethically choose.⁷⁷ She states that there is little substantive difference between impartiality in mediation and neutrality.⁷⁸ Although the term ‘neutrality’ has been removed from the NMAS, the concepts of ‘impartiality’ and avoidance of ‘conflicts of interest’ and ‘bias’ remain characteristics of the mediator’s role.⁷⁹ Therefore, it appears that the presence of

⁶⁹ Mediator Standards Board, above n 23, 11.

⁷⁰ Boule, above n 64.

⁷¹ Ibid.

⁷² Joseph Folger and Robert Bush, ‘Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice’ (1996) 13 *Mediation Quarterly* 263, 272.

⁷³ Douglas, ‘Neutrality’, above n 25, 33.

⁷⁴ Douglas, ‘Constructions of Neutrality in Mediation’, above n 57.

⁷⁵ Rachael M Field, ‘The Theory and Practice of Neutrality in Mediation’ (2003) 22(1) *The Arbitrator and Mediator* 79. See also Hilary Astor, ‘Mediator Neutrality: Making Sense of Theory and Practice’ (2007) 16(2) *Social & Legal Studies* 221; Douglas, ‘Constructions of Neutrality in Mediation’, above n 57; Carol Izumi, ‘Implicit Bias and the Illusion of Mediator Neutrality’ (2010) 34 *Journal of Law and Policy* 71.

⁷⁶ Sourdin, above n 1, 92–6.

⁷⁷ Rachael Field, ‘Mediation Ethics in Australia — A Case for Rethinking the Foundational Paradigm’ (2012) 19 *James Cook University Law Review* 41, 55–7.

⁷⁸ Ibid 53–4.

⁷⁹ Mediator Standards Board, above n 23, 11.

neutrality/impartiality is reliant on the values of the individual mediator.⁸⁰ Impartiality requires an independent and open-minded mediator,⁸¹ who treats each disputant consistently.⁸² Arguably, impartiality could be present in any model where the mediator shows even-handed treatment of each disputant.

3 *Trust*

Closely related to neutrality, trust is considered significant to mediation,⁸³ but is difficult to define.⁸⁴ This difficulty appears to be because trust overlaps with the other elements of PJ such as voice, validation and respect.⁸⁵ Trust in mediation involves participants' trust in the mediator, trust between disputants and trust in the process.⁸⁶ From the parties' perspective, trust stems from the mediator's expertise in the process and how they explain it, the interactions with the parties being positive and having chemistry and lack of bias.⁸⁷ Building trust involves an even-handed mediator who has the interpersonal skills to engage with, show concern for, listen to and validate the parties.⁸⁸ These skills are closely aligned with the range of interpersonal skills required to provide PJ.⁸⁹ As trust relies on interpersonal skills, it is likely to be present in the models of mediation that focus on the relationship between the disputants, such as facilitative mediation where mediators aim to develop an exchange of dialog between disputants in an attempt to foster their joint problem-solving.⁹⁰ Trust is also more likely to be present in private mediation, where the mediator contacts each disputant separately prior to the mediation to provide disputants with information about the process and to establish a rapport with each disputant.⁹¹ As discussed above, it has been argued that the removal from the NMAS of the term 'neutrality' as a core characteristic of the mediator's role requires mediators to develop a new understanding of the content of their role. The relationship of trust between mediators and disputants has been offered as an alternative ethical foundation of the mediator's role.⁹² Arguably, this focus offers scope to recognise that PJ can enrich the understanding of the mediator's role.

⁸⁰ Sourdin, above n 1, 93.

⁸¹ Douglas, 'Constructions of Neutrality in Mediation', above n 57.

⁸² See, eg, Hollander-Blumoff and Tyler, above n 17, 5.

⁸³ Douglas, 'Ethics in Mediation', above n 65, 54–5.

⁸⁴ Hollander-Blumoff and Tyler, above n 17, 5–6.

⁸⁵ *Ibid.*

⁸⁶ Douglas, 'Ethics in Mediation', above n 65, 55.

⁸⁷ Jean Poitras, 'What Makes Parties Trust Mediators?' (2009) 25(3) *Negotiation Journal* 307.

⁸⁸ Hollander-Blumoff and Tyler, above n 17, 5–6.

⁸⁹ *Ibid.*

⁹⁰ Boulle, above n 64, 240–1.

⁹¹ *Ibid.* 232.

⁹² Douglas, 'Ethics in Mediation', above n 65, 46.

