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Considering possible settlement: Asian parties in court

Mai Chen, Barrister and President of NZ Asian Lawyers, with an update from the recent NZ Asian Lawyers Conference

PURPOSE OF CONFERENCE

This article derives from the NZ Asian Lawyers Conference on 19 May 2025, in partnership with the Ministry of Justice, the New Zealand Bar Association, and the New Zealand Law Society, and hosted by Russell McVeagh. The Michael and Suzanne Borrin Foundation has commissioned work to scope a project in this area.

Let me start by being clear that this conference is not about stereotyping Asians, which is poor advocacy and fails to meet the requirements of the Evidence Act 2006, as the Supreme Court reminded us in *Deng v Zheng* [2022] NZSC 76, [2022] 1 NZLR 151 at [81]:

> [81] When a witness explains their own or joint conduct by reference to their cultural background, there will be little risk of stereotyping; this is because the evidence is necessarily specific to that witness. Where, however, the evidence comes from an expert or there is reliance on s 129, some care is required. There are two aspects to this:
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> (a) First, people who share a particular ethnic or cultural background should not be treated as a homogeneous group. By way of example, that guānxi is important for some people of Chinese ethnicity does not mean that it important for everyone of Chinese ethnicity and, still less, that it was necessarily of controlling significance to the conduct of the parties in relation to the issue in dispute. The more generalised the evidence or information, and the less it is tied to the details of what happened, the greater the risk of stereotyping.
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> (b) Secondly, and with particular reference to guānxi, it will not be safe to conclude that its importance to litigants means that a relationship between them was necessarily one of partnership or a joint venture or had fiduciary elements. For instance, guānxi may have been a factor in two people engaging together in a business, but if they have chosen to do so through a company, guānxi is not in itself a reason for concluding that they were in fact partners. Still less should guānxi be treated as imposing a fiduciary or similar overlay in relation to arms-length transactions such as contracts for the supply of goods and services.

The Supreme Court also said at [79(d)] that:

> Rather more difficulty may arise where a litigant wishes to introduce social and cultural framework information to explain not their own or joint conduct but rather that of another party. In this situation, the information as to cultural background is likely to be best provided by an expert or under ss 128 and/or 129.

Thus, any Borrin Foundation research and report scoping settlement issues for Asian parties in court needs to satisfy s 129 of the Evidence Act being documents "that the Judge considers to be reliable sources of information on the subjects to which they respectively relate". See M Chen "Constitutional legitimacy and diversity — The value of pluralism and filling gaps in the common law" in M Hickford and MSR Palmer (eds) *The Futures of Democracy, Law and Government* (Te Herenga Waka University Press, 2024) at 183–205 and Justice David Goddard and Mai Chen "Putting a Social and Cultural Framework on the Evidence Act: Recent New Zealand Supreme Court Guidance" (2022) 4(1) Amicus Curiae, Series 2, 224.

We are some way from that on the basis of the evidence currently available and the little research done on this topic. The issue this conference is exploring is whether any generalisations are possible about "Asians settling in court."

PROBLEM DEFINITION

Every litigant has a right to have their case heard and to have their day in court. But research is needed into whether there are misunderstandings that result in matters going to a hearing when those Asian parties are unaware of settlement opportunities that would be in their best interest. Or when settlement is only considered at a very late stage. Are there a disproportionate number of Asians filing proceedings compared to other groups? Do they disproportionately represent themselves as compared with other self-represented parties? If so, why is that the case?

None of these issues are straightforward. I spoke to two lawyers last week involved in a vendor/purchaser dispute over $500,000 which resulted in a 6-day hearing in the Auckland High Court. The plaintiff's lawyer said the three Chinese defendants would not settle and should have. The defendants' lawyer said the Chinese respondents could not settle as "deceit" had been alleged, and as a point of principle, they had to go to a hearing. The judgment is forthcoming so I shall not comment further.

