

Mediator Actions: Challenges to Neutrality and the Delivery of Procedural Justice

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Abstract - Ethnographic data suggest the mediator role transcends that of the neutral third party intervener described in the literature. The mediator becomes part of the mediated negotiation process, at times separate from the parties, aligned with the parties or in opposition to the parties. This fugitive identity is analysed in this article in relation to concepts of neutrality and procedural justice, two concepts much discussed in the mediation literature, often recognised as core features of the mediation process. Also explored is the justice consciousness of the parties to the process through ethnographic data for what is revealed about concepts of justice from the parties' perspective. The article concludes by challenging the dictum of the mediation literature that the process offers procedural justice to its participants.

Keywords: dispute resolution, procedural justice, justice consciousness, mediation, neutrality, mediator

1. Introduction

Ethnography is a well-used methodology in the context of sociological or anthropological research, but less so in legal scholarship. In a legal context, interview and survey data are often collected, but real immersion in the phenomenon occurs less frequently. This paper explores the dispute resolution process of mediation ethnographically, a methodology that is not conventional in this field, but one that is analytically enlightening.¹ Ethnographic data regarding the

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¹ While there are observational studies about mediation (for example, see JA Wall, TC Dunne & S Chan-Serafin, 'The Effects of Neutral, Evaluative, and Pressing Mediator Strategies'

social interactions that take place during the process of mediation discern patterns of actions and interactions that can yield greater understanding of the phenomenon.

Patterns of actions and interactions within the facilitation process of mediation were explored in a prior ethnographic study conducted by the author of the mediation process.² The observed patterns disclosed in the data of the prior study identified the fugitive identity of mediation which sees a mediator shifting between personas throughout a mediation process where the mediator becomes an active player in the scene, moving between the identities of facilitative intervener, party, and party advisor. Implications from the research suggest a need to examine the impact of this shape shifting by the mediator on concepts of neutrality and impartiality because such shifts challenge the traditional understanding of the neutral or impartial third party intervener and with it, a stated core feature of the process. This paper takes on this analysis within the framework of the procedural justice discourse in the mediation literature, one of the most common forms of justice attributed to mediation.

Concepts of neutrality play a significant role in the delivery of procedural justice as one part of its four constituent elements as conceived by the literature. This paper challenges the accepted norm of the presence of a neutral or impartial third party intervener in the mediation process, and with it, the view that procedural justice is deliverable through the process. The mediation process needs to be defined to accord with the real-life patterns of actions disclosed by the ethnographic data in view of the challenges to its underlying assumption of neutrality. Contrary to the arguments made in the literature, if procedural justice is

(2011) 29 Conflict Resol Q 127; DM Kolb & Associates, *When Talk Works: Profiles of Mediators* (Jossey-Bass 1994)), studies in an anthropological ethnographic tradition involving immersive study of mediation are limited (see Stacy L Burns, *Making Settlement Work: An Examination of the Work of Judicial Mediators* (Ashgate 2000) for her ethnographic study of retired judges conducting mediations).

² Debbie De Girolamo, *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (Routledge 2013).

to be realised, it must do so through an active mediator, rather than an anodyne facilitator who is portrayed as neutral, yet in action, is not. It is the action of the mediator through these shifts in identity which ensures all voices are heard at the mediation, that all perspectives are understood, and that real capability can be exercised by the parties during the process.³

To come to this conclusion, the paper will begin by exploring the concept of justice in mediation with particular focus on procedural justice as discussed in the mediation literature, and its relationship to the concept of neutrality, a concept situated as fundamental to the process. After an introduction to the fieldwork site, it will then discuss mediator interactions exposed by ethnographic data which disclose a mediator who actively engages with parties in dispute. Within the framework of this active engagement, the paper will argue that neutrality, as currently understood and applied to the mediation process, is an irrelevant concept for the efficacy of the mediation process. The mediator's fugitive identity challenges the premise that mediators must be neutral and therefore questions the ability of the process to deliver procedural justice as argued by its proponents. Having challenged the concept of mediator neutrality, this paper explores the justice consciousness of the actors in the process through ethnographic data; more particularly, what the parties say about the process as it may relate to justice issues, and the implications of this for procedural justice.

The valuable contribution this article adds to the field lies in what it says about the delivery of procedural justice in mediation and also the methodology used for its claims. It makes use of important ethnographic data to challenge claims of the literature that mediation offers procedural justice. It does so by examining the actions of the third party intervener who is presented in the literature as a neutral and impartial intervener and by examining the justice consciousness of parties

³ Debbie De Girolamo, 'Sen, Justice and the Private Realm of Dispute Resolution' (2018) 14 Int JLC 353.

during the mediation, a little-used lens through which to explore parties' perceptions and experiences of justice.

2. Delivery of Procedural Justice by Mediation: What the Mediation Literature Tells Us

Mediation falls within a pluralist paradigm, one where systems of order are achieved outside the parameters of state law. People enter into their own system of obligations through the prism of their subjective understandings creating a personal system of order for their dispute. As such, the issue of whether mediation delivers justice is steeped in mediation folklore: the debate is one of definition and it is a debate well versed in the literature. There are several ways of approaching justice in mediation.

The context for this exploration is the mediation literature and its self-reflexive views about the process and its promises regarding the delivery of justice. Varying approaches are taken to general concepts of justice in mediation. Stulberg and Menkel-Meadow see justice in mediation as offering more than legal entitlements: Stulberg sees justice connected to the concept of self-determination while Menkel-Meadow sees it as private and individual.⁴ Nolan-Haley too sees justice as individual, drawing a similarity to equitable justice, involving individualised informed decision-making (where the 'informed' is about legal rights and entitlements).⁵ Bush and Folger see it resting in equality as a form of social

⁴ Joseph B Stulberg, 'Fairness and Mediation' (1997-1998) 13 Ohio St J on Disp Resol 909, 910-911; Carrie Menkel-Meadow, 'Practicing 'In the Interests of Justice' in the Twenty-First Century: Pursuing Peace as Justice' (2001-2002) 70 Fordham L Rev 1761, 1767.

⁵ Jacqueline M Nolan-Haley, 'The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound' (2004) 6 Cardozo J Conflict Resol 57, 64-65; Nolan-Haley, 'Court Mediation and the Search for Justice Through Law' (1996) 74 Wash ULQ 47, 51.

justice.⁶ Shapira speaks in terms of normative fairness in both process and outcome.⁷

Justice, arguably, is a loose term in the mediation field. Whether mediation delivers any justice is also debated by scholars such as Genn, Fiss and Abel, who argue that justice is delivered by a state court based on the application of state rules and thus cannot be delivered by the mediation process which is a private and consensual process.⁸ They distinguish between a private process which involves party decision-making leading to the formation of contractual relations between parties from the public forum of judicial adjudication of a binding decision. These are but a few examples of the discussion in the literature.⁹ They have resonance for the mediation field given the efforts of governments in their formulation of state civil justice systems to include mediation as a preferred way of dealing with conflict.¹⁰ Welsh argues that a dispute resolution process which forms part of a civil justice system must provide a fair procedure: “The business of the courts is not business – it is justice. And the dimension of justice for which courts are primarily

⁶ Robert A Baruch Bush & Joseph P Folger, ‘Mediation and Social Justice: Risks and Opportunities’ (2012) 27 Ohio St J on Disp Resol 1, 2-4.

