# Unjust Enrichment

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Mediation is a resolution process, in the shadow of the law, that is “by the people, with the people, from the people”[[1]](#footnote-1). “From the people” implies a connection to the mores, social, cultural, ethnic, gender, racial and contextual attitudes, expectations, needs and rights of the disputes/mediatees, all of which are changeable. Mediators, being “of and with the people”, can understand and relate to disputants’ psycho-socio-political systems . Moreover, the professional requirements and ethics of mediators and mediation can change, albeit more slowly, to any changes. Such responses are usually in advance of any legal changes to law. The rise of the rights movements and the dissembling of Western democracy have caused difficulties (and delays in reassessment) for mediators and mediation, particularly within two of the principal ethics[[2]](#footnote-2): Autonomy and Justice.

1. …”culture (a composite of the customary beliefs, social forms, and material traits of a racial, religious or social group) is not static and autonomous, and changes with other trends over passing years”[[3]](#footnote-3)
2. “When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult.”[[4]](#footnote-4)

An emerging trend affecting Autonomy and Justice is an increasing fixed mindset, unreal worldview and resistance to negotiation/settlement under the broad umbrella of ‘unjust enrichment’[[5]](#footnote-5).

## A mediator’s view of Autonomy

“…all persons have intrinsic and unconditional worth, and therefore, should have the power to make rational decisions and moral choices, and each should be allowed to exercise his or her capacity for self-determination.”[[6]](#footnote-6)

Autonomy and self-determination overlap enough to be used interchangeably. For self-determination to occur, three conditions must occur:  
 1. *Competency* to receive, understand and make decision(s);  
 2.  *Voluntariness* (the freedom to make coercion-free decisions);  
 3. Relevant information that is understood for that decision-making

Where these three conditions are of high quality, Shapira called this “real substantive self-determination”[[7]](#footnote-7)

The 24/7 availability of information via the internet, the relative decrease in curiosity, the premature exposure to adult-learning has led to *hyper-individualism[[8]](#footnote-8)* in the 21st century. Here, the substantive tag becomes a focussed, ready-made position, a fixed mindset and thought process created by external forces. Pressure from rights groups, vocal minority groups, climate change forces, Get-Up, MeToo, feminism groups, gender diversity, Anti- groups provide the filtered/edited/credible information that satisfies, allowing for a high degree of self-determination, a sense of authority and superiority that excludes any different views. On the one hand, a teenager can lecture the United Nations on climate change, and on the other hand, a person who does not accept the ever-changing evidence on climate change is castigated as a climate-change denier.

Peter Bennett[[9]](#footnote-9) called this “ *the irrefutable ignorance of (*self-taught*) experts*” and within mediation this is exemplified by rigid positions and often self-righteous beliefs with announcements like “I am right to think this way”, “My position and my demands/explanations/expectations are irrefutable” ; “It’s not the money, it’s the principle” (which is never named or defined); “It’s not my fault so someone else has to pay or suffer”; *“I shouldn’t have to pay (or, repay) because ….. “*.[[10]](#footnote-10) A mediator’s skills are tested in matching and syncing, in narrative, story-telling and hypotheticals, in reality checks, and establishing an informed, credible, authentic presence in joint sessions and in one-on-one sessions. In turn the mediator’s skills can lead to a balanced, realistic party self-determination that achieves an acceptable resolution.

This conjoint self-determination (called party self-determination) is the underlying driver for a successful mediation. Douglas credits Cooper and Field as identifying four steps that mediatees (with the mediator) can take to achieve party self-determination[[11]](#footnote-11):

a) actively and directly participate in the communication and negotiation processes.

b) choose and control the substantive norms that will guide their decision-making.

c) create the options for settlement; and

d) control the final decision regarding whether or not to settle and the terms of settlement.

## A mediator’s view of Justice

Justice is generally interpreted as fair (equal), equitable, and appropriate treatment of persons and their needs. Such divisions, categorisations and their obtuse definitions have persisted since Aristotle in 300BC. Aristotle, a keen observer of human behaviour, surmised that the way we relate to people in justice situations is variable: “treat equals as equals and unequals as unequals.”[[12]](#footnote-12)The first part of Aristotle’s aphorism equates to fairness, a concept that Australians accept as a given: giving someone a fair go; creating a level playing ground are an integral part of Australianism. The second part (unequals as unequals ) relates to equity wherein a person who is better-off can accept a lesser percentage of a settlement if the other mediatee has less (e.g., money, less repayment ability, etc.). The ‘needs’ component can be a flow on from the equitable (less or more than 50% rather than a split down the middle) subcategory of equity.