Anecdotally, the courts are seeing increasing numbers of Asian parties in court, just as lawyers are experiencing a transformation in their client base towards Asian parties. As lawyer David Campbell wrote to me by email on 13 March 2025: "[l]ike everyone doing commercial litigation our practices have changed over time. Nowadays we have a significant amount of Chinese litigation, and it involves added and more acute challenges". He appended the Caveat and Summary

Judgment list in the Auckland High Court for 18 March 2025, where he was appearing for a Chinese party. Seven out of the 14 cases on that list had parties with "Asian" sounding names.

On the one hand, Asians are now one in three in Auckland so will be more common parties in the Auckland High Court in particular. The migrants of the nineteenth and early twentieth centuries were almost all from the United Kingdom and Ireland (Paul Spoonley "Renegotiating Citizenship: Indigeneity and Superdiversity in Contemporary Aotearoa New Zealand" in Jatinder Mann (ed) *Citizenship in Transnational Perspective* (2nd ed, Palgrave Macmillan Cham, Switzerland, 2023) at [230]). But in the 1990s, following changes to immigration policy so they no longer discriminated against Asian migrants (Paul Spoonley, above, at [230]), the early Asian immigrants came from Hong Kong, Taiwan, and South Korea. After 2000, mainland China and India quickly increased in importance and now form the two largest groups of Asians in New Zealand. Nancy Swarbrick's chapter on "Indians" (8 February 2005) in Te Ara — the Encyclopedia of New Zealand < www.teara.govt.nz/en/indians>) says that:

> Until the 1980s most Indians in New Zealand were born in Gujarat, in north-western India, or were descended from those born there. The next largest group traced their origins to the Punjab region of India and Pakistan. A smaller number came from other places including Fiji, Africa, Malaysia, the Caribbean, North America, the United Kingdom and Western Europe. In 1981, about 46% of Indians had been born in New Zealand, 31% in India, 13% in Fiji, and 10% in other countries.
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> By 2001, two major changes were apparent. The proportion of New Zealand-born Indians had dropped dramatically to 28.6%, and the proportion born in Fiji had risen to 31.3%.

From Census 2023 data, there were 279,039 Chinese people in New Zealand of which 71.1 per cent were born overseas. There were 292,092 Indian people of which 72.9 per cent were born overseas. This contrasts starkly with 28.8 per cent of the total New Zealand population who were born overseas ("Place and ethnic group summaries" Stats NZ Tatauranga Aotearoa <www.tools.summaries.stats.govt.nz>).

Why such details about ethnicity may matter was addressed by Chief High Court Judge Justice Fitzgerald during the conference. She emphasised that most civil proceedings before the Court still settle and, in what might be surprising to some, most settle early, before a matter is allocated a hearing date. Nevertheless, in recent years, a somewhat "stickier" set of cases in the Auckland High Court are proceeding to trial. It is not known whether this reflects cultural factors at play. Justice Fitzgerald noted that this trend will need to be watched closely, if indeed it is a trend rather than a "blip". Justice Fitzgerald also reported feedback from Associate Judges on judicial settlement conferences (JSCs), noting that it would not suggest they are unsuitable for Asian litigants but are perhaps not often sought by such litigants. She noted that the Court is looking at whether there should be more JSCs held, observing that they obviously take up (very scarce) judicial resources, so it is a constant balancing act. Justice Fitzgerald also emphasised that all lawyers, not only those acting for Asian clients, need to be willing to give hard and independent legal advice to their clients on the court processes, timeframes, costs and potential outcomes, consistent with their professional obligations.

We must accurately identify the problem to accurately determine a solution. The problem is that there are no ethnicity statistics kept by the Ministry of Justice. Anecdotally it appears that cases with parties with Asian sounding names are going to full trial when they are ripe for settlement. They often concern property disputes (often intra-family), contractual disputes, or some form of trust or estate litigation, or undocumented projects/joint ventures. Culturally and linguistically diverse (CALD) parties needing interpreters at a hearing can require up to double the amount of court hearing time.