4 *Courtesy and respect*

Tyler argues that in ADR many disputants care about interpersonal behaviour and place a high value on being treated courteously by a third party who respects their dignity.⁹³ Mediators can demonstrate respect for disputants through a range of conduct that is consistent with displaying care for the parties.⁹⁴ This can include, for example, the mediator providing the participants with information about the process and the physical facilities available at the meeting venue.⁹⁵ Encouraging an exchange of information between parties, and facilitating enhanced communication is another example. Respect is more likely to occur in mediation that has a relational focus, such as facilitative, transformative and narrative mediation. While courts and tribunals require respect and politeness amongst participants in court-connected mediation,⁹⁶ a focus on settlement and efficiency may be at the expense of the use of high-level interpersonal techniques.⁹⁷

C The Potential for Mediators to Improve Their Practice Through Applying Procedural Justice

In summary, while some models of mediation offer scope for mediators to provide disputants with an experience of PJ, in other efficiency driven models such as evaluative mediation, mediators are less likely to promote PJ.⁹⁸ Mediators themselves may not be clear about the importance of PJ, as some may focus more on the substantive outcomes of the mediation according to legal norms.⁹⁹ Many of the original aims of the introduction of ADR into courts, such as increasing party self-determination and maximising collaboration, have been undermined by the legal culture that first adopted and then changed the practice of alternatives to litigation.¹⁰⁰ The courts' objective for efficiency and case management has meant that some of the relationship dimensions of conflict in negotiation and mediation have been subjugated to the need to achieve settlement.¹⁰¹ The presence of lawyers as agents and mediators in negotiation and mediation

⁹³ Tyler, above n 36, 56.

⁹⁴ William G Schma, 'Therapeutic Jurisprudence in Courts of General Jurisdiction' in Bruce Winick and David Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 87, 88.

⁹⁵ Boule, above n 64, 232.

⁹⁶ Victorian Civil & Administrative Tribunal, *Mediations* <<https://www.vcat.vic.gov.au/steps-to-resolve-your-case/resolve-a-case-by-agreement/mediations>>.

⁹⁷ Boule and Field, above n 4, 44.

⁹⁸ Sourdin and Balvin, above n 26, 144.

⁹⁹ Noone and Ojelabi, above n 35, 540.

¹⁰⁰ See generally Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted Or "the Law of ADR"' (1991) 19(1) (Summer) *Florida State University Law Review* 1.

¹⁰¹ *Ibid* 3.

relating to legal disputes,¹⁰² the prevailing adversarial culture of lawyers in both courts and legal firms, and lawyers' expectations about the process and their understandings of mediation,¹⁰³ have a profound impact upon the practice of court-connected negotiation and mediation.¹⁰⁴ Consequently, the promotion of PJ can be curtailed. In particular, the opportunity for disputant voice can be limited. Often, lawyers are focused on procedural fairness and are less concerned about fairness perceptions experienced by disputants.¹⁰⁵ Lawyers can encroach on disputants' autonomy by dominating the process and decision-making and limiting their clients' involvement.¹⁰⁶ Lawyers acting for disputants can be reluctant to give their clients the opportunity to participate in the process,¹⁰⁷ thus denying participants a key PJ element of voice.¹⁰⁸ Importantly, court-connected negotiation and mediation occurs in the shadow of the law;¹⁰⁹ that is, these processes are influenced by the probable court outcomes relating to a dispute. Therefore it is likely that court-connected ADR practice differs from other areas of ADR that are more remote from the courts, such as community mediation, and are more inclined to support the non-legal needs of disputants, such as their personal values and beliefs, psychological and physical wellbeing and interpersonal relationships.¹¹⁰

PJ can assist in developing a new understanding of the mediator's role that combats lawyer dominated practice in the court-connected context by explaining how the skills and attributes of mediators affect the experiences of disputants. Like the relationship between the judge and court participant, which is crucial to participants' perceptions of fairness and increased likelihood of complying with court orders,¹¹¹ the relationship between mediator and each disputant is also crucial in promoting PJ. Knowledge of PJ theory offers mediators the opportunity to improve their practice by explaining that their interventions can provide an experience for disputants that is both enhanced and more likely to lead to compliance with the decision. The experience of PJ for disputants is also consistent with the

¹⁰² In Australia, lawyers in court-connected mediation often attend and speak for their clients: Peter Callaghan, 'Roles and Responsibilities of Lawyers in Mediation' (2007) 26(1) *The Arbitrator and Mediator* 39.

