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Jill A. Howieson  
*Edith Cowan University*

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Procedural Justice in Civil Court Mediation:

A Critical Review of the Literature

Procedural Justice in Civil Court Mediation:

Exploring the Instrumental and Non-instrumental Processes

Jill A. Howieson

A Report Submitted in Partial Fulfilment of the  
Requirements for the Bachelor of Arts  
(Psychology) Honours, Faculty of Community  
Studies, Education and Social Sciences, Edith  
Cowan University.

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## Acknowledgments

I would like to express my gratitude to my supervisor Dr Neil Drew for his expert supervision and advice during this arduous process. He kept me balanced, focussed and encouraged, and exemplified the value of having a committed, thorough and receptive supervisor. I would also like to thank Dr Alfred Allan for his suggestion that I approach the Local Court to conduct my survey (instead of the Supreme Court, who still to this date has not responded to my request). I would also like to thank Dr Noel Howieson for editing assistance and Dr Craig Speelman for his guiding silences.

I would also like to acknowledge my gratitude to Mr Graham Bruce and Mr Michael Johnson of the Local Court for granting me permission to conduct the survey in their Courts, and for providing no impediment to this transpiring (and to Mr Peter Darma of the Fremantle Local Court). Also, my thanks to John Lawson for providing entrance to his domain and for providing guidance on how the pre-trial conferences are conducted. I would also like to thank everyone on Floor 9 of the Perth Local Court who was friendly and obliging to my presence (Andy, Dom, Geoff and others) and especially Jeanette, who was so wonderful, so helpful and so interested in my work and who made my Mondays and Fridays in the courts an absolute pleasure. I would also like to thank the participants who again made my time in the courts a pleasure and made the data collection exercise a satisfying experience.

Finally to my family – to Claude my deepest gratitude for you doing everything else while I did this (I could never have achieved this without your never ending understanding and support). Thank you also to Jack, Cabe, Romy and Marco for putting up with me glued to the computer.

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Running Head: PROCEDURAL JUSTICE IN MEDIATION

Procedural Justice in Civil Court Mediation:

A Critical Review of the Literature.

Jill A. Howieson

Edith Cowan University.

### Abstract

This article provides a comprehensive review of research on the issue of procedural justice in dispute resolution procedures, with a particular focus on mediation. The review traces the history of the literature from the early control models of Thibaut and Walker (1975), through to the modern relational model postulated by Lind and Tyler (1992-1998). It discusses the major theoretical models of procedural justice in terms of their implications for legal dispute resolution and focuses on mediation procedures used by the civil courts. The models provide a theoretical base for identifying which psychological processes, namely non-instrumental, instrumental or relational, operate in influencing litigant satisfaction with civil court mediation. The models also help explain litigants' perceptions of the fairness of mediation and their satisfaction with it as an "alternative" dispute resolution procedure.

## Procedural Justice in Civil Court Mediation:

### A Critical Review of the Literature.

The concept of justice pervades most systems of social life, yet at no other time are people's concerns about justice as obvious as when they confront the legal system. When disputants choose a legal mechanism for the resolution of their disputes, they often do so to "get justice". What constitutes justice, however, and what people actually mean when they speak of justice, and what they perceive to be just, are questions that have interested psychologists for decades.

Justice is a social construct, the meaning of which changes as society changes, and the understanding of which will depend on the context of the experience (Drew, 1997). Justice is also a perception. "It is an idea that exists within the minds of all individuals", a subjective sense of right or wrong (Tyler, Boeckmann, Smith, & Huo, 1997, p.4). To understand the concept of justice, social psychologists have mainly studied what affects people's subjective feelings about justice, and what psychological processes are involved when people construct their meaning of justice in any given setting. Social psychologists have developed models of justice that include principles of distributive justice and procedural justice; however most of the research in the last twenty-five years has focussed on exploring issues related to procedural justice.

In legal settings, the study of the psychology of procedural justice has generally concentrated on the adversarial trial process and on what issues influence litigants' perceptions of a fair and just trial (Lind & Tyler, 1988). Currently however, many legal institutions are using alternatives to the trial procedure to resolve civil disputes. These alternative procedures are known collectively as alternative dispute

resolution or ADR. Mediation is perhaps the most popular ADR procedure used by the civil courts, yet justice scholars have rarely investigated how litigants perceive the justice of civil court mediation, or how perceptions about the justice of ADR may differ from litigants' views of the justice of courtroom trials. As justice is a primary concern for litigants attending court to resolve disputes, it is imperative that researchers investigate how people react to and perceive what is just in this new domain of the civil legal system.

### Mediation

There are three primary legal dispute resolution procedures - adjudication, negotiation and mediation. ADR incorporates the latter two procedures and hybrid forms of all three procedures (Law Reform Commission of Western Australia, 1997 - 1999). Adjudication usually involves a third party who resolves the dispute by making a binding decision based on who is right or wrong at law. Negotiation usually involves the disputants approaching each other and attempting to resolve the dispute without the assistance of any third party at all. Whilst there are many different definitions and models of mediation, it essentially involves a third party mediator assisting disputants or facilitating their progress toward a unique solution of their own (Astor & Chinkin, 1992). Notwithstanding individual mediator differences and the fact that mediation is not a procedure that has common analogues, most mediation procedures do follow a common process. This process usually involves: the mediator welcoming the parties and explaining the purpose of the mediation; the mediator setting the ground rules, (this may include allowing each party to speak without interruption and prohibiting verbal or other abuse); each disputant in turn explaining his or her side of the dispute without interruption; the parties, with the assistance of the mediator, identifying and narrowing the issues in dispute (this can include the use of private caucuses); the

parties, with the assistance of the mediator, generating options for solving the dispute; and the parties reaching an agreement or settlement (this can include an agreement not to agree).

Whilst the legal fraternity has practised ADR in the form of arbitration (a hybrid form of adjudication) for centuries (e.g., *English Arbitration Act 1697*), mediation is a relative newcomer to legal institutions (Astor & Chinkin, 1992). Arbitration usually takes place outside the court arena and although connected to, is not integrated with, the court system. There is a process known as court-annexed arbitration but still this is usually conducted independently from the court system. Negotiation also, is a process most disputants use before they resort to court. Mediation, however has become the preferred ADR process taken up by the courts, and now most courts incorporate some form of mediation in their civil procedures to help litigants to resolve disputes before going to trial (Law Reform Commission of Western Australia, 1997 -1999).

Brunet described the wave of dispute resolution literature that swept ADR and mediation into the courts as displaying an “almost evangelical fervour” (Astor & Chinkin, 1992, p.159). Proponents of ADR, and in particular mediation, viewed it as a panacea for all the ills (costs, delay, formality, restricted scope of claims and remedies, lack of consensuality and party control) of the adjudicative system (Astor & Chinkin, 1992). They also believed mediation processes would erase the win/lose situation of adjudicatory procedures and would be a more satisfying dispute resolution mechanism for litigants.

In the 1980's in the United States, and in the 1990's in Australia, “the more balanced and sceptical second wave of analysis” of ADR arrived (Astor & Chinkin, 1992, p.159). This wave brought a flurry of research into the mediation process (see

Kressel and Pruitt, 1989 for a comprehensive review of the research), but little research on the justice of mediation. Most of the research explored one aspect or another of the myriad of enactment and stylistic differences that can occur in the mediation process and investigated how this impacted on the effectiveness of mediation in different contexts (Carnevale & Pruitt, 1992). The research showed that generally mediation does remedy some of the objective ills of the adversarial system and on this basis the courts embraced mediation as an alternative to trial. Yet there are significant variations in how the courts employ mediation in individual cases and across jurisdictions and relatively little research has been done to fully assess whether the mediation processes chosen by the civil courts are viewed by litigants as just and preferred alternatives to trial (Lind & Tyler, 1988).

Social justice psychologists now believe that it is procedural justice (the fairness of procedures) that is the “important factor in determining a variety of attitudinal and behavioural reactions to encounters” with dispute resolution procedures (Tyler & Lind, 1991, p.82). Procedural justice is thought to be one of the most important considerations affecting disputant preferences for different dispute resolution procedures, satisfaction with those procedures, and the overall perceived fairness of those procedures (Thibaut & Walker, 1975). However, as very little research has been conducted into perceived justice in the mediation domain, it is uncertain whether the same issues that affect disputants’ perceived justice of the traditional dispute resolution procedures will extend to court mediation. This review will address this question. It will explore whether, theoretically, people’s perception of justice in a civil court mediation procedure will turn on the same issues as their perceptions of justice in the traditional legal procedures.

## The Social Psychology of Justice

Tyler, Boeckmann, Smith and Huo (1997) identified four eras of social justice research. The first, generated the concept of relative deprivation; the second, focussed on the psychology of distributive justice or the fairness of the outcomes; the third, focussed on the psychology of procedural justice or the fairness of the procedures used to determine the outcomes; and the fourth, and newest area of research, introduces an interest in the concept of retributive justice. (Retributive justice refers to people's responses to the breaking of social rules and is more pertinent to research in the criminal justice system. It is therefore beyond the scope of this review).

Relative deprivation theory had its origins in the political and social unrest of World War II. The concept arose out of research involving soldiers and their experiences with promotion through the ranks, during and after the war. Essentially, relative deprivation theory proposes that people evaluate the fairness of their outcomes by comparing them with the outcomes of others. Perceptions of relative deprivation, or unfairness, may occur when people lack something they desire, or feel they deserve, and they compare their situation with the situation of someone within their social group who has this thing (Tyler et al., 1997). Any perceptions of unfairness that occur in the comparison may in turn lead to feelings of anger and resentment.

Distributive justice theories also propose that people make social comparisons when evaluating outcomes, but suggest that people, rather than using self-evaluation type comparisons, use various sophisticated proportionality principles to compare their situation. Adams (1963) first articulated the major distributive justice theory, equity theory, which suggests that people evaluate the outcome of a social exchange by calculating the proportionality of benefits and costs to all the participants of an

exchange (from Tyler et al., 1997). If a person perceives there is a balance between all the participants' inputs and outcomes, then he or she may experience a sense of equity. If, however a person perceives a discrepancy between the relative contributions of the participants and the allocation of benefits, then he or she may sense inequity and experience feelings of anger and dissatisfaction. Subsequent researchers, such as Deutsch (1975), have qualified equity theory and included principles of equality and need, amongst others, into the calculations and comparisons (from Tyler et al., 1997).

Although subsequent researchers expanded and reformulated equity theory, distributive justice theories appear anchored in the equity model and the concept of social comparison. A basic premise of equity theory is that people are primarily self-interested and seek to "maximise their rewards from their interactions with others" (Drew, 1997, p. 310). Consequently, equity theory and other notions of distributive justice view people as caring mostly about the fairness of the distribution of benefits, or the outcome, of an exchange. This focus on the outcomes of an exchange meant distributive justice researchers virtually ignored the possibility that the fairness of the procedures used to determine the outcome might also influence people's overall perceptions of justice. The idea that procedures may also play a part in perceptions of fairness led other social psychologists, who were unconvinced that perceived justice only derived from perceptions of the fairness of outcomes, to turn their attention toward investigating the relationship between procedures and justice.

### Procedural Justice

Since procedure is the cornerstone of our system of law, it is not surprising that the study of the psychology of procedure began with studies of legal procedures (Lind & Tyler, 1988). Most of the early influential research into procedural justice took



place in the legal setting and focussed on the adversarial trial process, although initially there was some interest in ADR procedures.

In the mid-1970's, Thibaut and Walker (1975) conducted a series of studies that explored disputants' preferences for several different types of dispute resolution procedures - arbitration, moot, mediation, autocratic adjudication and bargaining. Arbitration consisted of quasi-adversarial adjudication, where a neutral third party heard the evidence of the parties and made a binding decision. The moot required that, after hearing the evidence, the parties and the third party had to agree on the final decision. Bargaining was essentially negotiation and mediation consisted of the third party making a recommendation and the parties deciding to accept or reject it. The third party's role in the moot and the mediation was to facilitate discussion about possible resolutions. In the Thibaut and Walker (1975) research design, the 'dispute' involved executives in advertising deciding which advertisements to put forward into a competition. (Although they called this experimental scenario a dispute, it is really only decision making that has the potential to become a dispute. It has not yet become a dispute.) The participants in all the experiments were law students or newly graduated lawyers.

The participants judged arbitration as the most preferable procedure to resolve the dispute followed by the moot, mediation, autocratic adjudication and bargaining in that order. Surprised at this information Thibaut and Walker further investigated the mediation process. They used a simulation of a mediation process to explore how effective mediation is for producing settlements in outcome-correspondent (low-conflict with the possibility of a mutually satisfying solution) disputes. The results showed that outcome-correspondent disputants settled their disputes twice as often as outcome-non-correspondent (high-conflict and little common ground) pairs did in

mediation. Thibaut and Walker therefore, concluded and prescribed, that outcome non-correspondent disputants should go straight to trial and have their disputes resolved by a third party vested with decision making authority. Having dismissed mediation in this way, Thibaut and Walker's (1975) next studies focussed on the two major trial procedures used in the Western world, adversarial and inquisitorial, and it was in these studies that several important discoveries about the psychology of procedural justice emerged.

Thibaut and Walker (1975) conducted scenario studies that simulated the adversarial and the inquisitorial trial procedures. They manipulated various aspects of the procedures in order to gauge what processes influenced disputants' preference for, and satisfaction with, both procedures. Arguably, the most enduring finding of this research was that the opportunity to present arguments was a common predictor of perceived fairness, preference for, and satisfaction, with the trial procedure. The most startling discovery however, was that the satisfaction produced by the adversarial procedure occurred whether the outcome (decision) was favourable or unfavourable to the disputant. These results revealed the procedural justice phenomenon that has since been replicated across many settings, that the "use of a fair procedure can increase the satisfaction of all concerned *without any increase in the real outcomes available for distribution*" (Lind & Tyler, 1988, p.29). Put simply, the fairness of procedures can enhance disputant satisfaction regardless of the outcome of the case.

The Thibaut and Walker (1975) studies stimulated "an increase in the level of sophistication" and an increase in the volume of research in the procedural justice area (Lind & Tyler, 1988, p. 40). The research has since shown, that the procedural justice phenomenon and procedural justice effects are robust, and extend beyond the legal arena to work organisations and political settings (Folger, 1977; Tyler, 1990; Tyler &

Lind, 1991; Lind et al. 1990). Ironically however, despite their early work on ADR procedures, the focus of Thibaut and Walker on the adversarial trial process may have led to a relative neglect of research into the procedural justice of ADR in legal settings. There have only been sporadic studies in the ADR domain (Brett & Goldberg, 1983; Pruitt, Peirce, McGillicuddy, Welton, & et-al, 1993; Shapiro & Brett, 1993; Lind, Kulik, Ambrose, & Park, 1993; Bingham, 1997; Posthuma, Dworkin, & Swift, 2000), and very few studies of ADR used by legal institutions (McEwen & Maiman, 1984; Lind et al., 1990b; Kitzmann & Emery, 1993). In addition, most of the procedural justice research in the legal setting has investigated procedures that involve a third party adjudicator, rather than a third party facilitator. Some researchers have tentatively suggested however, that the basic theories posited in the procedural justice paradigm will simply generalise to third party facilitated procedures such as mediation (Lind & Tyler, 1988; Tyler, 1987b). To assess the wisdom of this, one must first understand the basic theories and models of the psychology of procedural justice, and their relevance to mediation procedures.