⁷ Omer Shapira, ‘Conceptions and Perceptions of Fairness in Mediation’ (2012) 54 S Tex L Rev 281.

⁸ Hazel Genn, *Judging Civil Justice* (CUP 2010); Genn, ‘Representing and Contesting Ideologies of the Public Spheres: The Architecture of Justice: What is Civil Justice For? Reform, ADR and Access to Justice’ (2012) 24 Yale JL & the Humanities 397; Owen Fiss, ‘Against Settlement’ (1984) 93 Yale LJ 1073; Richard Abel, ‘A Comparative Theory of Dispute Institutions in Society’ (1973) 8 Law & Soc Rev 217.

⁹ For others, see Tania Sourdain, ‘A Broader View of Justice’ in Michael Legg (ed), *The Future of Dispute Resolution* (Butterworths 2012); De Girolamo, ‘Sen, Justice and the Private Realm of Dispute Resolution’ (n 3); Mary Anne Noone & Lola Akin Ojelabi, ‘Ethical Challenges for Mediators around the Globe: An Australian Perspective’ (2014) 45 Wash U JL & Pol’y 145.

¹⁰ For example, it is a process that is supported and promoted by the British government in England and Wales and the EU Parliament as an improved means to justice; see The Civil Procedure Rules, 1998 SI 1998/3132. See for discussion, Debbie De Girolamo, ‘Rhetoric and Civil Justice: A Commentary on the Promotion of Mediation without Conviction in England and Wales’ (2016) 35 CJQ 162; Simon Roberts, ‘“Listing Concentrates the Mind”: the English Civil Court as an Arena for Structured Negotiation’ (2009) 29 OJLS 457. See also, Council Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136; Council Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165.

responsible is process fairness – which includes, among many other things, assuring that all people stand equal before the law and are greeted by the judicial system with the same presumption of respect. It follows that the primary concern of any court that sponsors an ADR program must be with the process fairness of the services that are provided in that court’s name. Those processes must be fully respect-worthy”.¹¹ Mediators replace the third party decision-maker parties would encounter in court. For the parties, they represent legal authority.¹² As a result, it is necessary to engage in the debate regarding the delivery of justice through mediation.

The focus in this paper is on one aspect of the justice debate which argues that mediation should and does offer parties the promise of procedural justice, if nothing else. Procedural justice is a concept that rests on certain elements of process, that if present, results in party perceptions of fairness in the dispute resolution process experienced by them. Where parties experience fairness in a legal process, research suggests that they are more favourably inclined to the outcome reached, whether it is in their favour or not.¹³ Procedural justice, therefore, is about the fairness of a procedure. Hollander-Blumoff and Tyler suggest that procedural justice is as relevant as substantive justice for parties, noting that a procedurally fair process impacts perceptions about outcome positively because parties care about the process by which outcomes are reached.¹⁴ Research suggests therefore that parties care about procedural justice: they want to feel that justice is being done.¹⁵ Procedural justice is also a concept that is arguably less controversial than other forms of justice such as substantive or popular justice since it relies on

¹¹ Nancy A Welsh, ‘Making Deals in Court-Connected Mediation: What’s Justice got to do with It?’ (2001) 79 Wash ULQ 787, 837.

¹² *ibid* 792-93.

¹³ Tom R Tyler, ‘What Is Procedural Justice - Criteria Used by Citizens to Assess the Fairness of Legal Procedures’ (1988) 22 Law & Soc Rev 103.

¹⁴ Rebecca Hollander-Blumoff & Tom R Tyler, ‘Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential’ (2008) 33 Law & Soc Inquiry 473, 477.

¹⁵ *ibid* 476-78; Rebecca Hollander-Blumoff, ‘Just Negotiation’ (2010) 88 Wash UL Rev 381, 384, 386-87.

process rather than outcome as an indicator of justice achievement. Given the relative ease with which process can be examined, procedural justice invites a closer observation for its relevance to this debate.

Procedural justice is not only pertinent in the context of court adjudicative processes. Perceptions of procedural justice also matter to a party's assessment of negotiated outcomes: an outcome reached through a consensual process will be seen to be fair if the process and treatment of the parties within that process leading to the outcome, are fair.¹⁶ Between the two contrasting methods of adjudicative and consensual decision-making lies the mediation process where a third party who has no adjudicative function is invited by the parties to assist them with their negotiation of a solution to their dispute. Stulberg argues it is the process within which decisions are made that is important rather than the standards against which decisions are made, and through its process, mediation provides justice.¹⁷ Welsh too sees a link between justice and mediated outcomes in arguing that mediation should deliver procedural justice to parties: "...there can be no real or lasting resolution unless sufficient attention is paid to justice".¹⁸

As for the attendant elements of procedural justice, they are steeped in party participation experiences. They include a need and desire for an opportunity by parties to tell their story and to control its telling, a consideration of their story in a fair manner, and to be treated with dignity and respect.¹⁹ Welsh states that: "four

¹⁶ Hollander-Blumoff & Tyler (n 14), 491, 494.

¹⁷ Joseph B Stulberg, 'Must a Mediator be Neutral? You'd Better Believe it!' (2012) 95 Marquette LR 829, 830, 845. Ojelabi uses Rawls to examine the ability of mediation to deliver procedural justice through Rawls' procedural justice framework, however, contrary to Stulberg, concludes that mediation, in its form, cannot provide any form of Rawls' pure, perfect or imperfect procedural justice: Lola Akin Ojelabi, 'Mediation and Justice: An Australian Perspective using Rawls' Categories of Procedural Justice' (2012) 31 CJQ 318.

¹⁸ Nancy A Welsh, 'Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories' (2004) 54 J Legal Educ 49, 50, 52-4, 57; Welsh, 'Making Deals in Court-Connected Mediation: What's Justice got to do with It?' (n 11) 818.

¹⁹ Rebecca Hollander-Blumoff, 'Formation of Procedural Justice Judgments in Legal Negotiations' (2017) 26 Group Decis Negot 19; Welsh, 'Making Deals in Court-Connected Mediation: What's Justice got to do with It?' (n 11); Nancy A Welsh, 'Disputants' Decision

particular process elements result in heightened perceptions of procedural justice: the opportunity for disputants to express their voice, assurance that a third party considered what they said, and treatment that is both even-handed and dignified".²⁰ The literature is quite clear that parties want to be treated fairly (with all that is attendant to a concept of fairness) and be given the opportunity to be heard. This involves concepts of equal access and treatment, and thus the neutrality of the third party intervener.²¹

Although not characterized in procedural justice terminology, ideas of self-determination, equality of treatment, participant experiences are elements affecting process and the fairness of that process: "...a mediator acts fairly when the mediation is conducted impartially, without bias, evenhandedly, and indiscriminately".²² In the literature, fairness is oft equated with justice and discussion is often in the guise of fairness of process suggesting the phrase to be synonymous with procedural justice particularly when discussing ethical standards of conduct.²³ Shapira sees procedural justice as embedded within concepts of

Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice' [2002] J Disp Resol 179.