The national median High Court waiting time to trial for general proceedings (with waiting time defined as the time between when the case is directed to have a fixture allocated to it and its actual hearing date), as of 31 December 2022, was 561 days. In the largest registry in Auckland, the median wait time was 615 days. In Rotorua it was 985 (albeit reflecting only one case with a scheduled hearing date); and from 2021–2022, the median waiting time increased by 26 per cent (High Court of New Zealand *Annual Report 2022*) (presumably reflecting the continuing disruption in Auckland from COVID-19, from 2020 and into 2022), and another 2 per cent in 2023 (High Court of New Zealand *Annual Report 2023*; Courts of New Zealand "High Court — general proceedings — waiting time for scheduled hearing as at 31 December 2022" <https://www.courtsofnz.govt.nz/the-courts/high-court/annual-statistics/annual-statistics-for-the-year-ended-31-december-2022/high-court-general-proceedings-waiting-time-for-scheduled-hearings-as-at-31-december-2022>).

Recently, Justice Minister the Hon Paul Goldsmith said he was on a mission to ease court backlogs (Tracey Neal "Justice Minister Paul Goldsmith on mission to ease court backlogs" *The New Zealand Herald* (online ed, 13 October 2024)). And the Ministry of Justice's Long-Term Insights briefing will include work on the better operation of the courts.

The Chief Justice, the Rt Hon Dame Justice Helen Winkelmann, underscored the importance of this issue by stating to the Law Association of NZ Wellington Breakfast on 5 July 2024 on the matter of court backlogs that "[r]ecent statistics showed that one in five defendants was released on the day of their sentence. I think we can all infer that a fair portion of those will have served more time than was required by the sentence".

NEW ANALYSIS AND INSIGHTS

CALD in Courts: A Chinese Case Study written in November 2019 (Mai Chen, Superdiversity Institute for Law, Policy and Business, <lawfoundation.org.nz/wp-content/uploads/2019/11/2019_46_6_RESEARCH-REPORT-Embargoed-till-8am-18th-Nov-2019.pdf>) reinforced the need to stop referring to litigants just as "Asian". The reason is that *where in Asia* a litigant or defendant was born may impact on their appetite for litigation and for settlement, as well as factors including the type of case, the legal issue and whether the Asian party is the plaintiff or the defendant. Thus, reference to "Asians" as a group is an inapposite stereotype when discussing settlement of litigation issues.

Even the use of the word Chinese is an inapposite stereotype if not attached to the country of birth of the party. Chinese people are generally influenced by Confucian values. However, being a person of Chinese descent from Mainland China means you grew up in a markedly different culture and maybe also language from a Chinese person born in Taiwan,

or Singapore or Malaysia. By language, I mean both the different dialects used by Chinese depending on origin such as Cantonese, Hokkien and Taiwanese, but also the use of different words in Mandarin, which have different meanings and come with different slang terms and accents (see Danny Wang and Lynn Grant "Challenges of Court interpreting: Implications for Interpreter Education" (2015) 7 International Journal of Interpreter Education 51). Also, a person of Chinese ethnicity born in New Zealand is likely to behave very differently from a Chinese person born in Asia. And even those who came here as children (known as the '1.5 generation', see M Chen "Superdiversity Stocktake: Implications for Business, Government & New Zealand" (2015) at 33) may behave differently from those who immigrated to New Zealand as adults, and from those who were born in New Zealand.

Professor Spoonley writes (in Steven Vertovec and others "Superdiversity: Today's migration has made cities more diverse than ever — in multiple ways" The Max Planck Institute for the Study of Religious and Ethnic Diversity): "[i]f you look at the Chinese community in Auckland, those aged between 18 to 25 years are very different to those aged 40 to 45 in terms of their English language use, work experiences, family relationships and lifestyle".

Tineke Jannink wrote in "Culture and the Court Interpreter: An examination of current literature on dealing with potential intercultural miscommunication in the criminal court" (2022) 5 Neke The New Zealand Journal of Translation Studies 1, that:

> The question of culture in a courtroom goes beyond what the culture of that person's home country is, but what it is for people who have left that environment and are now in New Zealand. A person's history and journey will shape the culture they belong to and consideration of the specific culture to which they belong is of primary importance.

As Justice Goddard said, "culture does not drop away at the courthouse door" (pre-recorded speech to New Zealand Asian Lawyers Conference, Russell McVeagh, Auckland, 19 May 2025).