### Control Models

Thibaut and Walker (1975) postulated that people's reactions to the fairness of a procedure are associated with the distribution of control between the participants and the third party. The research design used by the Thibaut and Walker group, varied the control aspect in role-plays of the adversarial trial and inquisitorial trial procedures, and examined how this affected the disputant's preference for, and satisfaction with, the procedure. (Houlden, LaTour, Walker, & Thibaut, 1978; Thibaut & Walker, 1975). The two central control mechanisms manipulated were referred to as *decision control*, (or outcome control) meaning "the degree to which any one of the participants may unilaterally determine the outcome of the dispute" and "control over

the development and selection of information that will constitute the basis for resolving the dispute, referred to as *process control* (Thibaut & Walker, 1975, p 546).

In the inquisitorial trial process, control is vested in the third party. The judge asks the questions he or she thinks fit and directs the parties to answer them. The judge also calls the witnesses from whom he or she wants to hear and cross-examines them. In the adversarial trial procedure, the parties retain process control. The parties are responsible for the presentation of evidence and the calling and cross-examination of witnesses. Thibaut and Walker (1975) examined the participants' overall satisfaction with both these trial procedures, as determined by the perceived fairness of the procedure to both parties, and the opportunity afforded to present evidence. The results showed that the adversarial trial procedure produced greater satisfaction among participants than the inquisitorial procedure. The findings indicated that the amount of opportunity for evidence presentation, namely process control, was the major determinant of perceived fairness and satisfaction.

Experiments conducted outside the legal environment confirmed this finding. In a pay allocation procedure, workers given the opportunity to voice an opinion about a proposed pay schedule reported an increased sense of satisfaction with the outcome than those unable to "voice" (Folger, 1977). Folger termed this phenomenon the voice effect. Essentially, in this context, voice operated in the same way as process control, in that it involved the opportunity to express an opinion to a third party decision-maker on how to make the decision. In adjudicative or allocation procedures there appears to be little difference between process control and voice. However, in the less formal dispute resolution procedures, such as mediation, there may well be a difference. In adjudicative or allocation procedures, process control refers to the presenting of evidence and the advancement of argument that supports the disputant's

case. In mediation, there may be several dimensions to voice or process control: voice may be what is termed “ventilating” (telling one’s side of the story complete with emotional and descriptive content) at the beginning of the mediation; whilst process control may involve having the ability to control the flow of communication with the other party throughout the mediation. (Pruitt et al., 1993). Researchers rarely distinguish between process control and voice and often use the terms interchangeably. As is discussed further below, this tends to create problems for the researcher.

### Instrumental Control Theories

One explanation for the process control effect, is that in circumstances where individuals relinquish decision control, in a decision making process or a dispute, they concentrate on achieving indirect control over the decision through process control (Brett & Goldberg, 1983). By being able to present evidence or give opinions that advance their cases, people perceive process control as an opportunity to influence the decision of the decision-maker. This explanation for process control is termed *instrumental*, in that process control is viewed as instrumental to attaining fair outcomes (Lind & Tyler, 1988). In terms of the effect of process control on procedural justice judgments then, the instrumental explanation suggests that in the absence of decision control, people judge procedures that give them process control to be fairer and preferable, because if they are afforded process control they feel they are still able to influence the outcome in some way (Lind & Tyler, 1988). The procedural justice phenomena can be explained in terms of this model: if people perceive that the procedure was fair (due to heightened process control) and it helped them toward the desired outcome, they are more likely to perceive the outcome as fair regardless of how favourable the outcome actually was for them.

The instrumental control models of procedural justice suggest that people are primarily concerned with the end-result or outcome of a social exchange, or a decision (Lind & Tyler, 1988). Like equity theory, the major theory of distributive justice, instrumental control models are rooted in the self-interest model of human behaviour and are premised on a belief that people rate their experiences with others in terms of how much or how little they gained. Instrumental control models view people as striving to maximise their control over outcomes that affect them. They would suggest then, that disputants prefer procedures such as mediation, that allow them maximum decision control, as this would be perceived as contributing to a maximisation of their resource gains.

There is no decision made by a neutral third party in mediation. What mediation seeks is agreement between the disputants. So whilst adjudicative or allocation procedures vest decision control in the third party, mediation, being a non-binding procedure, vests decision control in the parties. Brett and Goldberg (1983) reported that disputants in the coal industry rated mediation fairer than arbitration. Similarly, McEwen and Maiman (1984) reported more favourable reactions to mediation than adjudication in small claims courts. Both these studies were field studies of real-life grievances or disputes. That the results are at odds with Thibaut and Walker's (1975) findings (of preference for arbitration/adjudication) can be explained in part by the "psychological representation" of mediation in the studies and partly by the differences in field studies versus scenario studies (Brett, 1986). In natural settings, mediation provides the parties with opportunities for input into formulating the solution in a joint problem-solving type approach. In Thibaut and Walker's experimental mediation scenario there was no opportunity to jointly formulate the solution, only the opportunity to accept or reject the mediator's

recommended solution. The field studies suggest that disputants are more satisfied with, rate as fairer, and prefer procedures that give the most decision control, including control over actually helping to formulate the outcome.

Instrumental explanations of control imply that it is only in the absence of decision control that the process control effect would occur. If a disputant has decision control there appears to be no reason why he or she would also need to influence the outcome indirectly through process control. Research findings made since Thibaut and Walker's original experiments support this. Houlden, La Tour, Walker and Thibaut (1978) found that under conditions of high decision control, legally orientated participants preferred neither low nor high third party process control. The concern for fairness that led the participants to favour high process control, no longer appeared when the participants maintained high decision control. This supports the proposition that when outcome control remains with the disputants, the disputants are not particularly concerned with having process control. This idea that process control only really represents a proxy for decision control, accords fully with an instrumental reading of the process control effect. Interestingly however, participants with an equity case (a case decided on rules of fairness as opposed to rules of law) still preferred high process control under conditions of low third party decision control. Houlden et al. (1978) attributed this finding to the possibility that equity-orientated litigants may be "concerned that their facts may not even be presented unless they control the process of evidence presentation" (p. 28). Procedural justice theorists have not explored this equity versus legal dichotomy further, but this finding may have provided the first hint that it may not only be in the absence of decision control that process control effects occur. There may be other explanations for the influence of process control on judgments of procedural justice, satisfaction and preference for

dispute resolution procedures - non-instrumental explanations. Further studies conducted over the next decade investigated this issue as psychologists began to work toward explaining the broad role of process control in fairness, satisfaction and preference ratings (Tyler, Rasinski, & Spodick, 1985).

### Non-instrumental Control Theories

In an experimental scenario study, Lind, Lissak and Conlon (1983) re-used the advertising simulation of the Thibaut and Walker (1975) studies but added an 'industrial espionage' element and an ensuing trial. The trial incorporated manipulation of decision control and process control variables. Lind et al. found no outcome control main effect on a measure of procedural satisfaction and concluded that outcome control is a minor consideration in satisfaction judgments, compared to process control. The result showed that perceptions of satisfaction are not necessarily outcome driven as is suggested by instrumental control theories.

Further evidence of this came from Tyler, Rasinski and Spodick's (1985) study of satisfaction with leaders. Tyler and his colleagues conducted three correlational studies that examined the naturally occurring relationship between process and decision control. The first study involved surveying defendants' perceptions of the fairness of trial procedures in a traffic misdemeanour court. The second study involved surveying psychology students on the satisfaction with courses they had taken the previous semester. The third study utilised the experimental scenario approach to vary the amounts of decision and process control that participants perceived they had in an allocation procedure. The study results showed that there is difficulty in separating process and decision control. In the third study, "respondents led to believe that they had high decision control translated that heightened decision control into increased process control" (Tyler, Rasinski, & McGraw, 1985).



Nonetheless, the results of all three studies suggested that heightened process control is just as effective at heightening judgments of procedural justice and raising leadership endorsement, at low decision control as at high decision control.

Heuer and Penrod (1986) explored the issues of process and decision control in negotiable dispute resolution procedures. Negotiable disputes are negotiable in the sense that they are low conflict and outcome correspondent, and the disputants have an opportunity for concession making or compromise. The disputants also have the opportunity for absolute decision control. Thibaut and Walker (1975) carried out a series of studies which looked only at disputes that were non-negotiable, that is the outcome was an all or nothing decision. Heuer and Penrod investigated preferences for the bargaining, mediation, moot, adversary and inquisitorial procedures as operationalised in the Thibaut and Walker (1975) experiments but they manipulated the opportunity for concession exchange. They did so in order to explore their hypothesis that when “conflicts allow for concession exchange the disputants would prefer those procedures that provide them with a share of the decision control” (Heuer & Penrod, 1986, p.701). As in the Thibaut and Walker (1975) experiments, the results revealed that fairness is the procedural characteristic that best determined disputants’ preference for certain procedures. In addition, all the disputants involved in both negotiable and non-negotiable disputes, preferred procedures which allowed them complete control over presentation of evidence, or process control. However, the surprising result was that disputants in negotiable disputes preferred procedures that offered some level of third party decision control rather than complete disputant decision control. The researchers expected that disputants in negotiable disputes would prefer to handle the resolution of the dispute themselves with no intervention from a third party in the final decision. The result shows, however, that even in a

situation where concession exchange can occur, and there is a relatively low level of conflict, disputants still prefer a third party to assist in defining and facilitating a settlement. This may be to enable the parties to “concession exchange free of the appearance of weakness” as the parties can rationalise that it was the third party who suggested the settlement (Heuer & Penrod, 1986, p.708). In addition, it may also be to ensure that a settlement does occur in a relatively short time. In any case, the results showed that even in outcome correspondent disputes, dissenting parties preferred to have some level of third party decision control. This in turn indicates that there may be more to process control than an opportunity for an indirect control of the outcome. The preference for maximum process control whilst conceding some decision control, suggests that not all of process control relates to decision control. This also leads to the conclusion that it is not only in the absence of decision control that there is a process control effect, and that process control is not just decision control’s proxy.

Although, prior to these experiments it appeared that perceptions of procedural justice were enhanced only by perceptions of direct or indirect control over outcome, these studies confirmed independent effects of process control – that is independent from outcome control (Folger, 1986). These effects are referred to as non-instrumental in that they are not instrumental in affecting outcomes.

Describing the process control effect as “probably the best documented in procedural justice research”, Lind, Kanfer and Earley (1990) set about to test again the validity of non-instrumental effects of process control, or voice (p. 952). Lind and his colleagues conducted an experiment, which addressed the empirical question of whether voice effects occur in situations where it is clear that the exercise of voice cannot influence the outcome of the procedure. In a goal-setting procedure, undergraduate students assessed both the distributive and procedural fairness of the

procedure under three conditions that manipulated voice. Subjects were given either the opportunity to voice opinions about the goal, before the goal was set, after the goal was set, or not at all. Both distributive and procedural “fairness judgments were enhanced by the opportunity to voice opinions even when there was no chance of influencing the decision”, namely after the goal was set (p. 957). Further, subjects with opportunity for voice (both pre and post-decision), reported feeling more decision control than those subjects in the no-voice condition did. These results confirmed Tyler’s earlier finding that process control and decision control may be inextricably linked (Tyler et al., 1985). However, analysis of the data showed that even within the combined effect of the control variables, there were still non-instrumental processes at work. The analyses showed that “when variance attributable to the decision control ratings was removed (in an ANCOVA) neither fairness variable showed a significant contrast between the post-decision voice and the pre-decision voice conditions (Lind et al., 1990, p.956). This led the researchers to conclude that the perceived decision control ratings accounted for some, but not all of the voice effect on fairness ratings. Although the study provided convincing evidence of the independent effects of voice, it also showed that voice together with possible influence over the decision led to an even greater rating of perceived fairness. Lind et al. asserted therefore that “it is premature to conclude as Tyler et al. (1985) did that people seem insensitive to whether their heightened process control is linked to actual control over decisions” (p. 956). They argued against dismissing instrumental concerns in favour of non-instrumental concerns and vice versa, and suggested instead, that there is room for both concerns in peoples’ subjective evaluations of procedural fairness.

Folger, Cropanzano, Timmerman, Howes, & Mitchell (1996) also reviewed the role of voice in determining the fairness of, and preference for, procedures. They designed three conflict resolution procedures that resembled autocratic decision making, arbitration and a hybrid form of both, with each procedure incorporating different opportunities for disputant voice and decision maker voice. The results of the study showed that the procedure most preferred and the one judged as the most fair, was the one that gave the disputants and the decision maker maximum opportunities for voice. The researchers concluded that voice is an important ingredient in procedural fairness judgments and in determining preference for dispute resolution procedures. Furthermore, they argued that voice is important in the process stage and decision stage of the procedure and that disputants like the decision maker to have the opportunity to ask questions and voice opinions in the decision stage.

Folger et al. (1996) also noted, that although these findings clarified the importance of voice, they also pointed to the fact that voice is not simply instrumental and that there are many other reasons why people value the opportunity to speak. These other factors include the more psychologically and socially based explanations for procedural justice effects. They derive from non-instrumental theories of process control that view people as caring about other aspects of procedures rather than just the self-interest aspects.

### Beyond Control Models

The new focus on non-instrumental processes in the 1980's, led researchers to introduce new variables into the procedural justice study domain and to explore procedural justice effects in a variety of settings: allocation and goal setting procedures in organisational settings (Lind et al., 1990), political decision making in authoritative and political institutions (Tyler et al., 1985), encounters with police

(Tyler, 1987), managerial fairness (Sheppard and Lewicki, 1987), reactions to recruiting processes (Bies & Moag, 1986) and some, although relatively few, studies in the alternative dispute resolution domain (Shapiro & Brett, 1993).

Leventhal (1980) suggested there were six rules for procedural fairness. He suggested that to be fair an allocation procedure must include the following:

- a) Consistency. Consistent application of procedure across persons and time.
- b) Bias suppression. Suppression of any bias on the part of the decision-maker.
- c) Accuracy of information. A provision for full and accurate information presentation.
- d) Correctability. Some form of appeal procedures that can correct a bad decision.
- e) Representativeness. “the process must reflect the basic concerns, values and outlook of important subgroups in the population of individuals” affected by the process (Lind & Tyler, 1988, p. 131).
- f) Ethicality. Conformity to ethical and moral standards.

Lane (1986) also generated a set of possible sources of procedural fairness in political settings. His set includes four criteria; the process should recognise and reinforce the citizen’s dignity, the process should be efficient, there should be a sharing of common values between the political leader and citizens, and the process should lead to fair decisions (outcome fairness) (in Lind & Tyler, 1988, p. 172).