²⁰ Welsh, 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice' (n 19) 185.

²¹ Jonathan M Hyman & Lela P Love, 'If Portia were a Mediator: An Inquiry into Justice in Mediation' (2002) 9 Clinical L Rev 157, 192; Ojelabi, 'Mediation and Justice: An Australian Perspective using Rawls' Categories of Procedural Justice' (n 17) 327-28. This discussion about the elements of procedural justice are those that are discussed in the alternative dispute resolution literature; however, they resonate with the wider literature on procedural justice: see Sevier where he succinctly sets out the elements of procedural justice as it relates to party perception of fairness and which includes reference to the decision-maker's neutrality, respect towards the parties, party voice and autonomy, and trust in the decision-maker's fair treatment of the parties: Justin Sevier, 'The Truth-Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems' (2014) 20 Psych Pub Pol & L 212, 213.

²² Shapira (n 7) 287; For further discussion, see also Ellen Waldman, 'The Concept of Justice in Mediation: A Psychobiography' (2005) 6 Cardozo J Conflict Resol 247; James Coben & Penelope Harley, 'Intentional Conversations about Restorative Justice, Mediation and the Practice of Law' (2004) 25 Hamline J Pub L & Pol'y 235.

²³ For fairness as justice, see Jonathan M Hyman, 'Swimming in the Deep End: Dealing with Justice in Mediation' (2004) 6 Cardozo J Conflict Resol 19, 20-1; Welsh, 'Making Deals in Court-Connected Mediation: What's Justice got to do with It?' (n 11), 817. For fairness as

fairness, and therefore, it is to the fairness of process and outcome that must be explored where mediator responsibility to the parties and to society generally impact expected mediator behaviours.²⁴ Hyman and Love argue that procedural fairness applies to both adjudicative and mediation processes, concluding that mediation delivers procedural justice if all its elements are met.²⁵

Shapiro and Brett take the various work conducted on perceptions of procedural justice and apply it to mediation and arbitration processes, arguing that much of the prior work on procedural justice is centred on outcome controlled processes such as adjudication by a third party decision-maker.²⁶ Using data obtained from 158 miners who experienced mediation and arbitration processes for labour issues, they found that mediation scored higher perceptions of procedural justice than arbitration. In particular, they found that the third party interactional context was a significant factor in findings of procedural justice over issues of control of process: third party behaviour affects judgments of procedural justice as it relates to third party impartiality, consideration and understanding.²⁷ The need for mediator impartiality in the consideration of procedural justice perceptions is noteworthy given the comparative context of the study between adjudicative and non-adjudicative processes where the mediator is not a decision-maker who is expected to render a decision on an impartial basis. MacDermott and Meyerson also comment on this relational aspect suggesting that the factors most impacting disputants in ADR processes are voice, dignified treatment, trustworthiness and neutrality rather than control over the process.²⁸

procedural justice in the context of ethical standards, see Susan Naus Exon, 'How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators' [2006] J Disp Resol 387.

²⁴ Shapira (n 7).

²⁵ Hyman & Love (n 21) 160-61.

²⁶ Debra L Shapiro & Jeanne M Brett, 'Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration' (1993) 65 J of Personality & Soc Psych 1167.

²⁷ *ibid* 1176.

²⁸ Therese MacDermott & Denise Meyerson, 'Australian Tribunals and Alternative Dispute Resolution: A Procedural Justice Perspective' (2018) 37 CJQ 443, 451-4, 461-62.

A concept of neutrality or impartiality seems to underlie the demand for fair treatment in the delivery of procedural justice. There seems to be a need for a third party who has is not biased nor favouring a particular party. Astor, for example, argues that neutrality is more important for mediation than adjudication because it is a private process and cannot depend on the law. As such, its legitimacy springs from neutrality and consensual decision-making.²⁹ She states: "...neutrality is firmly embedded in the theory and practice of mediation, as it is firmly embedded in ideas of fairness and justice in western liberal democracies. Mediation seems an unlikely candidate to redefine our discourses about justice and fairness. ...It deals with disputes in the shadow of established and defining formal justice systems that are deeply attached to ideas of neutrality. It lacks the characteristics of public, reviewable decision-making according to law, and this may make its attachment to other sources of legitimacy all the stronger".³⁰ In particular, a fair process is said to require mediators and adjudicators to act in an unbiased and impartial way so as to be perceived to be neutral.³¹ Neutrality, argues Elnegahy, is necessary in meeting the requirement of treating parties in a dignified and respectful way, one of the elements articulated by Welsh for the delivery of procedural justice.³² For those, therefore, who argue that mediation delivers procedural justice, it does so when the third party intervener is neutral.³³

There are contrary arguments. Neutrality and its related concepts have been seen as presenting a barrier to the delivery of justice through mediation. The concern is the inability of the neutral mediator to correct power imbalances or protect against unfair outcomes. For a mediator to become responsible for the equalization of power or fairness of outcome may mean a mediator must take sides

²⁹ Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 Soc & Leg Studies 221, 222.

³⁰ *ibid* 236-37.

³¹ Hyman & Love (n 21) 161, 172-73, 184, 192.

³² Sherif Elnegahy, 'Can Mediation Deliver Justice?' (2017) 18 Cardozo J Conflict Resol 759, 778-81.

³³ Stulberg, 'Must a Mediator be Neutral? You'd Better Believe it!' (n 17) 830, 854-57.

in the dispute, resulting in the loss of his position as disinterested third party intervener. Some say that this is necessary for justice. To ensure justice, the argument is that a mediator should intervene in such a way as to ensure power is distributed equally and the elements of agreement are fair to the parties. This means forgoing neutrality according to the proponents of this view, a suggestion which invites further exploration.³⁴ However, for purposes of analysis, the focus here is on neutrality as required for procedural justice.

3. The Third Party Neutral in Mediation

For the mediation process, ostensibly, this procedural justice requirement for neutrality should not be problematic. The mediator is generally described as a neutral or impartial third party intervener.³⁵ As Marian Roberts states: “The non-determinative nature of the mediator’s authority and a non-partisan alignment within the parties’ negotiations are recognised to be the two core characteristics of a mediator’s role and function”.³⁶ Within this conceptual understanding of mediation as offering the interventions of a neutral or impartial third party intervener are the attendant and varying definitions of the words neutrality and impartiality. While Colatrella sees a distinction between the concepts of impartiality and neutrality (with impartiality connoting a freedom from favouritism and even-handedness, and neutrality being concerned with not taking a position regarding the dispute or the parties), others do not.³⁷ For example, neutrality is said to comprise concepts of

³⁴ See for example, C Harper, ‘Comment – Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation’ [2006] J Disp Resol 595, 603; Menkel-Meadow (n 4).

³⁵ For example, Susan Blake, J Browne & S Sime, *A Practical Approach to Alternative Dispute Resolution* (OUP 2012), 200; C Izumi, ‘Implicit Bias and the Illusion of Mediator Neutrality’ (2010) 34 Wash UJ Law & Pol’y 71, 74-77.

³⁶ Marian Roberts, *Developing the Craft of Mediation: Reflections on Theory and Practice* (Jessica Kingsley Publishers 2007), 69.