Some senior court judgments include little if any ethnicity detail in circumstances where it may well be relevant to the factual context of determining who did what to whom and why. This differs from judgments concerning Māori issues where greater detail of such matters is included. For example, in *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 at [3], the Supreme Court stated: "[t]he plaintiff, Mr Smith, is an elder of Ngāpuhi and Ngāti Kahu, and a climate change spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders. *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 includes a background section outlining Mr Takamore's iwi and whānau connections as well as the events leading up to and after his death. The cultural identity detail concerning his family connections was directly relevant to determining where he should be buried, which was in issue (at [13]–[21]).

Māori introduce themselves with a pepeha which is a formal introduction that acknowledges one's connection to their ancestors, land, and community. It establishes identity and heritage in formal settings or ceremonies. So it is not a leap to understand that establishing identity and heritage may also be relevant to other ethnicities when judges decide cases.

The business culture of the home country may also impact litigation and settlement appetite. The 2024 Transparency International Corruption Perceptions Index (TI-CPI) shows the marked disparity between countries in Asia, with Singapore ranked as the 3rd least corrupt country in the world out of 180 countries. New Zealand was fourth. Hong Kong was 17th; Japan was 20th; Taiwan was 25th; South Korea was 30th; Fiji (where a third of Indians in New Zealand immigrate from are born) was 50th; China was 76th; and India was 96th.

As I wrote in "Asian litigants in New Zealand courts and possible settlement: interviews conducted to scope a project commissioned by the Borrin Foundation" (April 2025, unpublished, preliminary interviews undertaken for scoping purposes with Yvonne Mortimer Wang and Eryanto Widjaya) "... of those practitioners who consider language and culture of clients relevant, the answers to these questions vary markedly depending on which part of Asia the client was born in or has spent significant time being influenced by in their formative years". We need to interview many more practitioners with expertise and experience of advising Asian parties on proceedings and settlement to enrich the data and evidence collected and analysed for insights. The analysis of cases with Asian parties since *CALD in Courts: A Chinese Case Study* was published is yet to begin.

HIGHER LITIGATION APPETITE

These preliminary interviews together with some initial research and my experience of representing Asian parties or pakeha parties sued by Asian parties points to those from Mainland China generally having the highest litigation appetite and the lowest settlement appetite. There is also research that "Indians are less avoidant than both Western and East Asian groups and should not be grouped together with either demographic" (Ajay Somaraju "Conflict Avoidance — A Study Across Indian, East Asian, and Western Cultures" (paper presented to 34th Annual Society for Industrial and Organisational Psychology Conference, Fort Washington, Maryland, May 2021)).

Although India and East Asian countries score similarly on collectivism, the two subgroups have vastly different cultural value systems. A study (Khattab and others (2021) <www.researchgate.net/publication/351428693_Conflict_Avoidance-_A_Study_Across_Indian_East_Asian_and_Western_Cultures>) examined whether cultural distinctions between Indians, Westerners, and East Asians led to differences in conflict avoidance. Findings suggested that Indians are less avoidant than both Western and East Asian groups and should not be grouped together with either demographic as cultural distinctions have led to differences in conflict avoidance.

Those from India and Mainland China also come from very different CALD backgrounds. India has English as a unifying language, and a legal system based on English common law due to India's colonial heritage (Mahendra Pal Singh and Niraj Kumar "Introduction" in The Indian Legal System: An Enquiry (Oxford Academic, Delhi, 2019)). In the World Justice Project Rule of Law Index, China ranks 97,th India ranks 105th and New Zealand ranks 8th.

High litigation appetite may be due to misunderstanding how courts operate (interview with David Liu, Director, Heritage Law and New Zealand Asian Lawyer Board member). This includes the view that wealth and status matter and will sway a judge to agree with that party (interview with Kai

Ling Chiu, Senior Solicitor at Meredith Connell (Preliminary Interviews, April 2025)). It also includes the view that the party can represent themselves as judges will play an *inquisitorial* role as opposed to the *adjudicative* role of New Zealand judges (most Asian countries borrow from the civil law tradition rather than the common law tradition, which frequently means they use an inquisitorial system. See "Comparative Criminal Procedure" Judiciaries Worldwide: A Resource on Comparative Judicial Practice <www.judiciariesworldwide.fjc.gov/comparative-criminal-procedure>). This leaves the Asian party without a lawyer to give them an informed reality check.

