MEDIATION POWER IMBALANCES: WEIGHING THE ARGUMENTS

Nigel Dunlop

It is commonly said that power imbalances in mediation render it unfair. The image is conjured up of a hapless party being cajoled into an unfavourable settlement by a more powerful party. Better to go to court, it is said, where bullying will not be tolerated, and where a just rather than a coercive outcome will result.

This popular image of what constitutes power imbalance in mediation is simplistic. It fails to take account of the many and varied types of power which may be present in any one mediation. It frequently involves inaccurate presumptions as to the existence or absence of power .[1]

Below is an example of power imbalances in a dispute between a separated husband and wife about the parenting of their children. Six individual power imbalances are identified. Some favour the wife, and some the husband.

Party A (wife)	Party B (husband)
Native born with excellent language fluency	Immigrant, still acquiring language fluency
The victim of domestic violence	The perpetrator of the violence
In robust physical health	In poor physical health
Inexperienced and ineffective legal representation	Experienced and effective legal representation
Strong legal case	Weak legal case
Very keen to settle	Indifferent as to settlement

Both party A and party B have the advantage of power imbalances, but it is impossible or meaningless to say which party holds the *overall* balance of power.

One reason for this is that negotiation power cannot be easily or accurately quantified. There is no unit of measurement to apply. The extent of power is determined by crude, subjective, non-numerical assessment. Assessment relies on prediction as to what will unfold during the course of mediation. Such prediction may well be flawed.

The primary reason why it is impossible or meaningless to say which party in mediation holds the *overall* balance of power, is that different types of power are incapable of ready comparison with each other. It is not feasible, for example, to weigh party A's language advantage against party B's legal representation advantage.

The six types of power referred to in the above example fall into two different categories. The first four are *process* power imbalances. The last two are *substantive* power imbalances. The difference between the two categories compounds the problems associated with assessing overall power imbalances.

Most often, references to power imbalances are to *process* imbalances. Process power imbalances are about the capacity of parties to negotiate. They determine whether or not it is fair or appropriate that mediation proceeds. That determination requires an examination of each individual process power imbalance that might be present. The mediator is required to assess

whether there are adequate measures that would be available during mediation to adequately address the handicap which the imbalance presents. For example, are B's language deficits so significant as to render mediation unfair? Are they able to be addressed by the presence of an interpreter or support person or his lawyer?

It is more productive to focus on the issue of capacity, rather than the issue of power imbalance as such. The key consideration with respect to the history of domestic violence in the above example is whether fear and domination will render the wife unable to freely negotiate. Endeavouring to quantify the power imbalance may be a somewhat abstract and unhelpful exercise.

Substantive power imbalances relate to the perceived respective bargaining strengths and weaknesses of the parties. These derive from the legal and factual merits of their arguments, and circumstances which might compel parties to settle.

Substantive power imbalances do not render mediation unfair or inappropriate in the procedural sense.[2] They should, however, be realistically taken into account by the parties. In the above example, party B would be wise to temper his expectations in the realisation that his legal case is weak, and party A would be wise to temper her expectations in the realisation that although she is keen to settle party B is not.

Sometimes there may be a linkage between process and substantive power imbalances. For example, the resources possessed by one party but not the other might give the former both process and substantive power. Such a well resourced party might be able to afford a phalanx of lawyers, unlike the other party, and as well be able to drive a hard bargain due to being in a stronger economic position to weather an ongoing dispute. Despite the source of the power being the same, namely superior resources, the power imbalance plays out both procedurally and substantively. In this example, it is still meaningless if not impossible to weigh the two categorically different types of power, process and substantive, despite them emanating from

the same source. Superior legal representation cannot meaningfully be weighed against the economic need of a party to settle.

As mentioned, the simplistic view adopted by many about power imbalances also derives from incorrect presumptions being made as to who holds power.

Take again the above example of the wife who was the subject of domestic violence at the hands of the husband, suggestive of a process power imbalance. It is often presumed that the perpetrators of violence hold negotiating power over the victims. It is presumed that the victim (usually female) will be fearful of, and overborne by the perpetrator. That might indeed be so. But it might not be.