Justice within mediation is not about legalistic rights or wrongs. It is about what two mediatees accept and agree upon, based on their concept of fairness, as a walk-away resolution to their dispute. Hyman succinctly summarises this effect in mediation :

“The justice that pertains in mediation is the justice the parties themselves experience, articulate and embody in their resolution of the dispute.”[[13]](#footnote-13)

Following from this, Hyman makes a salient point, giving permission to mediators to interact with mediatees in matters of common-sense justice and fairness:

“Explicit talk about fairness and justice can, and often does, form an appropriate part of a mediation session.”[[14]](#footnote-14)

Elsewhere Hyman states that a dialogue or trilogue between mediator and one or both mediatee(s) involving moral , ethical issues, justice and fairness within that mediation can help but have not been added to “the working ethos of mediators”[[15]](#footnote-15)

## The Mediator’s view of “Unjust enrichment”

“It is by nature fair that nobody should enrich himself at the expense of another”  
Pomponius (109-44 BC.)

Pomponius’ quote has survived over two thousand years as a maxim or principle of common behaviour. Commonly called unjust enrichment, whereby a person gains, unjustly, at the expense of another (causing a loss to this person) is very much the antithesis of fairness and justice. However, attempts for its inclusion in law have historically and geographically fluctuated[[16]](#footnote-16).

This article takes the position that mediation, in the shadow of the law, does not have to follow the travails of unjust enrichment becoming law. Common sense suggests that the concept of a person unjustly “ripping someone off” and hurting that person, is the antithesis of fair play and common justice. As such, protection of one mediatee from another mediatee’s unjust enrichment can easily fit into a fair and just principle within mediation . A principle is not law, merely a guideline that mediator and mediatees can discuss and decide on its relevance, sensibly and autonomously. Accusations of subjectivity are balanced by reasoned discussion within the psycho-socio-political, cultural, gender and other contexts that exist within that mediation. It can help by framing the discussion around four distinct questions[[17]](#footnote-17):  
  
(1) has one mediatee (usually the defendant) been benefited (i.e., enriched)?

(2) was the enrichment at the other mediatee’s (usually the claimant’s) expense?

(3) was the enrichment unjust?

(4) are there any defences or satisfactory explanations?

In mediation, the two commonest areas that cover unjust enrichment are

1. Failure to pay for work done, for goods supplied.
2. Refusal to return money or goods received.

Example 1: Failure to pay for work done:

During the current covid-19 restrictions there has been an upsurge in home renovations, repairs and rebuilds. Most of these changes are done by tradespeople with a verbal agreement, not a written contract. It is now more common for the home/building owner to refuse to pay the final invoice presented by the worker/company, often for very minimal/specious reasons. The reasons given are strenuously defended as real, genuine and incontestable. The builder/handyman/tradie often settle for less as they cannot afford further legal processes, or need at least some money, or are too stressed to continue, or are fearful of the enriched mediatee bad-mouthing them and tarnishing their reputation and future job prospects

*Jeff had been a tiler for over 20 years. He was recommended to Gwen by an electrician who was rewiring part of Gwen’s house. Jeff’s quote for tiling kitchen floor and splashback and bathroom, was cheaper than another quote and was accepted by Gwen. There was no written contract. The kitchen was done, and Gwen was very happy, recommending Jeff to several of her friends. In the bathroom, Gwen wanted a shower recess without a screen as she had seen a picture in a magazine and thought it would make the bathroom lighter and bigger. When finished, Gwen rang Jeff to complain that water was “pooling” around the shower area. On inspection, Jeff pointed out that she needed a shower screen to stop the water “pooling”. Gwen reluctantly agreed, grumbling about the extra cost. Post installation of screen, Gwen complained that the “pooling” was now right through the bathroom and this was caused by the tiles not being laid properly laid; and that she was not paying him his last invoice; and moreover had got a quote from another tiler to retile the floor, for an amount greater than Jeff’s fee for the two rooms; and that she would not allow Jeff to come and inspect the bathroom tiles nor allow him to remedy and faults; and that she was taking him to court*.

The action was referred for mediation.

Example 2 Refusal to return money.