Other reasons for a higher litigation appetite may be the cheaper cost of bringing litigation in New Zealand than in their home country, such as in Hong Kong, for example. Mediation may also be perceived to have no value because mediators lack decision-making authority (interview with Kim J McCoy, Crown Prosecutor at Kayes Fletcher Walker (Preliminary Interviews, April 2025)), so what is the point of it?

Some litigants may assume that a court judgment in New Zealand will be easily enforceable, similar to enforcement mechanisms in China, where the state actively facilitates compliance. Conversely, defendants may believe they can evade enforcement by leaving New Zealand (interview with Kai Ling Chiu, Senior Solicitor at Meredith Connell (Preliminary Interviews, April 2025)).

LOWER LITIGATION APPETITE

In general, those born in the following countries appear to have lower litigation appetites: Southeast Asian countries including Singapore, the Philippines, Indonesia, Malaysia, Thailand, Cambodia and Vietnam. Although Korea is in East Asia along with Mainland China, the interviews suggest they have a high appetite to settle disputes and not go to court (interview with Catharina Chung, Senior Associate at Tompkins Wake (Preliminary Interviews, April 2025)). Similarly, those from Hong Kong may have less litigation appetite despite Hong Kong being a part of China (interview with Kim J McCoy, Crown Prosecutor at Kayes Fletcher Walker (Preliminary Interviews, April 2025)). But Hong Kong was a British colony for over 150 years, from 1841 to 1997, before it was returned to Chinese rule (Hon Mr Justice Bokhary "Hong Kong's Legal System: The Court of Final Appeal" (Lecture, Law School of the Victoria University of Wellington in Wellington, New Zealand, 6 November 2002 published by that law school as Occasional Paper No 13) at 1). Both English and Cantonese are official languages in Hong Kong (Basic Law, art 9). On the World Justice Project Rule of Law Index, Hong Kong SAR ranks 23rd.

Low litigation appetite may also be due to the reputational stigma, so "mianzi" [面子] discussed by Professor Chen-Wishart below, may cut both ways and not just *increase* an appetite for litigation (interview with Kim J McCoy, Crown Prosecutor (Preliminary Interviews, April 2025)). Mediation also helps to maintain relationships necessary for social harmony consistent with Confucian values, and guanxi [关系], as discussed further below by Professor Chen-Wishart.

Family involvement in decision-making may be important in getting settlement. Even when representing an individual client, lawyers should be aware that legal decisions may involve input from the client's wider family, including spouses/partners, children, or other relatives. (Interview with Rayhan Langdana, Associate at Quinn Emanuel Urquhart & Sullivan Connell (Preliminary Interviews, April 2025)). In my own experience of settling litigation bought by a Chinese party, the group decision-making dynamic was crucial for successful settlement. But of course, this may also be the case for Māori and Pacifica parties to litigation.

PROFESSOR MINDY CHEN-WISHART

Professor Chen-Wishart's address, "Possible factors affecting Asian Immigrants' approach to out of court settlement in NZ", reinforced many of the findings above. She identified cultural values and perspectives, legal and systemic factors and historical and personal context. I found it helpful to consider her comments on these factors in the context of the Confucian values she identifies and discusses in her article on *Legal Transplant and Undue Influence: Lost in Translation or a Working Understanding?* (2013) ICLQ 62. I have summarised the main quotes from that work, which I have found valuable in settling proceedings with Chinese parties below (at 14, 16, 20 and 21 (footnotes excluded)):