Having identified domestic violence to have been present in the marriage of party A and party B, the mediator should embark on a careful inquiry as to whether or not the violence would render mediation unfair or inappropriate. Throughout this inquiry presumptions should be avoided. For example, if party A tells the mediator that she is emotionally strong enough to participate in mediation, the presumption should not be made that she in fact is. She may or may not be. Similarly, it should not be presumed that party B, the perpetrator of the violence, is emotionally strong. He may or may not be. The avoidance of presumption requires skilled, reflective and informed inquiry by mediators. Mediation should not proceed if a history of domestic violence indicates that it would be unsafe or unfair. Declarations, however, that mediation against a background of domestic violence is always inappropriate, involve multiple presumptions being made. These will be avoided if mediators drill down and inquire into the actual capacity of the parties to negotiate.

Incorrect presumptions are often made in relation to substantive power imbalances, as well as process power imbalances. One reason for this is that real power exists only if it is recognised. In the above example, party A will only have bargaining power on account of her strong legal case, if both she and party B recognise that she has a strong legal case. If party A recognises her strong legal case, but party B does not, then it does not become a source of power for Party A.[3] Equally, if party B recognises the strength of party A's strong legal case, but party A does not, then party A's strong legal case does not become a source of bargaining power which she can utilise.[4]

Not only can power sometimes not be recognised, but it can be hidden, emerging only during the course of mediation. In the above example of party A and party B, it might only be after mediation has commenced that it becomes apparent that party A lacks the decisiveness required of mediation, and is muddled in her thinking. Likewise, it might be that only well into the mediation that it is realised that the special needs of one of the children in relation to schooling are entirely inimical to what the husband is seeking.

Summary and conclusion

All the above suggests that the often heard statement that "mediation would be unfair because there is a power imbalance" is simplistic and misleading. It would be rare for a party to have a monopoly on power. The many and varied types of power inevitably present in each mediation do not lend themselves to ready measurement, nor are they capable of meaningful comparison. When assessing the fairness and appropriateness of mediation it is best to focus on the capacity of parties to negotiate, rather than engage in the doomed exercise of attempting to assess who might have the overall balance of power. Process power should be distinguished from substantive power. Presumptions should be avoided about who holds power, whether process or substantive. Who has power may not be obvious. Power may be hidden. Power may not be recognised. Power plays out unpredictably.

Power imbalances is an unavoidable part of life, and hence an unavoidable part of mediation.

End Notes

1 JFor present purposes I define power as the ability of a party to achieve their desired negotiation outcome.

2 Substantive power imbalances may be a reason, however, why a party does not choose to participate in mediation.

3 Party A's strong legal arguments will however inform her decision making as to whether or not it is better to proceed to court rather than settle.

4 Unbeknownst to her, she will however have power to some extent, because it will inform party B's decision as to whether to settle or proceed to court.

ABOUT THE AUTHOR

Nigel Dunlop

Nigel Dunlop is a barrister with 40 years of legal experience whose past specialties included family and criminal law. Nowadays he sits on a range of statutory complaint, adjudication and appeal bodies, having been appointed by the Governor General, Ministers and the Retirement Commissioner. He also mediates a wide range of disputes and undertakes workplace investigations. He is also available as an arbitrator. He is Nelson based but works throughout New Zealand. works, roads and drainage, water, bridges, tunnel and highway sectors.

Nigel has mediated some 700 disputes of many kinds involving thousands of parties. He is the author of the online module about Family Dispute Resolution for a major legal publisher. He has had many articles about Family Dispute Resolution published in legal journals. He was involved in the training of mediators in readiness for the advent of Family Dispute Resolution, and appeared before the Justice select committee to give evidence about Family Dispute Resolution.

To request the appointment of Nigel Dunlop, please contact the Registrar:

NZDRC

registrar@nzdrc.co.nz

FDR CENTRE
TE POKAPŪ MO TE WHAKATAU I NGA TAUTOHE WHĀNAU

casemanager@fdrc.co.nz