¹⁰³ Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* (Cambridge University Press, 2009) chs 5–6. At page 15, Relis argues that ADR, and in particular mediation, can assist with integrating clients' 'legal and non-legal interests' and promoting an 'ethic of care' in line with the aims of therapeutic jurisprudence.

¹⁰⁴ Julie Macfarlane, 'Culture Change? Tale of Two Cities and Mandatory Court-Connected Mediation' [2002] (2) *Journal of Dispute Resolution* 241.

¹⁰⁵ Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (University of British Columbia Press, 2008), 43–50.

¹⁰⁶ Boule and Field, above n 4, 269.

¹⁰⁷ Welsh, above n 12.

¹⁰⁸ Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9(2) *Murdoch University Electronic Journal of Law* 1.

¹⁰⁹ Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *Yale Law Journal* 950.

¹¹⁰ Daicoff, above n 15, 4.

¹¹¹ See, eg, Winick and Wexler, above n 95, 106–9.

goal of mediation to empower participants,¹¹² and the goal of courts to provide justice for individuals and maintain confidence in the legal system.¹¹³ Mediators can use the principles of PJ to develop techniques that can make their role more therapeutically and practically effective.¹¹⁴ In their key role as authority figures responsible for managing the process,¹¹⁵ effective mediators can develop advanced interpersonal skills to foster relationships of ‘shared respect’¹¹⁶ with the disputants. In such a relationship, respect shown by the authority figure can be reciprocated by the participant. In turn, this shared respect process can impact on how a person reacts to the decision-making process.¹¹⁷ Skills include open listening, the use of supportive and encouraging language and being mindful of treating each participant as a valuable human being who is deserving of dignity and respect. These skills are central to the TJ assumption that the law can foster an ‘ethic of care’ in appropriate cases.¹¹⁸ The methodology for the study is now outlined.

III Methodology

The responses relating to experiences of PJ in mediation by participants in this study were part of a broader study that addressed a range of practice areas. In order to understand more about the practice of mediation in a court-connected context, a qualitative methodology was adopted with 16 mediators interviewed at a large tribunal, VCAT.¹¹⁹ VCAT’s jurisdiction includes small claims, tenancy, guardianship, domestic building disputes, planning and commercial matters and routinely includes mediation as part of its case management framework.¹²⁰ A core characteristic of a qualitative approach to research is commitment to seeing the topic or issue from the perspective of those studied.¹²¹ The benefits of qualitative data lie in the deep and rich exploration of small samples, which come through in-depth interviews and ‘thick’ descriptions of lived experience. Qualitative research can give detailed insights into practice, where the stories of participants can

¹¹² s 2 Mediator Standards Board, above n 23, 9.

¹¹³ Welsh, above n 12, 792.

¹¹⁴ Winick and Wexler, above n 95, 148–55.

¹¹⁵ In the Australian context, the predominant view of the mediator’s role is that of process manager without content or outcome control. See, eg, Mediator Standards Board, above n 23, 2; Douglas, ‘Ethics in Mediation’, above n 65, 50.

¹¹⁶ Winick and Wexler, above n 95, 148–55.

¹¹⁷ *Ibid.*

¹¹⁸ King et al, above n 5, 28.

¹¹⁹ The data was gathered in 2009 and although some time has elapsed, the analysis of this data adds to the contemporary literature on PJ and mediation. There were a number of mediator practice concerns explored in the study, including attitude to emotion, the use of humour and the role of lawyers in mediation. There have been a number of publications resulting from the study with a variety of authors.

¹²⁰ Iain Ross, ‘A Centre of Excellence in ADR’ (2009) 83(9) *Law Institute Journal* 34.

¹²¹ Catherine Marshall and Gretchen Rossman, *Designing Qualitative Research* (Sage, 4th ed, 2006) 2.

be explored and analysed through an inductive approach.¹²² Mediators' self-reports of their own practice may be criticized, as mediators can describe their own efforts in ways that differ from their actual efforts in a mediation. However, there is still value in the study of mediators' reflections about how they frame their practice with the potential to improve practice.¹²³

The participants in this study were self-selected, as mediators were emailed with an invitation to be part of the research and 16 mediators volunteered to be part of the study. VCAT was chosen as the site for the research, as mediation was a common step in dealing with disputes in the tribunal. Analysis of the data showed that mediators in this study adopted a facilitative model of mediation.¹²⁴ The interviews with the 16 mediators were taped and later transcribed. Pseudonyms were given to each participant to protect their identity. The majority of the participants were legally qualified. There were equal numbers of women and men in the sample. Many had extensive experience in mediation practice, with the average being 14 years. There were two questions relating to PJ. Firstly, the mediators were asked 'Do you know the meaning of PJ?' If they did not, we provided a definition.¹²⁵ The definition was prepared as we speculated that many mediators would not understand the term and the definition was necessary for all but one mediator. Secondly, the mediators were asked 'What reflections do you have relating to PJ?' In the next section of this article, the participants' responses to the specific questions about PJ are analysed. Next, the data from all the interview responses are analysed under the headings provided by Hollander-Blumoff and Tyler: (i) Opportunity to present their own story; (ii) Neutrality; (iii) Trust; and (iv) Courtesy and respect.