³⁷ Michael T Colatrella Jr, ‘Informed Consent in Mediation: Promoting Pro Se Parties’ Informed Settlement Choice while Honoring the Mediator’s Ethical Duties’ (2014) 15 Cardozo J Conflict Resol 705, 711-13.

impartiality and equidistance;³⁸ impartiality and lack of bias;³⁹ equality, impartiality, consensuality of process and freedom from influence;⁴⁰ procedural and outcome neutrality and avoidance of bias;⁴¹ and lack of bias, evaluation and influence.⁴² A simple dictionary definition of the words seem to support this: “to be neutral is not to support either side in a dispute or conflict; impartial” and to be impartial is to treat “everyone equally; not biased”.⁴³ As Oberman suggests, the terms are subject to ‘a highly subjective standard’ with vague criteria.⁴⁴ It would seem from these definitions that there is overlap in the nature of the two words – to be neutral can be seen to be impartial. Distinctions between terms are blurred.

Given the variance of definitions, the term neutrality, for purposes of this paper, refers to the non-aligned status of the third party intervener, ostensibly, at a minimum, standing equidistant between parties and is used to reference both concepts of neutrality and impartiality as they are often used interchangeably in the literature and in normal usage.⁴⁵

As seems to be the general way in the conflict resolution scholarship, there is a debate about the role that neutrality should play in the mediation process.⁴⁶ On

³⁸ Sara Cobb & J Rifkin, ‘Practice and Paradox: Deconstructing Neutrality in Mediation’ (1991) 16 *Law & Soc Inquiry* 35.

³⁹ Harper (n 34).

⁴⁰ Astor (n 29).

⁴¹ Izumi (n 35).

⁴² Wall, Dunne & Chan-Serafin (n 1).

⁴³ Catherine Soanes & Sara Hawker (eds), *Compact Oxford English Dictionary of Current English* (OUP 2005).

⁴⁴ Susan Oberman, ‘Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum’ (2005) 20 *Ohio St J Disp Resol* 775, 798-99; see also Scott R Peppet, ‘Contractarian Economics and Mediation Ethics: The Case for Customising Neutrality Through Contingent Fee Mediation’ (2003) 82 *Tex L Rev* 227, 253-54.

⁴⁵ It should be noted that this definition of the ‘neutrality’ of the third party intervenor was used in the author’s original ethnographic study. It continues to be applied here as it is the view of the mediator held by the author upon entering the field. For interchangeability, see for example, Simon Roberts & Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-making* (CUP 2005), 153-172; Izumi (n 35) 78.

⁴⁶ See for example, LE Susskind, JB Stulberg, BS Mayer & J Lande ‘Panel Discussion: Core Values of Dispute Resolution: Is Neutrality Necessary?’ (2012) 95 *Marquette LR* 805; BS

the one hand, are those who argue that neutrality is an aspiration for the process used to create a sense of legitimacy for the authority of the mediator;⁴⁷ that it is not a defining feature of the process;⁴⁸ or that it cannot be satisfied by even the most facilitative of mediators.⁴⁹ On the other hand, are those who argue that a successful mediation can only occur with the presence of a neutral third party;⁵⁰ that it is a fundamental element of the process along with self-determination;⁵¹ and, that it is also necessary for legitimacy of the process and ethical practice.⁵² Yet others suggest that, despite its acknowledgement as a core value of the process, it impedes the attainment of fairness of process.⁵³ One commentator, while eschewing the need for the traditional concept of neutrality as a core feature of the process, sees the need for some form of impartiality in the mediator role and a need to tailor the concept according to party demands so that neutrality continues to exist in some form.⁵⁴ The fact that there is such a debate on the issue is indicative of its relevance to the process.

Whatever view is taken about the nature of neutrality in mediation, it would not be controversial to say that neutrality (in some form) is generally accepted as a

Mayer, 'What we Talk about When we Talk about Neutrality: A Commentary on the Susskind-Stulberg Debate' (2012) 95 Marquette LR 859.

⁴⁷ Linda Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality - Towards an Ethic of Partiality?' (2001) 10 Soc & Leg Studies 505, 508, 521-523.

⁴⁸ Mayer (n 46).

⁴⁹ AC Garcia, 'Negotiating Negotiation: the Collaborative Production of Resolution in Small Claims Mediation Hearings' (2000) 11 Discourse & Soc 315, 335-37.

⁵⁰ SB Goldberg & ML Shaw, 'The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three' [2007] Negotiation J 393.

⁵¹ JJ Alfini, 'Mediation as a Calling: Addressing the Disconnect Between Mediation Ethics and the Practices of Lawyer Mediators' (2007-2008) 49 S Tex L Rev 829, 831.

⁵² On the legitimacy point, see R Zamir, 'The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic' (2011) 11 Pepp Disp Resol LJ 467, 514; and for ethical practice, see Susan Naus Exon, 'The Effects that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation' (2007-2008) 42 USFL Rev 577, 582-89.

⁵³ Exon, 'How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators' (n 23) 417-18.

⁵⁴ Peppet (n 44) 253-257.

fundamental element of the process and acknowledged as such in the literature.⁵⁵ More expressly, Blankley sets out the importance of the concept: “Impartiality and freedom from bias are the most important ethical considerations for mediators...Mediator neutrality is among the most basic ethical obligations for the profession. ...Nothing is more important to mediation than neutrality”.⁵⁶ An interdependent relationship arises between neutrality and procedural justice: the neutrality of the third party intervener as a fundamental feature of the process is necessary for the delivery of procedural justice. It becomes relevant, therefore, to examine mediator interactions during the process to ascertain its presence. Procedural justice relies on it.

4. Fieldwork Site

The exposition of mediator interactions discussed in this paper, as stated earlier, is based on ethnographic data amassed during an ethnographic project that took place in 2006 and 2007. When the field was entered, the process was understood to be a private and consensual negotiation facilitated by a non-aligned third party invited into the dispute by the parties with no authority to determine outcome. Neither neutrality nor the lack thereof was specifically sought in the ethnographic exercise. The field was entered with a general understanding of theory; it was not entered to engage in a specific exploration of a particular issue. This is common for

⁵⁵ Kimberlee K Kovach, ‘The Mediation Coma: Purposeful or Problematic’ (2015) 16 *Cardozo J of Confl Resol* 755, 774.

⁵⁶ Kirsten M Blankley, ‘Is a Mediator Like a Bus? How Legal Ethics May Inform the Question of Case Discrimination by Mediators’ (2016-2017) 52 *Gonzaga L Rev* 327, 353, 371. Mediator codes of conduct often specify the requirement of neutrality or impartiality on the part of a mediator. See for example, the European Code of Conduct for Mediators at <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>; European Code of Conduct for Mediation Providers at <<https://rm.coe.int/cepej-2018-24-en-mediation-development-toolkit-european-code-of-conduc/1680901dc6>>; International Mediation Institute Code of Professional Conduct at <<https://www.imimmediation.org/practitioners/code-professional-conduct/>>

ethnographic study.⁵⁷ Immersion in the phenomenon was the purpose; analysis of the data would occur and patterns exposed once the field was exited. The data are not quantitative in nature and do not seek to establish a preponderance of evidence on any issue raised.