A further variation on the conceptualisation of procedural justice came from Bies and Moag (1986) who, based on their studies into recruiting processes, introduced the notion of interactional justice. Interactional justice refers to the quality of interpersonal treatment that parties receive during decision making procedures. Bies and Moag (1986) argued that previous procedural justice theories had neglected the social character of justice issues and had failed to distinguish the procedure from

its enactment. Their research using MBA students' reactions to a recruiting process led them to argue that factors in the communication of decision making, namely truthfulness, respect, propriety and justification for the decision, may drive people's perceptions of procedural justice.

Folger and his associates also identified several antecedent conditions which they believed would influence people's experience of unjust treatment (Drew, 1997).

Folger's set of conditions include:

- a) referent outcomes and referent instrumentalities which refer to alternative imaginable outcomes and alternative imaginable events that could lead to the alternative outcome;
- b) likelihood of amelioration which refers to any future event that could possibly improve the outcome;
- c) level of justification which is similar to Bies and Moag's (1986) condition of receiving some justification for the decision made; and
- d) context effects which refers to the impact that different contexts and situations have upon the experience of injustice (Cropanzano & Folger, 1989; Drew, 1997).

These theories all exhibit a mix of instrumental and non-instrumental elements. As previously discussed, purely instrumental models of procedural justice suggest that people rate procedural justice according to whether the procedure helped them toward, or was instrumental to them achieving, their desired outcomes. Tyler subsequently referred to these models as resource models, or as self-interest models (Tyler, 1994). Non-instrumental models, on the other hand, suggest that people consider the non-instrumental processes of procedural justice, not in terms of how they affect the outcome, but in terms of what the processes tell them about themselves and their

group-membership. Lind and Tyler (1988) advanced a model of procedural justice termed the group-value model that explains non-instrumental processes in this way.

### Group-value model

The group-value model builds on the work of Leventhal (1980) and Bies and Moag (1986), and is rooted in theories of self-identification that postulate that people value membership in positively identified social groups because membership is a source of self-validation (Lind & Tyler, 1988). This model of procedural justice suggests that people care about fair procedures and the social aspects of procedures, such as communication and voice, because the experience of a fair procedure tells people something positive about themselves and their group membership. For example, the process control or voice effect tells people that they are valued members of the group since they have been afforded a voice in the procedure, and their views have been listened to and considered. This in turn creates in the person a feeling of being accepted by the group that is enacting the procedure. This enhances his or her perceptions of self-worth and self-esteem and the positive feeling creates perceptions that the procedure is fair. Similarly, people dislike being ignored or not listened to, and perceive this to mean they are not worthy of group membership (Tyler, 1994). Hence procedures that deny people a voice, or the opportunity to present evidence on their own behalf, give rise to feelings of exclusion from the group which in turn creates perceptions that the procedure is unfair (Tyler, 1994). The group-value model may also explain the importance of decision control in procedural justice judgments. If a third party allows a disputant decision control, then this may tell the person that the third party deems him or her to be worthy of the responsibility of resolving the dispute, and this may lead to feelings of inclusion in the group and enhanced perceptions of fairness.

Relational model

A good relationship with an important group member (ie the decision-maker, or the person implementing the procedure) may also lead to enhanced perceptions of procedural justice via positive feelings of self-worth. In an extension of the group-value model of procedural justice, Tyler and Lind (1992) developed the relational theory. It postulates that people think about their relationship with the person enacting the procedure (the third party) in terms of the more interpersonal aspects of the process, rather than the structural, or control, elements of the process. The interpersonal or relational factors are important as they tell people something about whether they will be treated fairly and whether they are valued by the group using the procedure (Lind & Tyler, 1988). If the third party treats the participant with respect and dignity, this heightens the participant's feelings of self-esteem and self-worth. This in turn communicates positive information about the participant's social status and increases his or her perception of fairness (Tyler & Lind, 1992). The interpersonal aspects of the third party-participant relationship that have been identified as especially important for the judgment that procedures are fair, have been termed status recognition, neutrality and trust.

Status Recognition (or standing) – refers to peoples' perceptions of their status within a group. When the third party treats the person with politeness, dignity and respect it gives the person a feeling of positive social status within the group.

Neutrality – refers to the extent that the third party creates a “level playing field”. If the third party acts dishonestly or with bias the person may sense discrimination, and feel less worthy than those not discriminated against (Tyler & Lind, 1992, p.141).

Trust – refers to beliefs about the intentions of the third party – whether one can trust that the third party is benevolent and will behave fairly. If the person believes he or



she can trust the third party it will enhance the perception that future interactions with the group, or a similar third party will be fair (Tyler, 1989; Tyler & Lind, 1992).

As people are more apt to focus on their social relationships with their work groups, rather than with legal institutions, the relational model appears to be particularly relevant to procedures enacted in hierarchical organisations (Tyler & Lind, 1992). However, theoretically it is also applicable to any dispute resolution procedure involving a third party, (and possibly even to dispute resolution without a third party, see Lind, Tyler, & Huo, 1997). In addition, people may view legal authorities as representative of society as a whole and “thus perceptions of one’s relation to an third party are important indicators as one’s relationship to the entire group” (Lind et al., 1997, p. 768). There is evidence of this in several studies. In Tyler’s (1989, 1990) studies of reactions to encounters with legal authorities the relational concerns proved to be powerful determinants of procedural justice (Tyler, 1990). The Tyler and Lind (1992) and Tyler (1996) studies also showed the influence of the relational concerns on perceptions of procedural justice and legitimacy. Furthermore, as is discussed below, there is evidence that the relational model applies to third party facilitated processes, such as mediation.

#### The Instrumental, Non-instrumental and Relational Models in Dispute Resolution

In a field study of mediation and arbitration, used for dispute resolution in the coal mining industry, Shapiro and Brett (1993) tested the impact of instrumental, non-instrumental and several of the relational (termed interactive) variables on disputants’ procedural justice judgments. The disputants were coal miners who had filed grievance complaints against their employers and went to either mediation or arbitration to resolve the dispute. Shapiro and Brett tested the effects of the variables across arbitration and mediation (difference in outcome control), across decision

making and dispute resolution, and across outcomes of wins, losses and compromises. In particular the study investigated: Brett's (1986) earlier suggestion that process control is an indirect way to achieve a sense of decision or outcome control (an indirect instrumental process); whether process control shows an effect independent of its effect on outcome control (a direct non-instrumental process); and whether perceptions of third party fairness (represented by the neutrality and trust variables of the relational model and termed interactive) are as important as voice in predicting procedural justice. Procedural justice was measured on a scale that included questions about both the fairness of the process and the affect aroused by the experience.

The results of the study revealed strong evidence for all three effects. Process control showed an instrumental and non-instrumental effect on procedural justice and the interactive (or relational) processes were strong and significant predictors of procedural justice, more so than voice. All three processes, the instrumental, non-instrumental and interactive (relational), explained a significant amount of variance in judgments of procedural justice across procedures, contexts and outcomes, with one exception - the win outcome. In the win outcome, namely when the disputant won the case, outcome control (the instrumental process) did not account for any variance in procedural justice judgments. In compromise and losses, however, all three processes made independent contributions to procedural justice judgments. This result suggests that the only time that disputants may not be concerned with instrumental processes is when the outcome is favourable to them. Shapiro and Brett explain this finding by reference to attribution theory and the belief that people tend to make self-serving attributions. Subsequent research on self-serving attributions, suggests that when successful events occur, people do tend to attribute this to their own actions and do not seek out other reasons for their success (Schroth & Pradhan-Shah, 2000). When

unsuccessful events occur, however, people are more likely to search for an external attribution for these outcomes, or in this case, an instrumental explanation such as 'I had no control over the outcome' (Shapiro & Brett, 1993).

Nevertheless, the results support Lind et al.'s (1990) argument that researchers should not dismiss the role of instrumental processes in the psychology of procedural justice, in favour of the non-instrumental processes. The results did not show that the non-instrumental processes were more important in arbitration than in mediation, nor more powerful in dispute resolution than decision making. Although overall the relational variables (the behaviour of the third party) were the most powerful influence on perceptions of procedural justice, the instrumental processes of control still exerted considerable influence on procedural justice ratings.

Tyler (1989) had suggested earlier that the decision and process control variables were the central determinants of procedural justice when an experience with a legal authority involved a dispute in court, as opposed to when the legal authority makes a decision or gives advice (i.e., calls to the police or being stopped by the police). This led Shapiro and Brett (1993) to reanalyse Tyler's (1989) field experiment data (the same data reported in Tyler, 1987) to further differentiate between experiences that involved a dispute being resolved and experiences that involved a decision being made. Shapiro and Brett (1993) used Tyler's data as an example of naturally occurring decision making (i.e., there was no dispute to resolve, just a decision to be made amongst a variety of choices such as whether to fine a person or whether to attend an emergency call), however it does not appear that they removed the cases that involved disputes from the data. Tyler (1989) identified 7% of subjects who went to court, as being involved in dispute resolution (footnote 1, p. 831), therefore 7% of the subjects in Shapiro and Brett's (1993) decision making condition

may have actually been involved in dispute resolution. It is unclear whether Shapiro and Brett (1993) controlled for this by taking a sub-sample. Their study revealed that the relational variables were less important to procedural fairness judgments than the control variables in decision making, more important than the control variables in mediation, and just as important as the control variables in arbitration. This contrasts with Tyler's (1989) conclusion that "in the context of disputes, control is the major issue defining the justice of procedures" (p.837). The disparity in results may be due to the anomaly described above, or to differences in the way the researchers operationalised the control variables and the procedural judgment scales. Tyler (1989) averaged the process and decision control items to form a single control index, whereas Shapiro and Brett used multiple items. Similarly for the procedural justice judgment Tyler (1987;1989) did not combine fairness of the process and affect, but kept these as separate measures.

Kitzmann and Emery (1993) also compared how some of the relational factors (protection of rights and respect) versus decision control, influenced parents' satisfaction with court mediation and litigation procedures, in child custody disputes. Again there are problems with how the researchers operationalised several variables. The study assessed overall satisfaction by combining items that measured satisfaction with the court and the fairness of the final decision. The literature does not always distinguish between satisfaction and outcome fairness, and researchers often combine the variables in this way. Part of the reason for doing so, and for ignoring the distinction, is that the research has shown that the two concepts often "converge in people's heads" (Bos, Wilke, & Lind, 1998). However, recent research shows that people do form judgments on these two dimensions differentially, and that it may be a mistake not to draw an explicit distinction between the two judgments (Bos et al.,

1998). In addition, Kitzmann and Emery's (1993) procedural justice measure is confusing. They did not measure procedural fairness directly but simply averaged ratings of perceived decision control and factors regarding rights and respect, and termed this procedural fairness. This, and the Shapiro and Brett (1993), study illustrates the complicated and suspect nature of much of the procedural justice literature. Often procedural justice researchers use procedural justice terms interchangeably and they often do not draw distinctions between the variables they are measuring. There has been a recent call in the literature for researchers not to confuse distinct variables or distinct judgments with each other or to combine them in single measures. Researchers are urged to pay careful attention to how people may react differently to different issues and to make the distinctions between the issues, explicit (Bos et al., 1998).

The Kitzmann and Emery (1993) results do show, nevertheless, that decision control and the relational factors relating both to a protection of rights and respect, are salient to satisfaction in legal dispute resolution settings. In addition, they show that decision control is a more significant predictor of satisfaction in court mediation than in litigation and that the relational variables are more important in litigation than in court mediation. The results are in contrast to Shapiro and Brett's (1993) finding that the relational variables are more important to procedural fairness judgments in mediation than in arbitration. This may imply that litigants place different emphasis on decision control and relational factors when making procedural fairness judgments as opposed to satisfaction judgments, or it may be another example of the different results that arise when the researchers operationalise variables differently.

The Kitzmann and Emery (1993) study also yielded interesting findings related to levels of conflict of the dispute and gender differences, on the disputants'

assessments of decision control and the relational factors. Disputants in high conflict disputes reported that decision control had a greater influence on satisfaction than disputants did in low conflict disputes. Disputants who received relatively poor outcomes reported that both decision control and the relational variables influenced procedural fairness, whilst for disputants with subjectively high outcomes, decision control was not a significant predictor of procedural fairness but the relational variables were. This latter result supports Shapiro and Brett's (1993) finding that disputants appear unconcerned with instrumental processes when the outcome is favourable to them. Kitzmann and Emery (1993) also found that for men, decision control was more important to perceptions of fairness than for women, who rated the relational variables as being more significant. Tata (2000) also found gender differences in perceptions of fairness in a study in an organisational setting, investigating the effects of role and gender on assessments of the fairness of pay rises. Tata found that men were influenced more by instrumental factors (in the form of distributive justice principles), when evaluating pay raise decisions, than women who did not differ in their use of distributive versus procedural justice principles.

Despite some confounding use of measurements and contrasting results, what emerges from these studies is that both instrumental and non-instrumental (which include the relational) processes underlie peoples' perceptions of procedural justice. These processes represent different motives for justice, namely a self-interest motive or a group-value/relational motive. There is still considerable debate in the literature regarding when the different motives present in people and how and when the different processes interact with procedural justice judgments (Lind et al., 1997; Schroth & Pradhan-Shah, 2000). Part of the confusion concerning the degree of influence of these factors may have derived from differences in the methodologies

used to research these questions. (Shapiro, 1993; Tyler, 1987; Tyler et al., 1997). The Lind et al. (1997) and Tata (2000) studies incorporated hypothetical scenario methodologies, which from the researchers' own admissions suffered from the limitations associated with using student participants. The Shapiro and Brett (1993) and the Kitzmann and Emery (1993) results both come from the field, but there are differences in the ways the variables are operationalised. Since procedural justice research frequently shows that results from the field are at odds with results from the laboratory, it is clear that more studies need to be done in the field and experimentally, and across different dispute resolution procedures, before these issues can be fully understood (Brett, 1986).

Some researchers are now designing studies to tease out the effects of the non-instrumental and relational variables on procedural justice judgments. Tyler and Lind (1992) first suggested that in certain contexts the non-instrumental element of process control (voice) may only affect perceptions of justice "by virtue of its effects on judgments of status recognition, trust and neutrality" (p.159). Later, in a scenario study of dispute resolution, they tested to what extent perceived voice would account for variance in group-value feelings beyond that explained by the relational variables (Lind et al., 1997). Essentially, they postulated that voice (as operationalised by a scale measuring the disputant's opportunity to present his or her views about how the dispute should be resolved and whether the disputant felt his or her views were considered and taken into account) merely forms part of the relational variables and is not a separate effect. They found this to be the case and now, the Lind and Tyler group are omitting voice and process control variables from their dispute resolution studies altogether (Tyler, Lind, Ohbuchi, Sugawara, & Huo, 1998).