IV Findings

Analysis of the data showed that 14 out of 16 mediators expressed support for PJ. These mediators saw PJ as integral to mediation and the storytelling aspect of the process. For example mediators positively noted:

¹²² Alan Bryman and Robert Burgess, 'Qualitative Research Methodology: A Review' in Alan Bryman and Robert Burgess (eds), *Qualitative Research, Vol 1, Fundamental Issues in Qualitative Research* (Sage, 1999). See also Alan Bryman, *Social Research Methods* (Oxford University Press, 2004) 128–30.

¹²³ Kenneth Kressel et al, 'Multi-Dimension Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹²⁴ See for this analysis, see Kathy Douglas, 'Mediator Stories of Tribunal Practice: Flexible and Fluid to Meet Parties' Needs' (2012) 21 *Journal of Judicial Administration* 237.

¹²⁵ The definition provided was: 'Procedural justice asks that litigants feel heard by an authority figure or a third party, generally a judge or tribunal member, in relation to conflict. If a litigant believes that the process is procedurally just they are more likely to adhere to the decision of a court. Research shows that being able to tell the story of the conflict and being treated with respect, are more important [to parties] than winning in court.' Participants were asked to apply this definition to the context of mediation.

PJ for mediator is central ... PJ has significant impact on whether parties are willing to negotiate with each other in future ... as well as seeing that outcome is fair (David)

Parties anxious to be heard and want to be heard. [They] need to be given the opportunity to be heard and need to listen also (Barry)

Paramount structure of a mediation to make sure that PJ is followed. I set the background at the beginning re the process and set the rules making sure it encompasses PJ. I make sure parties are not interrupted (Gary)

People need to be heard in their own voice and need to have sense that there is a level playing field. [They] need impartiality ... if party makes own decision re outcome, much happier than imposed third party decision (Helen)

Two mediators in the sample were less sure of the application of PJ to mediation and expressed only qualified support for this concept as applied to mediation. These mediators stated:

PJ is important in adjudication but less important in mediation (Edward)

I have issues with the term used ... committed to procedural fairness ... helps parties feel empowered (Anne)

A Opportunity to Present Own Story

One of the most significant themes that arose from the data is the need for parties to have the opportunity to give voice to the story of their dispute. Many of the participants' comments related to the need for parties to tell their story and be heard by the other party and the mediator. The application of PJ to mediation is arguably most particularly about allowing parties to have voice in the process. This opportunity is generally greater than in any court or tribunal hearing and may include attention to emotion, an area that does not often receive attention in litigation. Many mediators in the study stated that parties wish to tell their story and be truly heard in mediation. For instance two mediators commented:

So I think you know, telling your story is important, it's extremely important for people to be able to do that and it's important to understand what's being said to them, and it's very important for them to be understood, but not just saying it, you know (Fiona)

I think it [procedural justice] is very relevant in all of the disputes, because it is important that people feel they've had their say, that they've been empowered by the process. But people do need to feel that they have been heard (John).

B Neutrality

In considering the PJ concern of neutrality, analysis of the data showed a careful approach to process to ensure that there was no bias shown in the participants' practice. They commented on strategies for even-handed treatment in the mediations that they conducted:

[I]f someone has done something very out of order I will say to them, you know, 'That's not appropriate', blah, blah, blah then get back to neutral and I'll turn around [to the other party] and I'll say 'And if you do the same thing, I will have to say the same things to you'. So then both parties are looking at me and it feels like I'm not just picking on one and I've sided with another. Then I'll go 'And you were just telling me about ...' and suddenly my face will change, I've gone into gentle mode and I will say, 'Now, you were just telling me, the point that you were trying to make is this ...' Then I let them pick up from there and everybody saves face OK (Fiona).