The aim of the study was immersive exploration of a phenomenon, to see patterns of action not immediately discernible. Malinowski describes the method as one that sees the 'imponderabilia' of life.⁵⁸ Indeed, it was not until a review of the data after the observations were concluded, that the shifting identities of mediator interactions became exposed and patterns reported. The data have been since examined again for patterns and themes relating to the delivery of procedural justice during the mediation process in the context of the expected neutrality of the third party intervener. The analysis of the data is an interpretative exercise following in the tradition of Geertz.⁵⁹

During 12 months of fieldwork with a leading mediation service provider in the United Kingdom, I attended 38 commercial and civil mediations, participating in the mediation process as a participant-observer, and more specifically, as assistant mediator and independent external researcher. Most importantly, parties consented to and were aware of my role as independent external researcher at all times. As assistant mediator, I was at times given minor administrative duties or acted as sounding board to the mediator. This role did not impede the observation as the mediator appointed by the parties had full responsibility for the mediation process which evolved under the mediator's direction. I was with the lead mediator whenever the mediator was with the parties, thus able to observe the interactions and take detailed notes of them. The mediators were skilled and experienced interveners, having completed the organisation's training and accreditation

⁵⁷ For a more fulsome discussion about the ethnographic method, see De Girolamo, *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (n 2) 22-31.

⁵⁸ Bronislaw Malinowski, *Argonauts of the Western Pacific* (1984 edn, Waveland 1922) 18.

⁵⁹ Clifford Geertz, *The Interpretation of Culture* (Basic Books 1973) 16, 20.

programme which was steeped in a facilitative framework, requiring neutrality on the part of the third party intervener and bolstered by a code of conduct to which all mediators subscribed.⁶⁰ Often they were or had been practicing lawyers, although some had other non-lawyer professional or industry backgrounds.⁶¹

5. *Shifting Mediator Identities and the Concept of Neutrality*

Due to the immersion in the phenomenon of the mediation process, the ethnographer, as Geertz succinctly described, “sorts winks from twitches and real winks from mimicked ones” (1973: 16).⁶² This enables understanding beyond labels affixed to action by the literature. The literature tells us what mediators do: they are facilitative; they are evaluative; they are problem-solvers; they are reality testers. Recalling that the ethnographic enterprise does not speak to quantitative data outputs, the data observed, recorded and analysed that are relevant for this paper and the contextual premise of the neutrality of the third party intervener, disclose a pattern of action involving mediators who actively position themselves in the facilitated negotiation in order to impact it.

The actors in the drama of mediation are the parties in dispute, their legal representatives who often attend and the third party invited by the parties to assist them with the negotiation of a resolution to their dispute. While carrying out this invited third party intervention, mediators engage in active intervention techniques by assuming the identity of different personas throughout the process. They do this by taking on party, advisor and facilitator identities at various times during the process, acting as party, as advisor and as neutral third party invited intervener.

⁶⁰ It needs to be noted that the mediation service provider had a complaints process available to parties regarding mediator conduct. No formal complaints were made during or after these mediations regarding any of the issues explored herein.

⁶¹ For a fuller description of the fieldwork site, see De Girolamo, *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (n 2) 33-44. .

⁶² Geertz (n 59) 16.

Shifting and hidden identities emerge throughout the process.⁶³ An analysis of the observational data discloses patterns of actions that are not immediately discernible. It is only through an immersive observation that they are revealed.⁶⁴ These patterns of action have implications for issues of mediator neutrality in that they challenge the presumption of the process requirement for a neutral third party intervener, and thus challenge the view that mediation offers procedural justice to parties.

Looking closely at the data, for example, in a two party dispute with Party A and Party B, mediators take on the following five identities: (1) that of their own self as mediator when with both parties; (2) that of Party A when confronting Party B or when empathizing with Party A; (3) that of Party B when confronting Party A or when empathizing with Party B; (4) that of Party A's adviser when with Party A; and (5) that of Party B's adviser when with Party B.

As mediator, the mediator engages in action that is typical of the expected third party neutral intervener such as explaining the process and the mediator role, setting the agenda, defining issues, exploring facts and interests, relaying information to each party, and carrying offers between parties. This is one identity revealed in the process; it is the expected identity. It is not the only identity that emerges in the process, however. Party identity also emerges.

The identity of party is comprised of two states: that of party proper and that of opponent. The mediator takes on the identity of party proper when

⁶³ The research and analysis regarding the shifting identities in this section is discussed in De Girolamo, *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (n 2) (see chapters 5 and 6 therein) where detailed case studies setting out the interactions between all participants of the process is provided. They and their analysis support these conclusions.

⁶⁴ Geertz speaks of ethnography as thick description: "What the ethnographer is in fact faced with...is a multiplicity of complex conceptual structures, many of them superimposed upon or knotted into one another, which are at once strange, irregular, and inexplicit, and which [the ethnographer] must contrive somehow first to grasp and then to render"; Geertz (n 59) 16.

empathising with the party over the issues in the dispute or about the other party, such as agreeing with party demands, articulating party interests, protecting party concerns or engaging in criticism of the other party. This is an assumption of direct party identity, fortifying party voice while discarding the mediator persona. This identity aligns the mediator directly with a party as a member of the party's team.

The second state of party identity is that of opponent. This results in the transformation of the mediation into a direct negotiation. Here, the mediator takes on the identity of party against party by opposing the other party's position on the facts, evidence or law through actions such as articulating a different view of the dispute or its weaknesses, arguing the party's case against the party or making demands. The fortification here is of the opponent voice. Mediator persona is again subsumed into party persona. The result is a set of interactions which is distinct from neutral third party intervener action. Both party identities augment party voice, providing additional iterations of party voice, but coming from the invited outsider.

Observed interventions also disclose an adviser identity. The third party intervener shape shifts into the persona of party adviser, whether or not the party is represented by legal counsel. Interventions as party adviser include the provision of legal or professional advice, recommendation on actions to take, offers to make, responses to give, and giving opinions on the merits of claims and positions. The mediators, in taking on this identity, become what Roberts and Palmer refer to as expert consultants, where their professional expertise is shared with and for the parties.⁶⁵

As a result of these patterns of actions which occur frequently throughout the process, the expected neutral third party intervener does much more than merely facilitating parties with their negotiation as expected by the process: there is active

⁶⁵ Roberts & Palmer (n 45) 155.

intervention where the mediator identity is often shed to participate directly in the negotiation as party and party advisor.

As a result of this active mediator engagement in the interaction between parties, traditional concepts of neutrality become elusive in the process. Due to these shifting identities, an ongoing shift in alignment toward parties and against the parties takes place in the search for settlement of the dispute. In advocating for a party against a party, or in supporting a party against a party, a mediator moves away from elements of neutrality that require even-handed treatment or lack of bias. Whatever the definition of neutrality, including concepts of non-alignment and equidistance (used herein for purposes of definitional approach to the concept in the first instance), these shifts alter the distance between mediator and party. The distance that is maintained or shortened is dependent on the identity assumed.