Again, there is the confounding argument about the interchangeability of the predictor variables. The Lind and Tyler group (1997;1998) do not distinguish between process control and voice. There appears to be several dimensions to the process control construct however, and whilst it is difficult to separate the dimensions, it appears erroneous to suggest that voice and process control are the same (Shapiro & Brett, 1993). There are instrumental and non-instrumental elements of process control. Process control may include having the ability to control the way the procedure advances, namely to control what issues are discussed and to influence the flow of the communication. It also may include an element that incorporates the opportunity to ventilate and the cathartic feelings this promotes. In addition, a relational dimension of process control may include the disputant's feeling that the third party has shown enough respect to allow the disputant the opportunity to say what he or she wants to say. Although it is unclear how each dimension should be considered in terms of its instrumentality, it is clear that the different dimensions need to be considered in procedural justice research. Possibly, the Lind et al. (1997) result may not have occurred had process control been operationalised differently. Moreover, from their own admission, the methodology of the 1997 study was not robust. Therefore, to omit process control as a predictor of procedural justice based on this one study appears inappropriate.

It is clear from the literature that procedural justice is multidimensional and incorporates a variety of issues. Relational concerns do, however, seem to "account for the bulk of the variation in procedural justice judgments" (Tyler & Lind, 1992, p. 144). Drew's (1997) review of the literature found that Lind and Tyler's (1992) relational model had the ascendancy in best explaining the psychology of procedural justice (Drew, 1997). In the last few years, however, some recent reviews and studies



show that interactional justice, as originally espoused by Bies and Moag (1986) better explains procedural justice (Morris & Leung, 2000; Posthuma et al., 2000).

Interactional justice incorporates some of the relational elements, yet some theorists actually consider that interactional justice is a completely distinct construct from procedural justice (Posthuma et al., 2000). Again this demonstrates the considerable overlap of terms and constructs within the literature, and shows that just as there is an incomplete picture of procedural justice, there is also an incomplete picture of justice concerns per se`.

### Procedural Justice and Distributive Justice

There is no comprehensive theory of the social psychology of justice that combines all the major justice streams. Although typically justice theorists have concentrated on only one domain, just recently, there has been a movement toward integrating the procedural and distributive justice domains (Bos, Lind, Vermunt, & Wilke, 1997). Bos et al. (1997) suggest that people use procedural justice judgments as a heuristic to judge the fairness of the outcome in situations when they find it difficult to assess whether the outcome is fair or unfair, or satisfying or not satisfying. Bos and his colleagues found that it is only when people receive outcomes that are better or worse than expected that they use procedural fairness principles to assess their reaction to the outcome. At other times, namely when the outcome equals what they expect, people use distributive justice principles (social comparison) (Bos et al., 1998). These findings lead the researchers to suggest that in some situations procedural justice may only be a proxy for distributive justice. This is an interesting proposition, particularly in relation to mediation when outcomes can be difficult to judge. In some mediations, parties may arrive at solutions to problems that incorporate compromises that address the parties' needs rather than their legal rights. In these

instances, people may not be able to judge the fairness of the outcome so readily, so this may be when people rely on procedural justice judgments to assess their own reactions and perceptions of fairness.

Similarly, referent cognitions theory (RCT) has heuristic value in bringing outcome favourability and procedural fairness judgments together (Cropanzano & Folger, 1989). In essence RCT postulates “that in a situation involving outcomes allocated by a decision maker, resentment is maximized when people believe they would have obtained better outcomes if the decision maker had used other procedures that should have been implemented” (Cropanzano & Folger, 1989, p. 293). Put simply, people will be resentful if there are possible alternative outcomes they feel they should have experienced, but did not. Whilst this theory essentially relates to autocratic decision making as people “imagine ways their outcome could have been more favourable if [they] had been in charge”, it also may relate to mediation processes (Cropanzano & Folger, 1989, p.298). If disputants are denied the opportunity to participate in the process or in the formulation of a resolution then this may lead them to imagine what might have been if they had said what they wanted to say, or had been allowed to talk about a possible solution. This in turn may affect their perceptions of fairness and satisfaction with the mediation procedure. Again, RCT represents an interesting synthesis of procedural and distributive justice and shows how perceptions of the justice of outcomes and procedures may merge in people’s minds. RCT also shows how instrumental and non-instrumental concerns may synthesize especially when procedures involve a third party’s actions. People may fantasize about how more favourable outcomes (instrumental concerns) may have occurred with different relational factors or voice (non-instrumental concerns) and

consequently it would be difficult to distinguish between the instrumental or non-instrumental concerns affecting their perceptions of procedural justice.

Despite these attempts at integration, overall, the research distinguishing the two justice traditions does seem to conclude that procedural justice concerns are the more robust in determining perceptions fairness and feelings of satisfaction with various procedures. However, the matter of to what degree, and when, instrumental and non-instrumental processes influence people's perceptions of procedural justice remains unresolved. It is possible that finding the answers to these questions represents the most important area of procedural justice research today (Tyler et al., 1997; Shapiro & Brett, 1993; Tyler et al., 1998). The "research on procedural justice has rarely been presented in terms of the relative importance of these different procedural factors" (Kitzmann & Emery, 1993, p.556), or for that matter presented in terms of individual differences (self-esteem) (Schroth & Pradhan-Shah, 2000) gender differences or role-based differences (Kitzmann & Emery, 1993; Tata, 2000). A current focus in the literature is on the importance of culture, as researchers are investigating what the impact of culture has on peoples' perceptions of justice (Morris & Leung, 2000). However, research into procedural justice issues in ADR remains minimal (although there has just recently been some investigation in to justice issues in labour management arbitration, see Posthuma et al., 2000) and research into procedural justice in court mediation is still quite rare.

#### Implications for Civil Court Mediation

More research is required on disputants' perceptions of justice in civil court mediation. It appears unwise to believe that litigants in non-formal procedures in institutional settings will experience the same psychological processes as in the traditional methods of civil dispute resolution as there are many ways that mediation

processes differ from the traditional adjudicative procedures used by the courts (Lind & Tyler, 1988). For instance, in mediation, as opposed to trial, disputants have the opportunity to ventilate and to participate in formulating solutions; there is also a greater variety of third party interventions; there are different orientations of the mediation process itself; and there is more possibility for a compromise or unique outcome. Consequently, these differences may affect people's perceptions of procedural justice. There is already some evidence that this might be the case.

Conlon, Lind and Lissak (1989) found that in situations where the third party gave all-or-nothing outcomes the disputants viewed the procedure as fairer and more satisfying than when the third party gave a compromised outcome (Conlon, Lind, & Lissak, 1989). Similarly, Lind, MacCoun, Ebener, Felstiner, Hensler, Resnik and Tyler (1990) found that litigants perceived the trial (with an all or nothing outcome) as fairer than bilateral settlements (with compromise outcomes). These results accord in part with Heuer and Penrod's (1986) finding that in negotiable disputes, disputant's prefer having a third party to assist them to define and facilitate the settlement, although Lind et al. (1990) viewed their own finding as tied to litigants' perception that the trial was more dignified than informal negotiation.

This issue of disputants' perceptions of justice in situations when the outcomes take some form of compromise requires investigation. This is especially so as the courts gear mediation toward settlement, which will invariably include compromise settlements. Transformative mediation, which is rarely practised by the courts, involves very little mediator intervention and emphasises that settlement is one possible successful outcome of mediation, but not the only one. Litigants may perceive control over the flow of communication in this type of mediation as important, but the relational variables as less important as the mediator takes a very

unobtrusive role in the mediation process. In settlement-orientated or problem solving orientated mediation, the goal of the mediation is to find a solution to the problem and to generate a mutually acceptable settlement. The mediator is usually directive in his or her attempts to reach this goal and usually controls the process and the substance of the discussion. The mediator in this approach also usually helps craft the settlement terms. Some ADR proponents argue that transformative mediation is more appropriate for high conflict disputes such as family disputes. However, most civil court mediation procedures usually employ the settlement-orientated approach and this may affect how litigants perceive the influence of the control and relational processes on procedural justice judgments (Law Reform Commission of Western Australia, 1997 – 1999).

Mediator behaviour may also have a significant effect on litigants' perceptions of relational issues and therefore on their satisfaction with the procedure. Mediator behaviours such as empathy, structuring, and stimulating discussion may lead to greater perceptions of trust and status recognition and therefore may improve satisfaction with a mediation. Meanwhile, behaviours such as providing reassurance, displaying expertise, keeping order, criticising or asking embarrassing questions may lead litigants to distrust the mediator and therefore detract from their satisfaction with the procedure (Zubek, Pruitt, Peirce, McGillicuddy, & Syna, 1992; Pruitt et al, 1993).

There is also a coercive element in court ordered mediation, settlement conferences or other ADR procedures, and this could run counter to control and relational concerns of procedural justice. This coercive element could lead to perceptions of reduced control, or a perception of a lack of respect, as the court did not allow the litigant to go to trial. Also, if their cases settle prior to trial, litigants may feel that they have not received the court's full attention and that their disputes – and

thus they themselves – are not worthy enough or important enough to warrant a trial and this may affect relational concerns (Lind et al., 1990).

There also may be expectancy violations in the use of court mediation. If a litigant expects a courtroom and a judge and gets a clerk of the court and a mediation, these issues too may influence perceptions of procedural justice (Vidmar, 1992). In addition, the manner in which the presence of lawyers affects the court mediation process could also be a variable to consider in examining factors that affect procedural justice judgments. Finally, the use of the private caucus may affect litigants' perceptions of fairness, particularly in relation to the control and relational processes.

### Conclusion

It appears that the research has established that procedural justice is the major determinant of perceived fairness, preference for and satisfaction with procedures, in most settings. Social psychologists have recognised the importance of the procedural justice effects for people in organisational, political, legal and even familial settings (Folger, 1977; Thibaut & Walker, 1975; Tyler et al., 1985; Fondacaro, Dunkle, & Pathak, 1998). Furthermore, the procedural justice effects appear to be robust regardless of whether people have high or low personal or financial stakes in an outcome, and for individuals as well as corporate actors (Lind, Kulik, Ambrose, & Park, 1993). There is evidence also that procedural justice can increase compliance with authorities and willingness to accept decisions (Lind & Tyler, 1988) and is a major determinant of how people view the legitimacy of authorities (Tyler, 1990). In addition, evidence has been presented that procedural justice is important for long term success of community mediation (Pruitt et al., 1993); compliance with obligations to pay (McEwen & Maiman, 1984); respondent satisfaction in child

custody disputes (Kitzmann & Emery, 1993); and important in predicting arbitrator acceptability (Posthuma et al., 2000).

Although there is debate in the literature regarding whether people's procedural justice concerns are self-interested or relational, it is clear that procedural justice forms a large part of disputants' perceptions of the justice of legal procedures and their reactions to these procedures. This information has strong implications for increasing litigant satisfaction with court mediation and with the justice system in general. The literature suggests that the success of mediation, as a satisfying long-term legal dispute resolution mechanism will hinge on the litigants' perceptions of the procedural fairness of the court's enactment of the mediation. Therefore, the authorities cannot simply assume that the notions of procedural justice that apply to the adversarial system of law will apply similarly to mediation. There is a need to "examine disputants' constructions of procedural justice to discover the ways in which ordinary citizens' ideas of what constitutes justice are similar to scholarly and judicial notions of justice"(Lind et al., 1990, p.986). This is a particularly apt statement in relation to the courts' use of mediation procedures. It is imperative that the civil courts investigate whether, when disputants go to court to receive justice, they perceive that they get justice, even when mediation is the dispute resolution procedure used. It is critical also, that the design of court mediation incorporates those elements of the procedural justice principles that will ensure that litigants perceive the process as fair.

It appears that the elements that are most likely to form litigants' perceptions of procedural justice in civil court mediation will be instrumental as well as non-instrumental, or relational. Having gone to court to receive a resolution to their disputes, litigants are likely to be primarily concerned with the outcomes of the

disputes. Consequently, their judgments of the procedural fairness of the mediation could be partly based on the instrumental issues associated with outcome, including the opportunity to formulate the solution. In addition, litigants' judgments are likely to be based on non-instrumental concerns, for example, the mediation process allows litigants to ventilate and "get it all out" and this may give litigants a positive cathartic feeling and in turn lead to heightened perceptions of procedural justice. Similarly, the relational factors associated with the relationship with the third party are likely to be important indicators of procedural justice. The third party in mediation sits closer in proximity to the litigants than a judge does, and therefore litigants may perceive the mediator as more involved in the dispute. It is likely that litigants' perceptions of how the third party treats them will have a significant bearing on how they perceive the fairness of the process.

The research into procedural justice in legal settings has shown that these instrumental, non-instrumental and relational psychological processes underlie disputants' perceptions of procedural justice of authoritative decision making. It appears that they could also influence litigants' perceptions of facilitative decision making. However, mediation is an alternative dispute resolution process, namely it is alternative to trial, and hence it is essential that authorities and scholars recognise that litigants' perceptions of the justice of mediation procedures may also be very different to litigants' perceptions of the justice of trial.

Future research in the justice domain needs to investigate issues associated with third party facilitated processes, such as mediation. Moreover, future research in the mediation domain should not ignore issues of justice. Research into issues of justice in the modern arenas of the legal domain, such as mediation, might reveal new conceptions of procedural justice and even of justice itself.



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Running Head: PROCEDURAL JUSTICE IN MEDIATION

Procedural Justice in Civil Court Mediation:  
Exploring the Instrumental and Non-instrumental Processes.

Jill A. Howieson  
Edith Cowan University.

### Abstract

Recent research has established that instrumental processes (those processes that revolve around issues relating to outcomes) and non-instrumental processes (those that incorporate the relational concerns and relate to issues of group membership and self-identity) are significant predictors of perceptions of procedural justice. Results from a field study of 103 litigants involved in pre-trial mediation conferences confirmed this, and further suggested that the non-instrumental concerns of voice and status recognition shape litigants' perceptions of procedural justice to a greater extent than the perceptions of mediator neutrality and trust. The design of the study also permitted an examination of group differences. Contrary to expectation, in the group of litigants who had not yet settled, distributive justice proved to be a better predictor of litigant satisfaction than procedural justice. These findings are discussed in terms of their implications for procedural justice theory and for the practical enactment of civil court mediation procedures.

### Procedural Justice in Mediation:

#### Exploring the Instrumental and Non-instrumental Processes.

In a civil dispute, when a person issues a summons against another it indicates that the person has chosen litigation as the legal mechanism by which to have his or her dispute resolved (Felstiner, 1980). The person will probably expect this will mean legal proceedings before a court. Today however, the first mechanism that legal institutions usually present to litigants, is not adjudication in the form of a trial, but instead some form of alternative dispute resolution, known as ADR. ADR refers to the decision making process by which matters are resolved outside the usual court-based litigation model and can include processes such as assisted negotiation, conciliation, expert appraisal, mediation and arbitration (Butterworths, 2000). Mediation is the most common ADR process used by the civil courts and now most courts in Australia incorporate some form of mediation in their civil procedures to help litigants to resolve disputes before going to trial (Law Reform Commission of Western Australia, 1997 -1999).

The major rationale for the use of mediation by the courts is to reduce court backlogs through increased settlement rates and earlier settlements (Astor & Chinkin, 1992). Whilst the judiciary and administrators may appreciate more settlements, however, it is not clear how satisfying or just, settlement mediation processes actually are to the litigants (Lind et al., 1990). Although there has been a substantial amount of research on how litigants perceive justice in the traditional civil trial procedure (Thibaut & Walker, 1975; Houlden et al., 1978; Lind et. al., 1980; Tyler, 1990; Tyler & Lind, 1991), relatively few justice scholars have investigated litigants' perceptions of justice in the ADR domain.