> ... Confucianism helps to explain the roots of overlapping and mutually reinforcing tendencies that can contribute to our understanding of the way that undue influence, a doctrine developed in a very different cultural context, manifests in Singapore. For the purposes of exposition, these tendencies are presented in contrast to broadly 'Western' values; namely: hierarchy versus equality; the positional versus the personal; and collectivism versus individualism.
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> 1. Hierarchy versus equality
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> In very general terms, social harmony is sought in the West via a system of individual rights protected by law. The emphasis is on that which can be ratified by agreement among equals. In contrast, Confucianism seeks social harmony by a system of obedience to reciprocal duties; a comprehensive code of conduct based on a hierarchy of generational sequence, age, and gender.
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> People of the older generation are superior to those of the younger; within each generation, the elder are superior to the younger; men are superior to women; and the oldest male is superior to everyone because he is superior in generation, age and gender. This hierarchy defines an individual's status, role, privileges, duties and liabilities within the family order. The family is then viewed as the prototype of all social organizations, a metaphor for community, country and universe. ...
>
> 2 The positional versus the personal
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> The second feature of Confucianism highlighted here reinforces the first feature. The West places primary importance on the person and his or her uniqueness; the person is the subject of its most significant ideas such as salvation, freedom, reason, contract, and love. In contrast, Confucianism places primary importance on conformity to positional roles [i.e. one's role within the hierarchy] and demotes the importance and the legitimate sphere of individual discretion or differences. The concept of an individual right is alien in Chinese tradition. This is a difference of kind and not simply in degree. While Western patriarchy emphasizes the superordinate's authoritative power, Chinese patriarchy emphasizes the subordinate's duty of obedience, elaborates role obligations that signify this submission, and restricts legitimate acts of power.

> This conception of roles permeates every sphere of Chinese society, in the same way that individuality and law permeates Western society. ...
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> ... the organizational and management behaviour of Chinese family businesses in overseas Chinese societies have distinct characteristics influenced by Confucian values: ... the unquestioned authority of the patriarch who is the head of the business; the participation of family members and friends in running the business; the priority of collective interests; the virtues of frugality, hard work, self-effacement and self-sacrifice; the avoidance of conflict and restraint of personal desires and emotions; the concern to preserve relationships; and the treatment of the business as a family, not personal, asset that will benefit everyone and typically pass to the sons. ...
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> Western views about 'honest confrontation' and 'clearing the air' are unacceptable. It would cause the superior to 'lose face' by challenging his presumed superiority. Conversely, success of the family business gives 'face' (it glorifies the ancestors and protects the family's good name) and this can lead to distinct reluctance to request assistance from those outside the kinship group, to upset confidence in the business and to wind up the business even if it has proven unprofitable. This exacerbates the pressure on family and employees to prop up a failing business.

In this conference, under "cultural values", Professor Chen-Wishart identified various elements in dispute resolution: face-saving (*mianzi*), under which settlements would be inhibited if compromise could be viewed as weakness or admission of wrong-doing; harmony and avoidance of conflict via settlements mediated by family, community or religious leaders; Confucian or other types of hierarchy; and guanxi-relational networks (interview with David Liu, Director, Heritage Law and New Zealand Asian Lawyer Board Member). Most significantly, Professor Chen-Wishart said that any settlement must not contradict the hierarchy. Under legal and systemic factors, she identified preconceptions about the New Zealand legal system, and preconceptions about judges based on their home legal systems. The need for translators can mean that things are 'lost in translation', different communication styles as to what words mean, direct and indirect communication styles, and translations of documents, may also obstruct clear communication or give unnecessary offence. As may different cultural frameworks, and different views on contracts and enforcement.

Judges may be low paid, relatively junior, or corrupt in the litigant's home country resulting in a lack of respect which is carried into the New Zealand courts. Indirect communication styles may result in miscommunications. Contracts in some Asian jurisdictions are viewed as flexible guides as opposed to being enforceable to the last detail. In Mainland China, 'without prejudice' communications only provide limited protection of what is said such that disclosure to the court and public is likely which has a chilling effect on settlement discussions. Likewise, in Japan, parties are responsible for their own costs and so may not be encouraged to settle by the realisation that they would be up for the other side's costs if they lose.

The key is trust and the paramountcy of family and community views on the dispute and how it should be resolved.