Interestingly, however, the impact of these shifts is not felt by the parties. The shifts occur and are visible only to the ethnographer. To the parties, they are not. Mediator and parties neither see nor experience the interventions as disclosed by the observations. Mediators tell the parties that they will not judge, advise or decide the issues between the parties. This is the expectation given to the parties. This expectation is met as the parties generally view their mediator as non-directive and even-handed, and at times, not interventionist enough.⁶⁶ The parties engage fully with all the mediator identities and do so without awareness of the nature of the intervention. Mediators too remain unaffected by the interventions in so far as their lack of awareness of the nature of the actions they take during the mediation.⁶⁷ For mediator and party, the concept of neutrality is respected and applied during the process. The data, however, say otherwise.

⁶⁶ De Girolamo, *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (n 2) 203.

⁶⁷ *ibid* 202.

Kolb suggests that neutrality requirements can be met even in the face of such interactions and identity shifts as long as the mediator dispenses equal treatment to each of the parties during the course of the process. An expression of mutual support, which if done well, will, she argues, maintains neutrality in the eyes of the parties.⁶⁸ Kolb's argument that evenhanded treatment of the parties satisfies neutrality requirements can only be viable from a superficial view of mediator interactions. The data, for example, show that mediators are generally evenhanded in terms of the amount of time that they spend with each party in private meetings during the process.⁶⁹ It is not until the data are analysed for patterns of action within the meetings with each party that the fugitive identities are revealed and the shroud of neutrality falls away. Furthermore, the fact that these interactions occur predominantly during private meetings makes it less obvious to parties when the mediator's neutrality may be compromised.

This view of neutrality by Kolb suggests that perception is critical in the application of neutrality requirements for the process. Perception becomes the aspiration rather than the reality. This however would not satisfy the need for mediator neutrality as understood in descriptions of permissible mediator interventions or the demands of ethical codes requiring mediators to be neutral during the process. The current boundary of neutral behaviour that is permissible by a mediator includes what is referred to as reality testing or playing devil's advocates. Observed mediators often described such actions as reality testing or playing devil's advocate, labels which are also carried forward in the mediation

⁶⁸ D Kolb, 'To be a Mediator: Expressive Tactics in Mediation' (1985) 41 J of Soc Issues 11, 19-20. Colatrella's reference to impartiality as even-handedness would support Kolb in this assertion while recognizing that impartiality can be maintained if the mediators conducted themselves in an 'objective and unbiased manner' but that neutrality could not be satisfied if the mediators take positions against parties: Colatrella (n 37) 712-13. Shapira too speaks in terms of 'evenhandedness' stating that a formal meaning of impartiality should be discarded for a substantive meaning where mediators should treat unequal parties unequally which would be impartial behaviour, at least in the view of the parties: Shapira (n 7) 308-310.

⁶⁹ De Girolamo, *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (n 2) 116, 126, 137.

literature to describe, ostensibly, effective mediator techniques. As noted in the author's prior study, labels do not change the nature of the mediator intervention as described herein and as disclosed by the observational data.⁷⁰

The data challenge the assumption that mediators are engaging in anodyne reality testing. One must step outside the box created by the self-reflexive views of mediation to determine what it is that the mediator is doing when he or she is interacting with the parties. When examining the actions and relationships of those to the process, it is clear that the mediator steps out of the third party role and steps into the dispute directly in these manners. This is not a bad thing, per se: arguably, it is necessary for effective mediation outcome. In any event, these actions must be recognised and accepted for what they are, not for what they are masked to be. The nature and purpose of these activities hide behind a label that is part of the mediator nomenclature. The actions underlying the labels suggest non-neutral and partial action. The data disclose that mediators do not necessarily treat the parties equally with respect to alignment nor do they remain neutral through the course of the process.⁷¹ The shifts come when and if the mediator deems necessary to progress the process.

As a result of these interventions by mediators, it would appear that the mediator does not satisfy the demand of procedural justice objectively considered. Objectively speaking, the mediator is to be neutral to meet one of the elements of procedural justice. The parties, however, do not experience a non-neutral or partial third party despite the nature of these mediator interventions. They say their mediator was neutral which would accord with procedural justice demands. These shifting mediator identities, however pierce the mask of mediator neutrality: the

⁷⁰ *ibid* 203.

⁷¹ Such findings raise questions about the ethics of this shape-shifting conduct by the mediator given the preponderance of the neutrality requirement on mediators in the literature and codes of conduct, and most importantly as expected by the parties. The impact of these findings on issues of ethical conduct, however, is beyond the scope of this paper and is a matter for future research. This paper is concerned with the shape shifting conduct in relation to the requirement of neutrality for the delivery of procedural justice.

concept of neutrality is challenged, and with it the delivery of procedural justice for the process and for the parties. An inconsistency appears between the observational data and parties' experiences. For the parties, neutrality does not appear to be compromised by mediator actions. What does this mean for a procedural justice analysis of the mediation process? Further consideration of parties' experience is required. In particular, it is necessary to delve deeper into the data to determine how parties experience justice and its relevancy to procedural justice.

6. The Data and Justice Consciousness

The data were reviewed and analysed for parties' notions of justice and fairness. For example, when exploring legal positions and settlement offers, parties often refer to legal structures and institutions. In one case, the mediator says: "I do not know what a judge would say – will a judge see it as fair? ...judges will do what they think is fair and proper."⁷² A defendant's counsel says to the claimant: "What would a judge do? He will look at the whole history of the case; look at the calendar, it is a cyclical business, will see that the claimant pulled out of the negotiation voluntarily at the late stage; will look at the estoppel correspondence; will look at what occurred in the fall when speaking with the distributors...Judges are human and the chancery division judges have great sense of fairplay so if there is any ambiguity, the balance of fairness is on the defendant's side..."⁷³

Fairness of outcome too is considered by the parties: is the offer or outcome a fair one? Will it be perceived as fair? One mediator tells a defendant that it needs to persuade the claimant that the offer is fair in terms of how the defendant has dealt with the claimant in the past and that the claimant needs to feel a sense of fairness.⁷⁴ Another defendant says in the context of a first offer that was accepted

⁷² Case 7: 48.

⁷³ Case 9: 16.

⁷⁴ Case 21: 53.

by a claimant without a counteroffer: "I have given him a fair price. I felt I could give him [] more but not much. They judged it right. Good for him."⁷⁵ The juxtaposition of an outcome determined by the adjudicative decision maker against the consensual decision reached during the mediation process is suggested here. In mediation, the parties determine what is fair in contrast to the courtroom where the judge decides what is fair. Fairness then can be difficult to gauge and from these perspectives seem to reflect the general uncertainty about justice itself: what type of justice is to be had from the mediatory process and how does this differ from the justice delivered by the state court process. The parties are unclear. The concept of procedural justice is not expressly articulated but is suggested by the link established in the research between fair process and fair outcome referenced earlier herein. This link however raises a question whether a view of outcome as fair necessarily leads to a conclusion that process was fair.