In addition, there are significant variations in how the courts employ mediation in individual cases and across jurisdictions yet very little research has been done to assess whether or not court mediation processes are viewed by litigants as just and satisfying alternatives to trial.

Proponents of ADR, introduced mediation to the courts as they believed it would remedy many of the ills (costs, delay, formality, restricted scope of claims and remedies, lack of consensuality and party control) of the adversarial system (Astor & Chinkin, 1992). They also believed that by erasing the win or lose situation of adjudicatory procedures the mediation procedure would be more satisfying to disputants. Most of the ADR research shows that generally mediation does remedy some of the objective faults of the adversarial system (see Kressel and Pruitt, 1989, for a comprehensive review of the American research). However, psychologists have found that in dispute resolution procedures what is perceived as fair and just depends on the disputants' subjective constructions of procedures and outcomes and not on objective benefits (Thibaut & Walker, 1975; Lind et al., 1990; Tyler, 1994). Psychologists have also found that if disputants' subjective needs for justice are not met, this leads to feelings of dissatisfaction with the legal dispute resolution experience and the justice system in general (Tyler, 1990). Though the introduction of mediation into the civil litigation system may deliver objective benefits such as a greater scope for remedies, reduced cost and delay, and a possibility for a mutually beneficial solution, this may not necessarily lead to perceptions of justice, and hence satisfaction, for litigants.

Social psychologists have identified and focussed on two major principles of justice: the fairness of outcomes (distributive justice), and the fairness of procedures (procedural

justice) (Folger, 1977; Tyler, 1994). Distributive justice theories suggest that people are more likely to perceive that an interaction was fair if they perceive that the decision or outcome was fair. Equity theory, for example, suggests that people base their perceptions of justice on social comparison information as they compare how their outcomes fall relative to the outcomes of others, and whether the outcome they received is equitable in terms of the relative contributions and rewards of all the participants in the interaction (Adams, 1965, in Bos, Wilke, & Lind, 1998). Other distributive justice theorists suggest that people compare their outcomes based on need or deservingness (Lerner, 1977, and Deutsch, 1975 in Tyler et al., 1997). A basic premise of most distributive justice theories is that people are primarily self-interested and seek to “maximise their rewards [or resources] from their interactions with others” and therefore they tend to focus on the success of their outcomes as the source of their fairness and satisfaction ratings (Drew, 1997, p.310 ). Procedural justice theories on the other hand, suggest that it is the perceptions of the fairness of the procedure used to determine the outcome that leads people to perceive the experience as fair and satisfying (Thibaut & Walker, 1975; Tyler, Boeckmann, Smith, & Huo, 1997). Although the early focus of procedural justice theories was on the way people perceive that fair procedures help them toward gaining a favourable outcome for themselves, later models are premised on the belief that disputants focus on the fairness of procedures because the experience of a fair procedure tells them important things about their social relationships and their self-identity (Tyler & Lind, 1992).

Many social psychologists now believe it is procedural justice that is the most important factor in shaping people’s overall judgments of fairness and in determining

reactions to encounters with third party dispute resolution procedures (Tyler & Lind, 1991). Across a variety of dispute resolution procedures and contexts researchers have found that the “use of a fair procedure can increase the satisfaction of all concerned without any increase in the real outcomes available for distribution” (Lind & Tyler, 1988, p. 29). This procedural justice phenomenon appears to be robust regardless of whether people have high or low personal or financial stakes in an outcome, and for individuals as well as corporate actors (Lind, Kulik, Ambrose, & Park, 1993). More recently, there has been evidence of the robustness of procedural justice effects across cultures, ethnicities and nationalities (Morris & Leung, 2000). There is evidence also that procedural justice can increase compliance with authorities and willingness to accept decisions (Tyler & Lind, 1992), and is a major determinant of how people view the legitimacy of authorities (Tyler, 1990). In addition, the research shows that perceptions of a fair procedure are important for long term success in community mediation (Pruitt, Peirce, McGillicuddy, Welton, & et-al, 1993); compliance with obligations to pay (McEwen & Maiman, 1984); respondent satisfaction in child custody disputes (Kitzmann & Emery, 1993); and in predicting arbitrator acceptability (Posthuma, Dworkin, & Swift, 2000). Procedural justice effects may even extend to dispute resolution in familial settings (Fondacaro, Dunkle, & Pathak, 1998).

Although procedural justice judgments are a major influence on disputants’ reactions to decision making and dispute resolution procedures, there have only been sporadic studies conducted into procedural justice in the ADR domain, (Brett & Goldberg, 1983; Pruitt et al., 1993; Shapiro & Brett, 1993; Lind et al., 1993; Posthuma et al., 2000) and very few studies in mediation processes used by legal institutions (McEwen & Maiman,

1984; Lind et al., 1990; Kitzmann & Emery, 1993). The procedural justice research in legal settings has generally investigated reactions to procedures that involve a third party adjudicator, rather than a third party facilitator as is used in mediation, although some major procedural justice theorists tentatively suggest that the basic theories posited in the procedural justice paradigm will generalise to mediation (Lind & Tyler, 1988; Tyler, 1987). It would be unwise to accept this proposal without further evidence for two reasons. In the first place, it is not clear that litigants in civil court mediation will experience the same psychological processes as in the traditional methods of civil dispute resolution, namely the trial; and secondly, the social justice literature shows that there are still many unresolved issues concerning the major psychological processes influencing procedural justice judgments in any event.

Despite the unresolved issues, it does seem that there are two major processes that underlie people's perceptions of procedural justice. Social psychologists have termed these processes instrumental and non-instrumental as they represent different motives for justice, namely a self-interest/resource (instrumental) motive and a group-value/relational (non-instrumental) motive (Tyler, 1994; Tyler & Lind, 1992).

Instrumental theories of procedural justice derive from Thibaut and Walker's (1975) control-orientated model of procedural justice. Thibaut and Walker argued that "the key procedural characteristic shaping people's views about the fairness of procedures is the distribution of control between disputants and the third party decision-maker" (Tyler et al., 1997, p.87). They referred to two control mechanisms; decision control, (or outcome control) meaning control over the outcome of the dispute; and process control, meaning control "over the development and selection of information that will constitute the basis

for resolving the dispute” (Thibaut, 1975, p. 546). Control theories of procedural justice posit that if people perceive that they have outcome control or process control they will perceive the process as fair (Brett, 1986). Thibaut and Walker (1975) focussed on adjudicatory dispute resolution procedures in which the third party has complete outcome control. Consequently, they found that process control was a major determinant of perceived fairness and satisfaction. This has been termed the process control effect and instrumental theorists attribute it to people’s perceptions that process control is an indirect path towards outcome control. Instrumental theorists suggest that if people perceive that they have process control and that they are indirectly influencing the outcome, they will then perceive the process as fairer and preferable because they have been afforded the opportunity to be *instrumental* in influencing the outcome in a positive way (Brett & Goldberg, 1983; Lind & Tyler, 1988).

Instrumental theorists view direct or indirect control over outcomes as a central characteristic of procedural fairness as they assume people are primarily concerned with the end-result or outcome of a dispute resolution process. In this sense, instrumental theories are similar to distributive justice theories in that they both focus on outcomes. They also both derive from a self-interest model of human behaviour that views people as rating their experiences with others in terms of how much or how little they gained in terms of resources. They see people as out to maximise their control over outcomes in order to maximise their resource gains.

Non-instrumental theories, on the other hand, view people as more concerned with the social aspects of procedures, such as communication and voice, because it is believed these aspects can lead to positive feelings about social relationships and self-identity.

Non-instrumental theories arose from several experiments that found that process control had a unique effect on procedural justice judgments – independent from outcome control (Lind, Lissak, & Conlon, 1983; Tyler, Rasinski, & Spodick, 1985; Heuer & Penrod, 1986). This unique effect of process control has been attributed to non-instrumental processes such as creating positive feelings of catharsis, high self-esteem or feelings of group membership (Lind & Tyler, 1989; Shapiro & Brett, 1993; Schroth & Pradhan-Shah, 2000).

The positive feeling of catharsis may derive from a “value-expressive” component of voice, or process control, that arises from being able to express one’s views or (in the case of mediation) ‘ventilate’ emotions, in the procedure (Shapiro & Brett, 1993). The high feelings of self-esteem may derive from perceptions of process control because being afforded process control, or voice, may communicate identity relevant information to the disputant (Schroth & Pradhan-Shah, 2000). The *group-value* model suggests that this may be so. The group-value model suggests people care about the process control or voice effect because if they have been afforded a voice in the procedure, and if their views have been listened to and considered, this tells the disputant they are valued member of the group. This in turn creates in the person a feeling of being accepted by the group enacting the procedure, which therefore enhances his or her perceptions of self-worth and self-esteem (Tyler, 1994). These positive feelings in turn create perceptions that the procedure was fair (Tyler, 1994).

More recently, it has been suggested that it is the relationship with the person implementing the dispute resolution procedure (the third party), and not process control or voice, that creates the positive feelings about self-identity and group status. The

*relational* theory posits that it is the interpersonal aspects of the third party/disputant relationship and the perceived fairness of the third party who is enacting the procedure, that tell people something about whether they will be treated fairly and whether they are valued by the group using the procedure (Lind & Tyler, 1988). If the third party treats one with respect and dignity, this heightens one's feelings of self-esteem and self-worth. This in turn communicates positive information about one's social status and increases perceptions of fairness (Tyler & Lind, 1992). Relational theorists suggest that to determine whether a procedure is fair, people attend closely to the interpersonal and relationship aspects of status recognition, neutrality and trust (Tyler, 1989). Status recognition refers to peoples' perceptions of their status within a group. When the third party treats the person with politeness, dignity and respect it gives the person a feeling of positive social status. Neutrality refers to the extent that the third party creates a 'level playing field' (Tyler & Lind, 1992). If the third party acts dishonestly or with bias the disputant may sense discrimination, and feel less worthy than the party not discriminated against. Trust refers to beliefs about the intentions of the third party – whether one can trust that the third party is benevolent and will behave fairly. If the person believes he or she can trust the third party it will enhance the perception that future interactions with the group, or with a similar third party, will be fair (Tyler, 1989; Tyler & Lind, 1992).

The Tyler and Lind (1992) relational model is currently one of the major models of what constitutes procedural justice and what leads to satisfaction with various third party procedures (Tyler & Lind, 1992; Schroth & Pradhan-Shah, 2000). The dominance of this model has led the Tyler and Lind group to now postulate that process control, or voice, merely forms part of the relational model and is not a separate effect (Tyler, Lind,

Ohbuchi, Sugawara, & Huo, 1998). Consequently, they are now omitting the process control (voice) variable from their third party dispute resolution studies altogether. There is however, an alternative argument about the operationalisation of process control, or voice. There are several dimensions to the process control construct: one, having the ability to control the way the procedure proceeds, namely to control what issues are discussed and to influence the flow of the communication; secondly, there is an element that includes value in the chance to express one's views and ventilate, and the cathartic feelings this promotes; and finally, a dimension that includes the perspective that the third party respects the disputants enough to allow them the opportunity to say what they want to say, and to consider their views. The latter dimension is the one the Tyler and Lind group referred to as voice. Although it is unclear how each dimension of process control should be considered in terms of its 'instrumentality', it is clear that these different dimensions of the process control effect, including voice, should be considered and measured in any procedural justice research of dispute resolution.

In addition to the issue of how to conceptualise process control, there are other problems associated with the operationalisation of variables within the procedural justice literature. Often procedural justice theorists use procedural justice terms interchangeably and researchers often do not draw distinctions between the variables they are measuring nor measure major variables consistently (see Shapiro & Brett, 1993; Kitzmann & Emery, 1993; and Pruitt et al., 1993 for examples of how the measure of procedural justice differs between these studies). Similarly, despite the ascendancy of Tyler and Lind's (1992) relational model, there is no conceptual clarity in the literature to signal that the relational processes are truly separate from the other non-instrumental processes. There is



considerable conceptual overlap between the relational construct and other non-instrumental processes (ie. of process or decision control) and this often makes it difficult to interpret the literature.

Nevertheless, there is definitely a clear distinction in the literature between the instrumental and the non-instrumental processes underlying judgments of procedural justice. The non-instrumental processes incorporate the relational concerns and relate to issues of group membership and self-identity, whereas the instrumental processes revolve around issues relating to outcomes and outcome favourability. In addition, several studies have shown that both instrumental and non-instrumental processes underlie people's perceptions of procedural justice (Shapiro & Brett, 1993; Lind et al., 1990; Kitzmann & Emery, 1993). Ultimately, the issue of the degree to which the different processes contribute to procedural justice judgments is not resolved in the literature and debate continues regarding which specific procedural factors influence perceptions of fairness, in which settings, and in which types of procedures.

With the exception of the Shapiro and Brett (1993) and the Kitzmann and Emery (1993) studies, (which produced conflicting results regarding the relative influence of the instrumental and non-instrumental concerns on procedural justice judgments, in adjudicative and facilitative procedures) "procedural justice is rarely presented in terms of the relative importance of the different procedural factors" (Kitzmann & Emery, 1993, p.556). Rarely also, are studies conducted on the perceived justice of the facilitative, as opposed to the adjudicative, dispute resolution mechanisms used in legal settings. Mostly the studies of procedural justice in the legal arena have concentrated on traditional third

party adjudication and there has been a relative neglect of studies into alternative procedures such as mediation.

There are many ways that civil court mediation processes differ from the traditional processes of third party decision making, and thus people's perceptions of procedural justice in court mediation may not match the current theoretical explanations for the psychology of procedural justice. For instance, in mediation, as opposed to trial, disputants have the opportunity to ventilate and to participate in formulating solutions; there is also a greater variety of third party interventions; and different orientations of the mediation process itself; and there is more possibility for compromise and unique outcomes. Consequently, these differences may affect people's perceptions of procedural justice. There is already some evidence that this may be the case.

Conlon, Lind and Lissak (1989) found that in situations where the third party gave all-or-nothing outcomes, the disputants viewed the procedure as fairer and more satisfying than when the third party gave a compromised outcome. Similarly, Lind, MacCoun, Ebener, Felstiner, Hensler, Resnik and Tyler (1990) found that litigants perceived the trial (with an all or nothing outcome) as fairer than bilateral settlements (with compromise outcomes). Researchers have also found that mediator behaviour has a significant effect on litigants' perceptions of relational issues and therefore on their satisfaction with the procedure (Zubek, Pruitt, Peirce, McGillicuddy, & Syna, 1992; Pruitt et al, 1993). Also, allowing disputants full participation in the generation of solutions has been found to heighten perceptions of the control and the relational concerns and therefore, procedural fairness (Shapiro & Brett, 1993).