For example, a young barrister had come in with his client and I could see the metaphorical can of petrol under his arm just in case the flames happened to die down. I thought, 'We've got a live one here'. So, not long in the mediation, we're in the joint session and this bloke is saying 'Well, we say that you have been acting reprehensibly', and ramping up the expression, trying to cross-examine, trying to brow-beat, all naughty, naughty stuff. What do you do in a situation like that? Well, what I decided to do on that day was to take all the lawyers out and I said, 'I really need to have a chat with the lawyers, could you come with me?' Because I didn't want to make him look bad in front of his clients ... [so I said] let's talk about how we're going to treat the other side. We can't yell at each other so we had about five or ten minutes of discussion, just with the lawyers and when we went back into the room, the parties had settled. He spent the next half an hour trying to unpick it. It was hilarious (Kate).

C Trust

As indicated, trust is an integral part of the mediation process that helps ensure the acceptance of mediated outcomes. An example of building trust through being treated fairly was discussed by a mediator:

The other reason it's important is if you're seeking a compromise in a situation where one or both parties has to compromise their position which is often the case, if the parties feel they are being treated fairly in process terms then they are more likely to accept a less than perfect or a compromise position. They'll even more likely accept what they regard as a somewhat unfair outcome if they feel they've been treated fairly... So, having a fair process reassures them that the outcome will be OK even if it's not quite what they envisaged at the start (David).

Trust was not widely discussed in the data but process issues relating to courtesy and respect did overlap with trust in the sample. Often the mediation process can assist with the building of trust.

D Courtesy and Respect

The participants in this study identified that the process of the mediation gave parties the experience of PJ. They saw respectful treatment as core to the process. For example, a commitment to process by the mediator enhances a party's experience to a greater extent than occurs in litigation:

And that's the whole thing about mediation particularly. Well it's the same with hearings but mediation you spend a lot more time with the parties to make sure

that they're comfortable with and committed to the process and understand what it is ... which is why jumping to the chase is never a good idea because then they will go away not feeling they were listened to (Anne).

It's the paramount structure of mediation to make sure that procedural justice is followed. Not only that, you've set the background at the opening statements of a mediation, so that the formalities are there in regard to the process of the mediation (Gary).

Another participant, referring to planning disputes, identified the educative benefits of mediation and the way that the process takes parties on a journey that may achieve PJ:

[W]e often have people who will come to the tribunal and they will, obviously want the best outcome, prefer to win, but often it's the journey, the journey actually educates and informs them, and if they feel they've had a fair hearing, I think it's a lot easier for them to accept. Often they won't and that's why I feel the mediation process is often an educative or an information session ... sometimes it's a decision process, but often it is not. Because I think privately we might do a bit of reality testing for people, where some of them feel they haven't had that opportunity, usually in a review of a council decision. Some of them, they have varied experiences of dealing with councils, and some of them feel that they need something outside that domain to seek a review or seek to enhance their positions (Owen).

Indeed, as discussed by one participant, the process might be said to aid the fair airing of party stories:

Well, it's probably partly what I was saying before in terms of trying to just set a framework, so hopefully people are comfortable with understanding that they're all there and they're all equal in terms of it being there to negotiate, and that someone's and everyone's going to get it as best as I can control it, a fair chance to say what they want to say or if they come up with a dumb idea, you know no idea's too dumb, because it just might get us to ... (Charlotte)

V Conclusion

The literature reviewed in this article shows that PJ and mediation are natural partners, with the giving of voice one of the most significant aspects common to both. Mediators in this study showed that although they did not explicitly frame their practice as including PJ, the approaches they adopted could be analysed through this theory. Notably, once given a definition of PJ many in the study acknowledged synergies with the theory. Historically, mediation in a court-connected context has largely focused on outcomes, often seen as evaluative in nature, with little attention being given to the effect of these processes on the experience for disputants. However, in the tribunal context that is the subject of this research, analysis of the data shows that at VCAT elements of PJ are included in the participants' mediation practice. This suggests that PJ may be more likely to occur in a tribunal context where practice is not evaluative. As mediation in courts becomes even more commonplace, it is important that the process meets disputant needs. PJ provides a frame for the improved experience for

disputants. Although the data in this research is a small, self-selected sample, it does provide insights into mediator practice. The research shows the ways that these VCAT mediators strive to give parties voice and validation, in a respectful and even handed process. Analysis of the comments of the mediators in this study adds to the literature on mediation and can potentially encourage more reflection about the value of PJ in mediator practice. Further research in this area is recommended as it could reveal more about the ways that PJ theory might enhance mediators' practice and improve the experiences of disputants.