Fairness of outcome is not the only relevant consideration. Party perceptions of justice experienced during this process are also relevant. Initially, legal consciousness, which is concerned with perceptions and experiences of law in the everyday, was considered as an appropriate framework through which to examine the data.⁷⁶ The frame of legal consciousness, however, may be too restricting through which to explore parties' perceptions and experiences of justice given its focus on the structures, rules and norms of a legal system. At issue in this paper is a particular form of justice – procedural justice - and the parties' perceptions and experiences of it. It is concerned with parties' experiences of justice during a non-judicial process. In other words, it is the justice consciousness of the parties that is explored through the data: the words of the parties are examined for what is said or not said about justice. A distinction is made here between legal consciousness and

⁷⁵ Case 21: 100.

⁷⁶ Sally E Merry, *Getting Justice and Getting Even: Legal Consciousness among Working Class Americans* (University of Chicago Press 1990); Patricia Ewick & Susan S Silbey, *The Common Place of Law* (University of Chicago Press 1998); Dave Cowan, 'Legal Consciousness: Some Observations' (2004) 67 MLR 928.

justice consciousness where legal consciousness is about the study of the way people use and understand the legal system, more broadly constituted through structures, rules and norms. Justice consciousness on the other hand, seeks subjective understandings of justice in particular contexts: the focus here is the experience or perception of justice during a process that ostensibly sits outside of the law.

Some may argue that legal consciousness is also about perceptions of justice. For example, Gill & Creutzfeldt, in their exploration of the legal consciousness of the users of the ombudsman system, say that legal consciousness provides a framework for understanding citizen's own beliefs of justice.⁷⁷ In so doing, they apply a legal consciousness framework to explore how people view a quasi-judicial process within the justice system and what people do with a dissatisfied outcome. The participants in the study are engaged in a quasi-legal process as described by the authors, which is grounded in legal rules and structures.⁷⁸ Hence, the exploration remains embedded in views of a particular justice *system* as opposed to views about concepts of justice as felt *outside* a justice *system*. That framework remains one of legal consciousness. For purposes of this paper, the framework for analysis is justice consciousness as distinct from legal consciousness: more particularly, it is an exploration of how people experience the *concept* of justice, not a *system* of justice. In other words, it is not about a legal system and how that legal system is experienced; it is about justice and feelings of justice when dealing with a dispute through a non-judicial process. The work is situated within a justice consciousness framework in so far as methodology is concerned: disputant's views about justice are observed during this non-judicial process as experienced by them. It is the

⁷⁷ Chris Gill & Naomi Creutzfeldt, "Ombuds Watchers": Collective Dissent & Legal Protest Among Users of Public Service Ombuds' (2018) 27 Soc & Leg Studies 367, 375.

⁷⁸ *ibid*

party's awareness of justice through their experience and its relationship to procedural justice that concerns this study.⁷⁹

It becomes clear in the data review that the disputants rarely use the words 'just' or 'justice' during the process. When the words are invoked, it is by the mediator or legal representative suggesting a distance among concepts of law and justice on the one hand, and mediation and justice on the other. The justice consciousness of these particular actors in the process takes justice away from law, away from court and away from the mediation process as well. For example, in one case, the defendant team, comprised of legal counsel and corporate representatives, suggests that justice and law are not compatible when describing the consideration of an offer as follows: "if justice prevails v the legal position".⁸⁰ In another mediation, the claimant's solicitor advised his client on two occasions during the course of the mediation: "I told you that law and justice are not the same thing. If you came to the law for a just decision, you came to the wrong place."⁸¹ In another case where both parties wanted a court decision, the mediator told the claimant: "People go to court thinking justice will be done; it does not always happen."⁸² These comments see law being challenged as a source of justice. Mediation too suffers the same challenge. When one defendant tried to persuade the mediator of its position, the mediator said: "You do not need to convince me. It is not a matter

⁷⁹ Justice consciousness is a phrase that has been used to reference environmental justice consciousness (for example, people's views of and experiences with justice surrounding environmental issues is referred to as environmental justice consciousness: Michael Gerrard and others, 'The Past, Present and Future of Title VI of the Civil Rights Act as a Tool of Environmental Justice' (1999) 10 *Fordham Env'tl LJ* 393, 411; Dollie Burwell & Luke W Cole, 'Environmental Justice Comes Full Circle: Warren County before and After' (2007) 1 *Golden Gate U Env'tl LJ* 9 39-40), or with respect to self-reflexive storytelling about one's views of justice (Patricia Erickson, 'Critical Justice Consciousness: Social Injustice & the Criminal Justice System' (2003) 6 *Contemporary Just Rev* 341; Michelle Inderbitzin, 'Outsiders & Justice Consciousness' (2003) 6 *Contemporary Just Rev* 357), but does not appear to be used more generally to encompass a focus on party justice experiences and perceptions. This represents a gap in the literature.

⁸⁰ The note was made on a flip chart in Case 15: 15-51. In this case there was much discussion about legal positions by both parties.

⁸¹ Case 32: 32-27.

⁸² Case 11: 11-66.

of justice.”⁸³ In another case, the mediator saw no justice in the settlement achieved.⁸⁴ These comments seem to exacerbate the debate about justice by implying that neither the court nor the mediation process offers justice, or by suggesting that it is one or the other which offers justice, but not both.

When speaking of what the process provides, the outcome sought or the outcome received, the words which reappear through the parties’ stories do not refer specifically to justice, but have some resonance to it. These words include: (1) being ‘reasonable’, ‘commercial’, ‘realistic’, and ‘logical’ or having ‘common-sense’ in reference to the nature of the objective being sought; (2) the search for ‘truth’, ‘right and wrong’, ‘satisfaction’, ‘fairness’, ‘vindication’, ‘finality/certainty’, ‘compassion’, ‘equity’ or being ‘owed’ in relation to desired outcome; (3) meeting the ‘objectives’ of the parties, ‘getting something one can live with’, ‘achieving something more through mediation than through the court process’ or mediation as ‘compromise’ as it relates to outcome obtained; and (4) the concept of ‘litigation not being a fair process’ or ‘litigation as risky’ in terms of what parties will experience if they do not resolve their dispute at mediation.

These words, arguably, are indicative of the parties’ subjective views of justice in mediation in so far as they describe how the parties experience the mediation process and the outcome that is sought from it. Very little, however, can be applied to these words beyond the suggestion of a pragmatism or satisfaction story.⁸⁵ There is a suggestion that the parties are interested in reaching an agreement that is, at minimum, tolerable as opposed to just. As for process, the hope is that it will be a better process than a court process, rather than a hope for a procedurally just process. Parties in a mediation do not necessarily think in terms of procedural justice.

⁸³ Case 32: 32-55.

⁸⁴ Case 12.

⁸⁵ Robert A Baruch Bush & Joseph P Folger, *The Promise of Mediation: the Transformative Approach to Conflict* (2nd edn, Jossey-Bass 2005) 9-11.

The language used to speak of the process and outcome suggests minimal justice consciousness on the part of the actors in dispute, although concepts invoking procedural justice elements are referenced: for example, 'equity', 'search for truth', 'fairness' have been mentioned with respect to desired outcome. This infers the parties come to the process with some hope for procedural justice. However, their objectives, obtained outcomes and reasons why resolution occurred, as described, offer a contrary view, one in which procedural justice seems to play little, if no, part. Yet, the parties' sense of being treated 'fairly' by a 'neutral' third party seems to suggest, again, that some aspect of procedural justice may be experienced, at least from the parties' perspectives. For them, it appears that they enter the process with some expectation of procedural justice and may indeed, experience it through this perception of mediator neutrality, but it does not appear to be an express objective of the process.