Even though it is not known conclusively to what extent the instrumental and non-instrumental processes affect procedural justice judgments, it does appear that it cannot be simply assumed that these processes, that seem to apply to the traditional third party legal procedures, will apply similarly to civil court mediation procedures. It is apparent however, that the success of mediation as a satisfying and legitimate legal dispute mechanism will most likely hinge on litigants' perceptions of the procedural fairness of the courts' enactment of the mediation procedure (Tyler, 1990; Lind, Kulik, Ambrose, de vera Park, 1993; Pruitt, 1993; Tyler et al., 1997). Consequently, although there is a general need to "examine disputants' constructions of procedural justice to discover the ways in which ordinary citizens' ideas of what constitutes justice are similar to scholarly and judicial notions of justice" (Lind et al., 1990, p. 986), there is a particular need to examine litigants' constructions of procedural justice in mediation as these procedures are now so frequently used by the Australian courts.

"Comparatively little empirical research on justice issues has been done [in Australia], and there is still not a strong tradition of using empirical research as a tool for developing justice policy in this country. There is a critical need to develop our own body of empirical understanding of the justice system" (Delaney & Wright, 1997, p.72). It is imperative that Australian courts investigate whether the predominant justice theories, generated mostly in America, apply to the Australian justice system. This is especially so since what little research has been done on procedural justice issues in Australian courts shows some conflicting results from those gained in America (Delaney & Wright, 1997).<sup>1</sup>

This may be due to the fact that although America and Australia both share similar western-type cultures, different socio-legal cultures exist in the two countries. However,

recent cross-cultural findings have stimulated refinement in basic models of justice judgments (including in the relational model) and issues that may arise from Australian research may also enhance our understanding of the current models of procedural justice (Morris & Leung, 2000). Most importantly however, the Australian authorities must discover whether litigants perceive the diversionary civil litigation procedure of mediation as a just and satisfying legal procedure, and thus as a legitimate alternative to trial.

The Australian judicial system uses mediation to assist in resolving a range of civil disputes, including family disputes, personal injury and insurance claims and commercial disputes. There are, however, differences in the way each jurisdiction conducts mediation and differences in emphasis on the purpose and orientation of each mediation program. For example, in family disputes the emphasis is on providing a counselling-type approach to mediation that aims to assist the parties to communicate with each other and find satisfactory long-term solutions to the issues in dispute. In commercial disputes, the mediation program is usually a settlement-oriented one with the emphasis on finding a quick, mutually acceptable settlement solution. Also, in some jurisdictions litigants are allowed legal representation in the mediation process whilst in others they are not. Although there is a variety of ways in which the Australian civil courts use mediation, perhaps it operates in its simplest form in small claims cases with unrepresented litigants. Therefore, a convenient starting point to investigating the issues that surround procedural justice in civil court mediation is to study these cases.

## The Study

The aim of this study is to test the predictions from several theories of procedural justice in a field study of a civil court mediation process, the pre-trial conference.

### The pre-trial conference

Although the pre-trial conference has its process formally embodied in statute (s45B (5) (a) Local Courts Act, 1904 (WA)), the process is in reality informal mediation. Notwithstanding individual mediator differences, the pre-trial conference follows the basic common process of mediation: the mediator welcomes the parties and explains the purpose of the mediation; the mediator sets the ground rules, (this may include allowing each party to speak without interruption and prohibiting verbal or other abuse); each disputant in turn explains his or her side of the dispute without interruption; the parties, with the assistance of the mediator, identify and narrow the issues in dispute (this can include the use of private caucuses); the parties, with the assistance of the mediator, generate options for solving the dispute; and the parties reach an agreement or settlement (this can include an agreement not to agree). In addition, the mediator (clerk of the court) has statutory powers to make interlocutory and interim orders as he or she thinks fit, and list the action for trial, or if a settlement is attained, order each party to file a memorandum of consent (s45B (5) (b) – (c) Local Courts Act, 1904 (WA)). Litigants can request a pre-trial conference but usually if neither party to the litigation makes the request the Court will direct that a pre-trial conference takes place before trial. When the amount in dispute is \$3,000 or less, litigants are not allowed legal representation in the pre-trial conference (unless the Court grants special permission). According to the court

mediators interviewed for this study, the primary objective of the pre-trial conference is to settle the dispute and this is how the Court rates the success of the mediation.

### Research questions

Several research questions are addressed in the study. The first is whether instrumental or non-instrumental factors will be the greater predictor of litigants' perceptions of procedural justice in civil court mediation. It is predicted that both the instrumental and the non-instrumental factors will contribute significantly to litigants' perceptions of procedural justice in the pre-trial conference, although it is thought that the non-instrumental factors, as they incorporate the relational concerns, may be the better predictors. The second question is whether the voice index (as operationalised by Lind et al., 1997) will make a significant contribution to litigants' perceptions of procedural justice in mediation beyond the contribution made by the relational judgments of neutrality, trust and status recognition. It is predicted, contrary to the relational theorists current position (Lind, Tyler, & Huo, 1997; Tyler et al., 1998), that in the pre-trial conference the voice index will show a unique and independent effect on procedural justice judgments after the effects of the relational variables have been excluded. The third research question addresses whether litigants' feelings of satisfaction with civil court mediation will be predicted more by judgments of procedural justice or distributive justice. In accordance with general procedural justice theory (Thibaut & Walker, 1975; Folger, 1977; Lind & Tyler, 1988), it is predicted that procedural justice will explain more of the variance in litigant satisfaction with the pre-trial conference than distributive justice. A subsidiary research question asks whether the litigants would have still preferred to go to trial regardless of the outcome of their cases.

## Method

### Participants

Participants in the study were litigants who were self-represented in a pre-trial conference in the Local Court of Western Australia. One hundred and three participants were surveyed, 72 men and 31 women. They ranged in age from 18 to over 55 years. Seventy-nine litigants were Australian, 11 European, 6 Asian and seven were another nationality. Forty percent of the sample had completed University degrees, 31% had only completed secondary school, 26 % had a TAFE or trade diploma and 3% had only completed primary school. Fifty-seven litigants were plaintiffs in the action and 46 were defendants. The majority of the actions were for small debts under \$3,000. Forty-one litigants said they requested the pre-trial conference, 30 said the other party did and 32 said the Court ordered the conference. All participants voluntarily participated in the survey and their anonymity was assured.

### Questionnaire

The questionnaire was adapted from the instrument used by Tyler in several of his studies with legal authorities (1987; 1989; 1994) and from the instrument used by Shapiro and Brett (1993) in their study of mediation and arbitration. Since research has suggested that it is unclear whether process control ought to be considered an instrumental or non-instrumental judgment (see Lind, Kanfer, & Earley, 1990; Shapiro & Brett, 1993; Tyler, 1989) and although there are doubts about whether voice should be included as a variable in procedural justice studies at all (Lind et al., 1997; Tyler et al., 1998), it was decided to adopt Shapiro and Brett's (1993) suggested separation of the process control variable into its instrumental element (influence over the process) and its non-instrumental factors

(voice and ventilating) to ensure that the different dimensions of process control were measured in the study. Also upon Shapiro and Brett's suggestion, a variable that related to disputants' participation in formulating a solution to the dispute was included in the instrumental judgments. In addition, an instrumental variable derived from Folger's Referent Cognitions Theory (RCT) of procedural justice was included (Cropanzano & Folger, 1989). All the responses were anchored on a 5-point Likert-type scale with alternatives coded from 1 to 5, with 1 = Very Favourable/ A lot of Influence/ Strongly Agree and 5 = Very Unfavourable/ No Influence/ Strongly Disagree. The complete wording of all the items is presented in the Appendix.

Instrumental judgments. An instrumental scale was constructed using six items that reflected the litigant's outcome orientated concerns: how favourable was the outcome to them; how favourable was the outcome compared to what they expected; how favourable was the outcome compared to what they would have liked it to have been (this item reflects Folger's referent outcomes from RCT, which refers to alternative imaginable outcomes); influence over the outcome and process; and participation in formulating the outcome. Cronbach's alpha for this scale was .81.

Non-instrumental judgments. A nine-item scale was constructed that reflected the litigants' concerns with the non-instrumental elements of process control and the relational variables, including: *voice* – having the opportunity to say everything they wanted to say in the conference and whether the mediator considered their views; *ventilating* - being able to say things made them feel good about participating in the conference; and the relational judgments of - *neutrality* – whether the methods used by the mediator were equally fair to everyone involved and the mediator gained sufficient



information to make good decisions about how to handle the issues involved; *trust* - trusting the mediator to be fair to them; and *status recognition* - whether the mediator treated them politely, showed respect for their rights, and whether the mediation was dignified. Cronbach's alpha for this scale was .90. For the hierarchical regression analysis, the voice and relational variables were operationalised as above, to reflect Lind et al.'s, 1997 example.

Distributive justice was measured by asking whether the litigants thought the outcome of the pre-trial conference was fair. Procedural justice was assessed by asking whether the litigants thought the procedure of the pre-trial conference was fair.

Satisfaction was assessed by asking whether overall, the litigants felt satisfied with the experience.

### Procedure

The researcher approached self-represented litigants in the pre-trial reception areas of the Fremantle and Perth Local Courts. The researcher explained she was from a university and was interested in their experiences with the pre-trial conference. The litigants were asked whether they would mind answering a short questionnaire with the researcher immediately after their pre-trial conferences, or if they preferred, whether they would complete the questionnaire in their own time and post it back to her. Sixty-seven participants agreed to be questioned immediately after their conference and 36 participants posted the questionnaire back. Of those asked, only four people refused to participate or take a questionnaire to return later, and the response rate of the questionnaires given out and posted back was approximately 33.3%.

## Results

Researchers in this area typically conduct a path analysis with LISREL or multiple regression. The size of the present sample dictated the use of multiple regression with SPSS Version 9 for Windows. Regression analyses are sensitive to differences in the reliabilities of measures, however all the scales yielded adequate internal consistency. The ratio of cases to predictor variables (7:1) was also acceptable (Tabachnick & Fidell, 1989). The major variables used for the analyses (procedural justice, distributive justice, instrumental, non-instrumental, neutrality, trust, status recognition and voice) were screened for fit between their distributions and the assumptions of multivariate analysis. Inspection of the Z-scores revealed there were several univariate outliers on the trust, status recognition and non-instrumental variables (Coakes & Steed, 1999). It is standard to see if the univariate outliers are also multivariate outliers before deciding how to deal with them (Tabachnik & Fidell, 1989). The multiple regression analyses were run to check for multivariate outliers and to inspect the assumptions of linearity, normality, and homoscedasticity. In the hierarchical regression, with the use of a  $p < .001$  criterion for Mahalanobis distance, three multivariate outliers were detected (two of these were also univariate outliers) and the scatterplots revealed a failure of normality and non-linear patterns. As failure of linearity and normality weakens the regression analysis, and in an attempt to remove the outliers and normalise the data, logarithmic transformations were performed on the trust and status recognition variables. Although the transformations removed the univariate outliers and the repeated hierarchical regression revealed that the multivariate outliers were also removed, the transformation did not improve the normality and linearity problems or improve the solution. Tabachnik and Fidell (1989) recommend

that, in the case where the use of transformed data does not improve the solution, researchers should use the untransformed data, and hence it was decided to use the untransformed data for the major analyses of the study.

Group differences were also examined using *t*-tests and One-way Analysis of Variance (ANOVA). No systematic differences on the major criterion variables (procedural justice, distributive justice and satisfaction) were found between males or females, plaintiffs or defendants, whether the questionnaires were mailed in or completed at the Court, nationalities, age or education. However, a significant difference was found on the variable of satisfaction between those litigants who settled their cases and those who did not (this did not include those who were returning to conference). Forty-one litigants reported their cases had settled, 58 litigants reported that their cases had not settled at the conference and four litigants agreed to return to conference later. The *t* test revealed that litigant satisfaction was affected by whether the case settled or not, with those litigants whose cases settled being significantly more satisfied with the process than those litigants whose cases did not settle,  $t(97) = -.29, p < 0.5$ . The strategies for dealing with this significant difference are varied, and could have included introducing an interaction term of settled or not settled into the regression analyses. However, given that the interest of the research was in questions relating to procedural and distributive justice and satisfaction, the researcher thought it best to articulate the multiple regression analysis for satisfaction as split between the two groups, as described by DeVauch, (1985) and recommended by E. Pascoe (personal communication, November 1, 2000). Although this reduced the number of cases in the analysis with satisfaction as the criterion variable, the ratio of cases to predictor variables was still acceptable. For the regression

analyses that included procedural and distributive justice as criterion variables, as no significant differences were found between the settled  $t(97) = -.55, p > 0.5$ . or not settled group,  $t(101) = -.96, p > 0.5$  on these variables it was thought the data set should be aggregated and analysed as a whole.

### Instrumental or non-instrumental

Multiple regression analysis was used to test the relative contribution of the instrumental and non-instrumental judgments in determining judgments of procedural justice. A standard multiple regression analysis was conducted between the instrumental and non-instrumental scales as the predictor variables, and procedural justice as the criterion variable. The two predictor variables in combination accounted for 53% (52% adjusted) of the variance, and  $R$  was significantly different from zero,  $F(2, 102) = 55.71, p < .001$ . Table 1 displays the results of the multiple regression. They indicate that both the instrumental and non-instrumental variables accounted for a significant portion of the variance in procedural justice judgments. The prediction that both the instrumental and non-instrumental variables would independently contribute significantly to procedural justice judgments was supported by the results which show that for the instrumental concerns, the standardised regression coefficient was  $\beta = .16, p < .05$ , and for the non-instrumental concerns it was  $\beta = .64, p < .001$ . These results also show that as predicted the non-instrumental factors were the better predictors of procedural justice. The contribution of the instrumental concerns was modest and it is evident that the non-instrumental concerns were far more important in predicting judgments of procedural fairness than the instrumental concerns were.

### Do the relational variables account for the effects of voice?

To test the hypothesis that the contribution of the relational variables would subsume the unique contribution of voice, a hierarchical regression was conducted. A measure of how much variance in procedural justice (the criterion variable) can be accounted for by voice alone once the relational variables have been excluded, was gained by entering the relational variables into the hierarchical regression equation first followed by the voice variable. The results are shown in Table 2. The results show that the change in  $R^2$  ( $\Delta R^2$ ) = .03 indicating that voice uniquely explained 3% of the variance in procedural justice over and above the relational variables. This result shows that after the effect of the relational variables had been excluded voice was still a significant, albeit modest, predictor of procedural justice,  $F(4,102) = 26.87, p < 0.01$ . Although voice did not explain a large amount of the variance, the results do not support the Lind and Tyler group's decision to omit voice from their studies of dispute resolution. It is interesting to note that the results show that in combination with voice, the relational factors of trust and neutrality were not significant predictors of procedural justice. This indicates that in the pre-trial conference litigants' concerns of procedural justice were shaped more by the indicators of voice ( $\beta = .28, p < .05$ ) and status recognition ( $\beta = .36, p < .001$ ) than issues of mediator neutrality ( $\beta = .07, p > .05$ ) and trust in the mediator's benevolence ( $\beta = .11, p > .05$ ). The theoretical implications of this finding are discussed below.