*Jack was a handyman/renovator/roofer and had done some small jobs in the past for Peter who needed a rental property reroofed. A price was agreed, and Jack asked Peter for $8000 for materials. Jack worked for two days removing gutters and flashing. Two days later he rang Peter saying he had put his back out and would be resting for a few days. Jack never returned, ignoring phone messages and emails. No roofing materials materialised. Peter sought recovery of the $8000 (excluding wages for work done). Jacks defence was that he was now a pensioner and that he was moving to Queensland (to save money and care for his mother dying of cancer). He claimed that the $8000 was an appropriate amount for his two days’ work.*

The matter was referred for mediation

Example 3. Refusal to pay for goods received

*Poultry Suppliers P/L were contacted late on a Friday to deliver a large order of fresh chicken breasts to Angellini Wedding & Conference Restaurant. The owner of Poultry Suppliers P/L delivered boxes and boxes of fresh chicken breasts for the wedding the next day (Saturday), personally handing then over to the chef with instructions to keep them in the fridge overnight. The chef put the chicken in the freezer. Saturday morning the chef complained to Mr Angellini that the chicken was partly frozen. Mr Angellini rang the poultry suppliers and declared that he never used frozen chicken and he would not pay for them. The next day, Mr Angellini had an extended family luncheon for 80plus guests featuring chicken breasts as the main course*

The matter was referred for mediation

In each of these cases one mediatee was unjustly, unfairly (and some would say, unethically) treated and suffered a loss whilst the other mediatee made a gain (was enriched). This would not pass the Australian “pub test”.

A mediator can, in identifying these patterns, introduce the topic of unjust enrichment, either in the open, triadic segments and or in the one-on-one segments. This is neither a judgement nor a coercive move on the part of the mediator. Its aim is to protect and support the mediatee suffering the unjust loss, and allow for discussion between mediatees, that can produce a shift in mind sets and bargaining positions and increase the chances of a more equitable, just and fai,r party self-determined resolution.

1. People (disputants) are empowered by a judge/adjudicator- free, courtroom-free ambiance to seek a resolution to their dispute with the help of a mediator, operating within a localized, context based, socio-political framework. [↑](#footnote-ref-1)
2. The four ethical of principles are Beneficence, Non-maleficence, Autonomy and Justice. [↑](#footnote-ref-2)
3. Basil Varkey. Principles of Clinical Ethics and Their Application to Practice.   
   Med Princ Pract 2021;30:17-28.p.19 doi: 10.1159/000509119. [↑](#footnote-ref-3)
4. Roscoe Pound, Address Before the American Bar Association Annual Meeting (Aug. 29,1906), *in* The Pound Conference: Perspectives on justice in the future app. at 337, 340 (A Leo Levin & Russell R. Wheeler eds., 1979) [↑](#footnote-ref-4)
5. This article is not a legalistic exposition, perspective, argument or adjudication /judgement on unjust enrichment, merely an observation of a not-well-known behaviour, and potential failure-to-settle outcome in mediation. [↑](#footnote-ref-5)
6. Basil Varkey supra Note 3 [↑](#footnote-ref-6)
7. Omer Shapira, *A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform*, 100 MARQ. L. REV. 81, 125–27 (2016)  
    [↑](#footnote-ref-7)
8. Christman, John. “Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves.” *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, vol. 117, no. 1/2, Springer, 2004, pp. 143–64, http://www.jstor.org/stable/4321441 [↑](#footnote-ref-8)
9. Peter Bennett *personal correspondence.* Editor’s insertion of expanded definition in brackets*.* [↑](#footnote-ref-9)
10. *This ‘not pay/not return’ statement is an early warning that the mentee is entering an “unfair   
     enrichment” zone.* [↑](#footnote-ref-10)
11. Douglas, S. (2012). Neutrality, self-determination, fairness and differing models of mediation. *James Cook University Law Review*, *19*, 19–40. P. 28 Downloaded from https://search.informit.org/doi/10.3316/ielapa.363252330693485 [↑](#footnote-ref-11)
12. Villones, Wilson. (2017). Some Reflections on Aristotle's Concept of Justice. 10.13140/RG.2.2.30492.49285 [↑](#footnote-ref-12)
13. Jonathan M. Hyman If Portia Were a Mediator: An Inquiry into Justice in Mediation P.164  
    Article *in* Clinical Law Review · Vol. **9:157** January 2002  
    Downloaded on 12/02/2022 from: <https://www.researchgate.net/publication/292137135> [↑](#footnote-ref-13)
14. Hyman supra P.165 [↑](#footnote-ref-14)
15. Jonathan M. Hyman . Swimming in the deep end: Dealing with justice in mediation. *Cardozo J. Conflict Resolution* [Vol. 6:19] 2005. P.40 [↑](#footnote-ref-15)
16. Kit Barker, ‘Unjust Enrichment in Australia: What Is(n’t) It? Implications for Legal Reasoning and Practice’. (2020) 43(3) *Melbourne University Law Review* (advance). Downloaded 15/02/2022 from https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3583999 [↑](#footnote-ref-16)
17. Andrew Burrows. In defence of Unjust Enrichment. Cambridge Law Journal, 78(3). 521-544  
    doi:10.1017/S0008197319000722 [↑](#footnote-ref-17)