The feelings described about the interactions with the opposing parties during the course of the process, however, suggest an alternative image to one offered by a process that promises procedural justice. For instance, disputants do, at times, speak in terms of bullying, coercion, and victimisation experienced during the process. One claimant says in response to the defendant's offer: "...we are conceding a lot on the case where there has been no loss. There is only so much I can give up and now they are changing the formula. Every trick is being played here to knock me down – hindsight is great. Had I accepted the [prior offer], they would have been happy to pay it. There has been a willingness to negotiation and concede. Now you are trying to justify it on a risk analysis."⁸⁶ Further, when the mediator says that he is not 'putting forward the defendant's case, but he needs to 'reality test', the claimant replies "I am being done" to which the mediator says "Yes, you are being done".⁸⁷ Another claimant feels the victimisation when he describes himself

⁸⁶ Case 7: 59.

⁸⁷ Case 7: 59.

and his partner as ‘innocents in a lion’s den.’⁸⁸ Claimants are not the only party who feel pressure. A defendant feels the strain too when he says: “They aren’t trying to come to a solution. They are trying to punish me.”⁸⁹ Yet later he perceives the claimant as ‘being beaten up by him.’⁹⁰ In another case, the claimant acknowledges that both parties are aggrieved, but in the end, they need to compromise to avoid the risks and costs of litigation, and to prevent the lawyers from benefitting from continued litigation.⁹¹

Despite feeling aggrieved, bullied, coerced or victimised, the parties can still come to agreement as they did in the cases from which these statements were taken. Further, the perception of mediator neutrality was not diminished. These feelings communicated by the parties add a subtle nuance to arguments of procedural justice in mediation. Agreement may be reached and neutrality may be perceived, yet some form of victimisation is felt. Perhaps the nuance lies in the feeling of victimisation by party against party as opposed to victimisation through mediator treatment and hence mediation process. Perhaps negative party treatment is expected in conflict and its resolution, resulting in party complacency in that expectation.

In relation to procedural justice in mediation and its four elements, this raises an interesting issue: despite these feelings, the literature would suggest that, as long as the parties have been given the opportunity to speak and be heard, and are treated in an even-handed way by the third party intervener, procedural justice is delivered. Where then should these party expressions fit within the discourse? The justice consciousness of the parties does not speak of them in justice terms. This notwithstanding, even if all these procedural justice elements are present, any victimisation of parties must test the presumption of procedural justice in those circumstances.

⁸⁸ Case 21: 12.

⁸⁹ Case 15: 65.

⁹⁰ Case 15: 73.

⁹¹ Case 21: 21.

The process, arguably, becomes tainted by the implication of procedural unfairness that is suggested by these expressions. These stories appear to challenge the procedural justice narrative in this regard, particularly when coupled with its neutrality presumption. The need for neutrality for procedural justice only serves to highlight a paradox: neutrality is said to be required for procedural justice yet a non neutral mediator would likely be required to tackle this issue during the process by, for example, balancing power inequities. Neutrality may render a third party intervener incapable of effective remediation of the problem. Mediator intervention to prevent victimisation, however, is beyond the scope of this paper and is a discussion for another day.⁹² Suffice it to say that the relationship between neutrality and procedural justice may create anomalies in the process.

7. Concluding Remarks

The exploration of justice that has occurred here is one set within the procedural justice framework of the mediation literature which embeds neutrality as one of its critical elements. This article is an important contribution to the field for its exposition about the delivery of procedural justice in mediation and also for the methodology used for its claims. First, it makes use of scarce ethnographic data to challenge claims in the literature that mediation offers procedural justice. Second, it applies an underexplored justice consciousness lens to explore parties' perceptions and experiences of justice during mediation.

The ethnographic data suggest mediator neutrality is not practiced as proposed by the literature. Parties though are not concerned because they believe that it is exercised. They however have a low threshold of justice consciousness

⁹² For a consideration of this issue from the perspective of Amartya Sen's capability theory within the context of an examination of the ability of mediation to deliver substantive justice, see Debbie De Girolamo, 'Sen, Justice and the Private Realm of Dispute Resolution' (n 3).

during the process and one that focuses primarily on outcome, so perhaps the lack of awareness of mediator actions is understandable. Their interest is in the outcome to be achieved.⁹³ That is their purpose in coming to mediation. They do not raise issues of justice per se. On the issue of neutrality, they want and experience a mediator who is impartial, who is not biased, who stands equidistance between each party. The data suggest that the mediator may not be any of these things.

Perhaps one conclusion that can be drawn is the important role perception plays in mediation suggesting the relevancy of Lord Hewart's aphorism, "justice should manifestly and undoubtedly be seen to be done" to the process.⁹⁴ Perception may be the reality for mediation and the delivery of justice through its process in its current state rather than justice as actually delivered through procedural justice or any other form of justice. Arguably this augers well for the proponents of the 'neutrality is justice' school of thought (for example, Stulberg), for if the parties feel neutrality, then some may say that is all that matters.⁹⁵ This seems to be the suggestion of the data. However, perceptions of procedural justice are ephemeral and an insufficient basis on which to promote the delivery of the concept through the mediation process.

The field must consider the implications of this for procedural justice and the promises about its delivery. If procedural justice requires a neutral mediator as is suggested by the literature (and certainly, the general requirement, notwithstanding the procedural justice requirements, is the need for a neutral third party intervener), the data suggest that by logical conclusion, procedural justice is an ideal, merely a party perception but not a reality. Mediators take an active role in the process. Acknowledgement of the active role has repercussions on the concept

⁹³ De Girolamo, *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (n 2) 143-144.

⁹⁴ *R v Sussex Trustees, Ex Parte McCarty* [1924] 1 KB 256, [1923] All ER 233.

⁹⁵ Stulberg, 'Must a Mediator be Neutral? You'd Better Believe it!' (n 17).

of neutrality. The shifting identities and the corresponding loss of expected neutral stance occurring during the process are carried out with a purpose of effecting a resolution.⁹⁶ Higher pretensions of neutrality concepts as fundamental to the delivery of procedural justice as demanded by the literature may need to be discarded as they are not supported by the ethnographic experience.

In conclusion, the justice debate in this field needs to recognise the third party intervener as an active player within the mediation process who ensures that perspectives are broadened, forcing parties to look beyond their own self-reflexive view of their dispute.⁹⁷ This is the mediator's function and the shifting identities assist with this function. As such, traditional concepts of neutrality as understood by the literature are not helpful in advancing the justice debate, whether invoking procedural or substantive justice concepts. It is to the nature of the outsider voice that regard must be made, and the role of such voice in the delivery of justice in the face of this reality.

⁹⁶ De Girolamo, *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (n 2) 200-01.

⁹⁷ This is further explored in De Girolamo, 'Sen, Justice and the Private Realm of Dispute Resolution' (n 3).