### The contributions of procedural justice and distributive justice to satisfaction ratings

Multiple regression analysis was used to test whether procedural justice judgments would be more salient in predicting litigant satisfaction with the pre-trial conference than distributive justice judgments. As described above, the data was split between the settled

and non-settled groups for this analysis. The results show that for the settled group  $\underline{R}$  was significantly different from zero,  $F(2, 40) = 20.67, p < .001$ , and the two predictor variables in combination accounted for 52% (50% adjusted) of the variance in the satisfaction rating. Similarly, for the not settled group  $\underline{R}$  was significantly different from zero,  $F(2, 57) = 40.77, p < .001$ , and the two predictor variables in combination accounted for 60% (58% adjusted) of the variance in the satisfaction rating. Table 3 displays the results of the multiple regressions. Although, both justice judgments independently contributed significantly to litigant satisfaction in both groups, there was a difference between the two groups on the relative influence of each predictor. In the settled group procedural justice was a slightly better predictor ( $\beta = .42, p < .01$ ) than distributive justice ( $\beta = .38, p < .05$ ), yet in the group who did not settle their cases, distributive justice ( $\beta = .51, p < .001$ ) was a much better predictor than procedural justice ( $\beta = .33, p < .01$ ). The results show that whilst issues of the procedural fairness of the pre-trial conference were significant predictors of litigant satisfaction with the pre-trial conference, so too were issues of distributive justice. The results provide partial support for the hypothesis that perceptions of procedural justice would explain more of the variance in litigant satisfaction with the pre-trial conference than distributive justice, but also show that in cases when the dispute was not settled, distributive justice judgments were the better predictors of litigant satisfaction. Whilst procedural justice was a better predictor of satisfaction for litigants who settled their cases, the difference between procedural and distributive justice as predictors of the satisfaction criterion, was modest. Meanwhile, for those litigants who did settle their cases distributive fairness was a much better predictor of satisfaction than procedural justice was.

### Instrumental or non-instrumental and Distributive Justice

This result highlights the significant contribution of distributive justice judgments to ratings of satisfaction and thereby stimulated interest in whether non-instrumental concerns would also influence distributive justice judgments. It was expected that the instrumental concerns would strongly predict distributive justice as they focus on the outcome of the procedure, however it was uncertain whether non-instrumental concerns would also contribute to distributive justice ratings. To test this, a standard multiple regression analysis was conducted, this time between the instrumental and non-instrumental scales as predictors, and distributive justice as the criterion variable. Table 4 shows the results of the regression. The two predictor variables in combination accounted for 36% (35% adjusted) of the variance, and  $R$  was significantly different from zero,  $F(2, 102) = 28.66, p < .001$ . This indicates that again, both the instrumental and non-instrumental variables accounted for a significant portion of the variance in distributive justice judgments, although less variance than they accounted for in procedural justice judgments. The results show that as expected, the instrumental concerns were the better predictor,  $\beta = .44, p < .001$ , but they also show that the non-instrumental concerns were also significant independent predictors of distributive justice,  $\beta = .27, p < .01$ . Although it is evident that the instrumental concerns were more important in predicting judgments of distributive fairness than the non-instrumental concerns, the results show that non-instrumental concerns also predict litigants' perceptions of distributive justice.

### Litigant satisfaction, preference for trial and perceptions of fairness.

There was overwhelming evidence that litigants wanted a settlement to their cases and did not want to go to trial. Table 5 displays the frequencies of preference for trial

amongst the settled and not settled groups. Of the 41 litigants that settled their cases only five said they would have preferred to go to trial and the remaining 36 said they were pleased it had settled. Of the 58 litigants who did not settle their case and the four who were returning to trial only seven said they were happy to go to trial and 55 would have preferred it if their case had settled at the conference. The chi-square test revealed that there was no significant difference between the two groups on preference to go to trial,  $X^2(2, n = 103) = 0.89, p > 0.5$ . Although in one case the minimum expected cell frequency (and thus one of the assumptions of chi-square) was not met, examination of the raw data leads to the conclusion that, regardless of whether the case settled or not litigants overall did not want to go to trial.

In addition, Table 6 displays the differences in satisfaction and perceptions of fairness amongst those litigants who settled and those who did not settle their cases at the pre-trial conference. The results show that most of the litigants judged the pre-trial conference procedure to be fair. This is evidenced by the mean of the procedural justice judgments for both groups being below the mid-point of the measurement scale (ie. 2.5 is the mid-point on the Likert-type scale of 1 = strongly agree and 5 = strongly disagree that the procedure was fair). This indicates that overall, despite the “success” or not of their cases in terms of settlement, most litigants perceived the process of the pre-trial conference to be fair.

### Discussion

This discussion will first highlight some limitations of the study that should be kept in mind when considering the results. It will then present both the theoretical and



practical implications of the findings and argue for the considerable usefulness of the study despite the limitations.

### Limitations of the Study

Field studies often provide insights into relationships amongst variables that closely approximate the complexity of the “real” world. In terms of utility then, results from the field are often preferable to results from experimental research. However, there is an absence of ability to exert experimental control in field studies and hence caution is required when interpreting those results, and generalising them to other samples. The lack of experimental control can often generate potential confounds, and in field studies these confounds are often associated with data collection and sampling procedures. In this study, for instance, there was limited access to participants and the data collection process generated a lack of random sampling and uneven group sizes. In addition, the naturally occurring data produced a restricted range of scores. This led to the violation of the assumptions of linearity and normality in some of the analyses thus weakening the strength of the multiple regression for those analyses. In particular, in this study, the results revealed a tendency toward positive skewness of the relational variables. This could have been caused by the relatively low response rate for the mailed back questionnaires as it may be that those who did not respond to the survey would have rated the relational variables lower than those who did respond. Alternatively, it could have been due purely to the expertise of the Court mediators and may therefore represent a “true” result.

There were other factors inherent in the natural setting that could have exerted an undesired (in terms of potential confounds) influence on litigants’ perceptions of the

conference: the litigants were involved in different types of disputes with different rights and interests at stake; the Court used several different mediators who may have exhibited different mediator styles; the litigants may have had different experiences whilst waiting for their conferences; and as some of the demographic group sizes were small there may have been cultural, age or educational differences that were not detected in the analyses. These limitations are, in general, artefacts of collecting data in a natural setting where it is not always possible to control for potentially confounding variables. Future research could overcome some of these deficiencies by examining a larger data set.

Cohen and Cohen (1975) argue that the general principle for multiple regression is to use as few predictors as the theoretical reasoning allows. Although in this study, due to the size of the sample, minimizing the number of predictors might have reduced the complexity of the investigation and rendered the results more meaningful, the author believes that no redundant predictors were used. Whilst future studies could reduce the number of predictors (if the focus was on more specific research questions), the author believes that the results of this study were not weakened by its research design, and that the limitations of this study were not such as to greatly limit the importance of its findings.

### Theoretical Implications

Although the results confirm some predictions concerning the non-instrumental and instrumental processes of procedural justice, as outlined in the results section, there are some unexpected findings with implications for procedural justice theory. The finding that distributive justice is a greater predictor of satisfaction with court mediation than procedural justice, in situations where litigants have not settled their cases, was

unexpected in terms of the current theories of procedural justice. On the other hand the finding that both instrumental and non-instrumental processes influence litigants' perceptions of procedural justice supports the general perspective shared by various procedural justice theorists (Shapiro & Brett, 1993; Lind et al., 1990; Kitzmann & Emery, 1993).

Furthermore, the finding that voice adds to the prediction of procedural justice judgments beyond what can be predicted by the relational variables of status recognition, neutrality and trust, confirms the author's contention that voice is an important element to be considered when predicting the procedural justice of the mediation process (in this case more important than neutrality and trust). As discussed below, these findings have important implications for expanding the theory of procedural justice; and practically, for assisting the civil courts ensure that their settlement mediation procedures are designed and enacted in such a way that litigants will view them as both satisfying and fair. Procedural justice theory is rarely presented in terms of group differences (be they gender, age, education or characteristics of the proceedings), and in this study, in the instances where their cases did not settle in the conference, distributive justice was a better predictor of the litigants' satisfaction with the pre-trial conference than procedural justice. When their cases did settle, however, procedural justice was the better predictor, but only marginally. It is possible that this result may derive from the fact that litigants who do not settle their cases have not yet received a final outcome, so therefore their focus may be on potential outcomes, and hence more on distributive justice issues than those who do settle. Meanwhile for those who do settle their cases, the issue of outcome may become a little less salient (as the outcome is finally decided), therefore they may attend to both

procedural and distributive justice principles to assess their reaction. With regard to these two variables however, litigants whose cases do settle appear to focus on the procedural justice issues to a greater extent than the distributive justice issues, and in turn their perceptions of a procedurally fair conference lead to higher levels of satisfaction. A possible explanation for this may derive from the proposition by some theorists (Bos, Lind, Vermunt & Wilke, 1997; Bos, Wilke & Lind, 1998) that when outcomes equal what people expect, people use distributive justice principles to assess their reactions to procedures. Bos et al. (1997) suggest that people use procedural justice judgments as a heuristic to judge the fairness of the outcome in situations when they find it difficult to assess whether the outcome is fair or unfair. Bos and his colleagues found that it is only when people receive outcomes that are better or worse than expected that they use procedural fairness principles to assess their reaction. At other times, namely when the outcome equals what they expect, people use distributive justice principles (social comparison) (Bos et al., 1998). It is possible that, given that the dispute has reached as far as it has, namely to court, litigants enter the pre-trial conference expecting that the dispute will not settle and that they will continue on to trial. When the dispute remains unsettled, as expected, people may use distributive justice principles to assess their reaction. When the dispute settles on the other hand, if the litigants did not expect to settle, they may be surprised, and therefore use procedural justice principles to assess their reaction. It is also possible that when the disputes do settle in the mediation conference, the parties may come to their own unique solution to the dispute, and these solutions may include compromises that address the parties' needs rather than their legal rights. In these instances, litigants may have difficulty in judging the fairness of the solution (in terms of

their legal rights) and this may be another reason why they rely on procedural justice judgments to assess their own reactions and perceptions of fairness.

In any event, the results demonstrate that litigants who felt that their conferences were procedurally fair were more satisfied overall with the conference. The results show that these litigants were likely to be those who settled their disputes. This is a unique finding and one that future research should explore. There appears to be an issue about the nature of outcomes in terms of their finality or temporary status that influences litigants' perceptions of the fairness of pre-trial conferences, and their satisfaction with them. Future research could refine the conceptualisation of the nature of outcomes, and explore what it is about the nature of an outcome that makes people less satisfied with a mediation conference when the dispute does not settle.

A second theoretical development stems from the finding that instrumental and non-instrumental processes both contribute to judgments of procedural justice in mediation. The finding that the non-instrumental concerns exert a greater influence on procedural justice judgments than the instrumental concerns in court mediation adds to the work of other researchers (Kitzmann & Emery, 1993; Shapiro & Brett, 1993). It appears evident that in mediation, the social aspects of the procedure have more influence on perceptions of procedural fairness than procedural issues associated with outcome. Litigants who felt they had the opportunity to express their views and emotions, and felt that their views were considered and used to help facilitate the outcome, judged the procedural fairness of the conference more highly than those who did not have this experience. Similarly, litigants who viewed the mediation as taking place within a polite, respectful and dignified atmosphere also judged the conference as fairer than those who did not. It is

clear that positive feelings about these social aspects of the procedure, which may lead to positive feelings associated with group membership, create strong perceptions of procedural justice.

The results also show, that although not as strong as the non-instrumental concerns, the instrumental concerns are important contributors to judgments of procedural justice. Perceptions of outcome favourability; outcome favourability of litigants' expected and imagined outcomes; perceptions of process and decision control; and opportunity to help formulate the outcome, are still important factors that influence litigants' perceptions of procedural fairness. That they are subordinated to the non-instrumental concerns, in litigants' minds, when they assess the fairness of the mediation procedure is no reason for future studies to ignore their influence.

The results suggest that the instrumental concerns are the major predictor of litigants' perceptions of distributive justice. However, the non-instrumental issues associated with the social aspects of the process are also important predictors. Other researchers (Tyler et al., 1997) have noted the influence of non-instrumental processes on distributive justice concerns and suggest that this derives from a link between equity and need principles, and the nature of the social relationship among the parties. If the parties share important social ties then the social aspects of those ties have been found to influence their use of distributive justice criteria (Tyler et al., 1997). It will not always be the case that opposing litigants will share direct social ties yet people may view legal authorities as representative of society as a whole, and thus the social ties may be ties to society as a whole group (via the mediator). In this way the social aspects of the mediation may

become a focal point for litigants' assessment of fairness and influence their perceptions about the fairness of the outcome.

These findings confirm that, in mediation, non-instrumental processes occupy an important place in the psychology of procedural (and distributive) justice. The findings also confirm the contribution of 'voice' in litigants' judgments of procedural fairness in mediation. Some research has demonstrated that having the opportunity to say what one wants to say and having one's views considered by the third party (voice), is critical to a person's perception of fairness in decision making (Folger, 1977; Tyler, 1989; Lind et al., 1990; Shapiro & Brett, 1993; Folger, Cropanzano, Timmerman, Howes, & Mitchell, 1996). However, more recent research has cast doubt upon how important voice is in perceptions of the fairness of third party dispute resolution procedures, and suggests that its effects are subsumed by the relational issues of social status, neutrality and trust (Lind et al., 1997; Tyler et al., 1998). The findings of this study indicate that in pre-trial conference mediation procedures, voice is a significant predictor of procedural justice, independent of the relational variables. The results show that there is value for litigants in telling their story and having their views considered by the third party in mediation that operates beyond the other relational aspects of the procedure. The value may be associated with self-esteem issues (or even instrumental issues) of using one's voice and relying on ones' own efforts to persuade and argue in a legal context; or with the cathartic feelings of ventilating; or with issues of acceptance by the group enacting the procedure, in this case the Court.

Shapiro & Brett (1993) called for future research to explore why disputants value the chance to say what they want to say and have their views considered by the third party. It

may be that future research will benefit from further exploration of the relationships between components of the voice variable. Nevertheless, it is clear, that in the pre-trial context, voice is an important contributor to perceptions of procedural justice and should be considered in further studies of procedural justice in mediation.

The relative importance of status recognition on perceptions of procedural justice, compared to the other relational factors of neutrality and trust is another clear finding of this study. The extent to which the litigant felt he or she was treated with politeness, dignity and respect by the mediator, was an important indicator of how the litigant perceived the fairness of the mediation procedure. Another particularly interesting finding of the study was that concerns about the neutrality of the mediator and trust in the benevolence of the mediator were not significant predictors of procedural justice when combined with status recognition. There are possible cultural explanations for this finding. Tyler and Lind's (1992) relational model of justice derived from research conducted in America, but Australians may differ from their American counterparts in the weight they place on each particular relational concern. Issues of trust in third party benevolence may not hold as much importance for Australians, nor may issues of concern about neutrality. These suggested differences between the two nationalities are purely speculative. The more important point to observe is that the results from this study do not, in general terms, match those of studies done in legal institutions in America (Tyler, 1990, 1996; Tyler & Lind, 1992). In particular they do not match those of the study done by Shapiro & Brett (1993) in coal-mining mediation in America, where the finding was that the relational variables of trust and neutrality were stronger predictors of procedural



justice than voice. These differences suggest that American research cannot be generalised to an Australian mediation context.

Social psychologists have noticed, however, that cross-cultural research conducted between collectivist and individualist societies has assisted in refining models of procedural and distributive justice (Tyler et al., 1998; Morris & Leung, 2000). Although the differences between American and Australian societies are only subtle, it may be that the results of this study might also contribute to accruing cross-cultural data on the relative importance of the relational variables in dispute resolution procedures.

There is possibly an alternative explanation for the fact that the status recognition factors proved to be greater predictors of procedural justice judgments than the neutrality and trust factors. It may be that when litigants are dealing with someone from their own social group (either the mediator or their opponent or both), issues of social status take on greater importance in their perceptions of procedural justice. In this study, litigants may have been more inclined to view the mediator as closer to their own social groups (i.e., as a peer or a friend) than for instance they may have viewed a judge, and this perhaps helps to explain the particular emphasis that litigants placed on the status recognition concerns. It may be more likely that the neutrality and trust issues assume a greater importance in litigants' perceptions of fairness when the third party is clearly not of the same social status, than at other times (as in this study for instance, where the mediator was not a judge nor even a lawyer). Alternatively, it may be that when the third party makes a binding decision, that litigants may be more concerned with issues related to the third party's neutrality and trust. Tyler and Lind's (1992) relational model relates more to contexts where the third party makes an adjudicative, or at least an authoritative decision,

but in situations where the third party only facilitates the parties' progress towards their own resolution, and does not adjudicate the dispute, the status recognition factors may subsume the effects of neutrality and trust. Again, these results raise some interesting issues in relation to the relative importance of the relational variables on procedural justice judgments in various dispute resolution procedures.

### Practical Implications

Perhaps the most important practical findings are also those that relate to these issues of status recognition and voice. As litigants appear to be especially sensitive to issues of status recognition when assessing the fairness of the procedure, it is imperative that the courts enact mediation procedures that do not detract from litigants' perceptions of their social status. The courts must ensure that mediators conduct court mediations in a polite way that conveys respect for the litigant and maintains the dignity of the proceedings, and the dignity of the litigants. In addition, litigants must be given a voice in the proceedings and the mediator must consider the litigants' views when helping them toward resolving their disputes. The litigants who participated in this study rated the status recognition and voice variables, and the procedural justice of the pre-trial conference, as relatively high, indicating that, in general, the Local Court mediators are successfully attending to these issues.

The findings that perceptions of distributive justice have a significant influence on satisfaction with the pre-trial conference, and that both instrumental and non-instrumental concerns influence litigants' perceptions of distributive justice, also have important practical implications for the courts. It is important that court mediators ensure that litigants are not coerced into unfair or unwanted settlements purely for settlement's sake.

This perhaps is more difficult for mediators to control. It is apparent from the results that litigants want settlements, and that settlements heighten litigants' satisfaction with the conference. Yet, the fairness of the outcome also affects litigants' satisfaction with the conference. It is a difficult task to induce litigants to settle, and at the same time ensure the settlement is fair to both parties. To achieve this, the results of this study suggest that mediators must attend to the non-instrumental social aspects of the mediation, whilst at the same time attending to the instrumental factors of ensuring that the litigants are not coerced into settlements or situations that are obviously unfair to one or more of the parties. This means that it is important to identify issues which could lead to unfair outcomes, whilst also attending to the social aspects of voice, communication and the relational elements of the mediation. In essence, mediators must ensure that having a 'successful' mediation (in terms of settlement), does not occur at the expense of having a mediation that is satisfying to the litigants.

Another issue is that lawyers did not represent the litigants who participated in the pre-trial conferences in this study. If lawyers had been involved in the conference process, this may have altered the results of the study. As the majority of cases in the civil courts have lawyers involved, it is important to examine whether litigants represented by lawyers respond to the issues of fairness and satisfaction with mediation in the same way as those who are unrepresented. It is possible that lawyer involvement may interfere with litigants' opportunity to voice, or their opportunity to help formulate the solution, and may alter their perception of the social aspects of the procedure. If lawyers influence litigants' perceptions of any of the major instrumental or non-instrumental concerns, then legally represented litigants may not view court mediation in the same way as the litigants

in this study did. Legal authorities would benefit from knowing how lawyers affect court mediation processes, and this knowledge would extend the theory of procedural justice in the mediation domain. Future studies could explore this issue of legal representation in civil court mediation.

It appears that overall litigants are generally satisfied with the pre-trial mediation conference and view it as a fair procedure. Litigants also appear to desire a settlement of their cases. Settlement enhances litigants' feelings of satisfaction but does not diminish their perceptions of fairness. It seems safe to assume then, that the pre-trial mediation conference is a legitimate and just alternative to trial.

The results of this study deepen considerably, our understanding of litigants' perceptions of and reactions to, civil court mediation. We now have a better knowledge of the processes underlying litigants' perceptions of procedural (and distributive) justice in mediation, and a greater understanding of the justice judgments that influence litigants' satisfaction with mediation. This study provides an important foundation for future justice studies in the civil court mediation domain, and provides evidence that mediation can be a just and satisfying 'alternative' dispute resolution procedure for use in our civil courts.

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## Footnotes

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- <sup>1.</sup> A study based on the Lind et al. (1990) study was conducted in Australia and it found that the results of the American research could not be generalised to Australia. One of the contradictory findings was the plaintiffs in tort cases found greater satisfaction with consensual processes as opposed to adjudicative processes.

Table 1.

Regression Analysis of the Effects of Instrumental and Non-instrumental Judgments on Procedural Justice (n = 103).

Independent Variable	Beta Weight (b/SE)
Instrumental Judgments	.16 (.00/.02) *
Non-instrumental Judgments	.62 (.01 / .01) ***
Adjusted $R^2$	.52***

Note: Numbers in parenthesis are the unstandardised regression coefficients and its standard error.

p < .05 \*\*\* p < .001

Table 2.

Hierarchical Regression Analysis of the Effects of the Voice and Relational Variables on Procedural Justice Judgments (n = 103).

Independent Variable	Beta Weight (b/SE)
<b>Step 1</b>	
Neutrality	.15 (.00/.06)
Status recognition	.41(.22/.05)***
Trust	.22 (.25/.14)
Adjusted $R^2$	.48***
<b>Step 2</b>	
Neutrality	.07 (.00/.06)
Status recognition	.36 (.19/.05)***
Trust	.11 (.12 / .14)
Voice	.28 (.11/.05) *
Adjusted $R^2$	.50*
$s R^2$	.03*

Note: Numbers in parenthesis are the unstandardised regression coefficients and their standard error.

\*  $p < .05$  \*\*  $p < .01$  \*\*\*  $p < .001$

Table 3.

Multiple Regression of Settled and Non-settled Groups Predicting Satisfaction from Ratings of Procedural and Distributive Justice.

Independent Variable	Beta Weight (b/SE)
Settled ( $n = 41$ )	
Procedural Justice	.42 (.44/.15) **
Distributive Justice	.38 (.36 / .14) *
Adjusted $R^2$	.50***
Not Settled ( $n = 58$ )	
Procedural Justice	.33 (.38/.13) **
Distributive Justice	.51 (.54 / .12) ***
Adjusted $R^2$	.58***

Note: Numbers in parenthesis are the unstandardised regression coefficients and their standard error.

$p < .05$  \*\*\*  $p < .001$

Table 4.

Regression Analysis of the Effects of Instrumental and Non-instrumental Judgments on Distributive Justice (n = 103).

Independent Variable	Beta Weight (b/SE)
Instrumental Judgments	.44 (.10/.02) ***
Non-instrumental Judgments	.27 (.00 / .02) **
Adjusted $R^2$	.35***

Note: Numbers in parenthesis are the unstandardised regression coefficients and their standard error.

$p < .05$  \*\*\*  $p < .001$

Table 5:

Frequencies for Preference for Trial Amongst Litigants

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	Settled ( $n = 41$ )	Not Settled ( $n = 58$ )	Returning to Conference ( $n = 4$ )
Preferred trial	5	7	0
Preferred settlement	36	51	4

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Table 6:

Effect of Settlement on Justice Judgments and Satisfaction

	Settled ( <u>n</u> = 41)		Not Settled ( <u>n</u> = 58)	
	<u>M</u>	<u>SD</u>	<u>M</u>	<u>SD</u>
Satisfaction	2.27	1.20	3.09	1.47**
Procedural Justice	1.89	1.14	2.02	1.29
Distributive Justice	2.63	1.26	2.90	1.39

**Note:** On the Likert-type scale 1 = strongly agree and 5 = strongly disagree.

\*\* denotes a difference of  $p < .01$  between the settlement groups on the satisfaction rating.



Appendix

Survey Instrument

## PRE-TRIAL CONFERENCE SURVEY

*Thank you for your participation in this survey.*

*To ensure that you remain anonymous do not write your name, or any other comments that will make you identifiable, on the attached. By completing the questionnaire you are consenting to take part in this research. As such you should first read the enclosed Information Sheet carefully as it explains fully the intention of this project.*

## INFORMATION SHEET

### Conference Survey

Thank you for reading this information sheet that will provide you with particulars of this conference study.

I am an Honours student in Psychology at Edith Cowan University.

The questionnaire which you are invited to answer is designed to investigate your experience with the pre-trial conference process. The questionnaire conforms to guidelines produced by the Edith Cowan University Psychology School's Committee for Ethical Research.

Please answer each question by circling the number on the scale below each question that best expresses your answer to each question. The questionnaire has 28 questions and will take approximately five minutes to complete.

Please be assured that this study is anonymous and you need not provide your name or any other identifying information on the paper. Also, the information you do provide will be held in strict confidence by the researcher and all data will be reported in group-form only. At the conclusion of this study, a report of the results will be available upon request.

Please understand that your participation in this research is totally voluntary and you are free to withdraw at any time during this study and to remove any data that you may have contributed.

Any questions concerning this project can be directed to Dr Neil Drew (Supervisor) of the School of Psychology on (08) 9400 5541 or myself on (08) 9339 7650.

You may keep this document for your records and you may also leave your name and address at Dr Neil Drew's contact number if you want a copy of the report.

JILL PAPANONE

**PLEASE CIRCLE THE NUMBER THAT BEST EXPRESSES YOUR RESPONSE.**

- |  |                    |   |   |   |   |   |                   |
|--|--------------------|---|---|---|---|---|-------------------|
| 1. How favourable was the outcome of the pre-trial conference to you?  | Very Favourable    | 1 | 2 | 3 | 4 | 5 | Very Unfavourable |
| 2. How favourable was the outcome compared to what you expected prior to the experience?                             | Very Favourable    | 1 | 2 | 3 | 4 | 5 | Very Unfavourable |
| 3. How favourable was the outcome compared to what you would have liked to be the outcome?                           | Very Favourable    | 1 | 2 | 3 | 4 | 5 | Very Unfavourable |
| 4. How much influence did you have over the outcome of the pre-trial conference?                                     | A lot of Influence | 1 | 2 | 3 | 4 | 5 | No Influence      |
| 5. How much influence did you have on how the conference proceeded?  | A lot of Influence | 1 | 2 | 3 | 4 | 5 | No Influence      |
| 6. The mediator/clerk used what I said to help formulate the outcome?  | Strongly Agree     | 1 | 2 | 3 | 4 | 5 | Strongly Disagree |
| 7. I had the opportunity to say everything I wanted to say in the conference.  | Strongly Agree     | 1 | 2 | 3 | 4 | 5 | Strongly Disagree |
| 8. Being able to say these things made me feel good about participating in the conference.                           | Strongly Agree     | 1 | 2 | 3 | 4 | 5 | Strongly Disagree |
| 9. The methods used by the mediator/clerk were equally fair to everyone involved.                                    | Strongly Agree     | 1 | 2 | 3 | 4 | 5 | Strongly Disagree |
| 10. The mediator/clerk gained sufficient information to make good decisions about how to handle the issues involved? | Strongly Agree     | 1 | 2 | 3 | 4 | 5 | Strongly Disagree |
| 11. I trusted the mediator/clerk to be fair to me.   | Strongly Agree     | 1 | 2 | 3 | 4 | 5 | Strongly Disagree |
| 12. The mediator/clerk considered my views.  | Strongly Agree     | 1 | 2 | 3 | 4 | 5 | Strongly Disagree |

- |  |                               |                            |                  |                     |                        |                                 |                   |
|--|-------------------------------|----------------------------|------------------|---------------------|------------------------|---------------------------------|-------------------|
| 13.The mediator/clerk treated me politely.                                   | Strongly Agree                | 1                          | 2                | 3                   | 4                      | 5                               | Strongly Disagree |
| 14.The mediator/clerk showed respect for my rights                           | Strongly Agree                | 1                          | 2                | 3                   | 4                      | 5                               | Strongly Disagree |
| 15.The pre-trial conference was dignified.                                   | Strongly Agree                | 1                          | 2                | 3                   | 4                      | 5                               | Strongly Disagree |
| 16.The procedure of the conference was fair.                                 | Strongly Agree                | 1                          | 2                | 3                   | 4                      | 5                               | Strongly Disagree |
| 17.The outcome of the conference was fair.                                   | Strongly Agree                | 1                          | 2                | 3                   | 4                      | 5                               | Strongly Disagree |
| 18.Overall, I feel satisfied with the pre-trial conference.                  | Strongly Agree                | 1                          | 2                | 3                   | 4                      | 5                               | Strongly Disagree |
| 19.Did you, the other side, or the Court request the pre-trial conference?   | My request<br>1               |                            | Other side<br>2  |                     |                        | Court<br>3                      |                   |
| 20.Was the dispute settled in the conference?                                | Settled<br>1                  |                            | Not Settled<br>2 |                     |                        | Returning to conference<br>3    |                   |
| 21.If <b>settled</b> , would you have preferred to go to trial?              | Preferred to go to trial<br>1 |                            |                  |                     |                        | Pleased it settled<br>2         |                   |
| 22.If <b>not settled</b> , would you have preferred the dispute had settled? | Preferred it had settled<br>1 |                            |                  |                     |                        | Pleased its going to trial<br>2 |                   |
| 23.Were/are you the plaintiff or the defendant?                              | Plaintiff<br>1                |                            |                  |                     |                        | Defendant<br>2                  |                   |
| 24.What is your gender?  | Male<br>1                     |                            |                  |                     |                        | Female<br>2                     |                   |
| 25.What is your nationality?   | Aboriginal<br>1               | Australian<br>2            | European<br>3    | Asian<br>4          | Other<br>5             |                                 |                   |
| 27.What is your age?   | 18-25<br>1                    | 26-35<br>2                 | 36-45<br>3       | 46-55<br>4          | Over 55<br>5           |                                 |                   |
| 28.What is the highest level of education you have achieved?                 | Completed Primary<br>1        | Completed High School<br>2 |                  | TAFE/<br>Trade<br>3 | University Degree<br>4 |                                 |                   |