Finally, under "recent historical context", Professor Chen-Wishart mentioned the documented impact of the cultural revolution on mainland Chinese. Its key objective was to eliminate the "Four Olds": old ideas, old culture (including Confucianism), old customs, and old habits. It created deep-seated distrust by turning citizens against each other and undermining the social institutions that support civil society. She also referred to the genocide of the Khmer Rouge on Cambodians, the Vietnam War on Vietnamese, the Sinhalese versus Tamil conflict in Sri Lanka and the indigenous coup against Fijian Indians.

She summarized personal factors such as the length of time in New Zealand, age, education and socioeconomic status; first generation immigrants either have a 'separated identity' from the country they immigrate to, or an 'ambiguous identity'. Subsequent generations tend to be less bound by traditional cultural practices and attitudes.

She concluded by referring to the Tūhono, tikanga-based Māori dispute resolution framework as a model for a culturally based dispute resolution framework for ethnic communities. She also reinforced the interview I had with George Lim where he spoke of the importance of non-lawyer but respected community leaders having a significant role to play in conflict resolution if they train as mediators (Preliminary Interviews, April 2025).

NICK MALARAO

Barrister Nick Malarao discussed Indian clients and settlement practices in general, but emphasised the importance of lawyers making a conscientious effort to understand each client's unique background, needs, and motivations. With that caveat, he said it is helpful that India has a long-standing tradition of parliamentary law-making, a common law system, and widespread use of English in commerce.

He observed that certain cultural characteristics are commonly shared among Indian clients. Values such as collectivism, harmony, and izzat (a concept loosely but imperfectly translated as "honour") are particularly significant. In business, these values often lead to an understanding that transactions are flexible and can evolve with changing circumstances. As a result, there is often less emphasis on formalising agreements in writing, and professional advice may not be sought before documents are signed.

When disputes arise, they are frequently perceived not merely as business disagreements but as breaches of trust. This perspective can lead Indian clients to act — or wish to act — in ways that may seem unconventional from a Western legal standpoint.

He also spoke about the cultural norm of haggling in Indian society. Contrary to some assumptions, Indian clients are not averse to settlement; in fact, they often prefer it. They value privacy and are keen to minimise legal costs. However, when deeply ingrained haggling tactics are applied in New Zealand's legal context, they can sometimes derail settlement negotiations before they properly begin.

POTENTIAL SOLUTIONS

Justice Fitzgerald noted that proposed changes to High Court Rules, recommended by the High Court Rules Committee from the Improving Access to Civil Justice Project, will include an increased focus on encouraging parties to consider mediation as a mechanism for resolving their disputes. For example, the rules concerning judicial issues conferences

(which will now be conducted in all general proceedings, unless a judge orders otherwise) will be amended to include the following (emphasis added) (the Rules Committee access to justice page is at <www.courtsofnz.govt.nz/about-the-judiciary/rules-committee/new/access-to-civil-justice-consultation>):

> Judicial conferences (judicial issues conferences and case management conferences)
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> 7.5 Judicial issues conference for defended ordinary proceedings
>
> ... 7.5A Agenda for judicial issues conference
>
> Unless a Judge directs otherwise, the agenda for the judicial issues conference is the following:
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> (a) the identification of the issues and the position of the parties on those issues, including—
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> (i) whether any amendment to the pleadings is appropriate:
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> (ii) whether any supplementary witness statements are needed (*see* rule 9.8):
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> (b) whether any steps should be taken to settle the dispute by means of facilitation, mediation, or otherwise, and, if not—
>
> (i) why this is the case:
>
> (ii) whether there are any steps that can be taken to maximise the chances the dispute might be able to be settled by means of facilitation, mediation, or otherwise:
>
> (iii) whether any steps should be taken to minimise the matters in dispute through facilitation, mediation, or otherwise: ...

Justice Fitzgerald also noted that under the new regime, there will be an expectation on the part of the Court that the parties, and not just the lawyers, will attend judicial issues conferences, which is new. She also stressed the importance of ongoing education for judges about the diverse users of the court system.

PROFESSOR ANDREW GODWIN

On alternative disputes resolution (ADR) and mediation to settle proceedings, Professor Godwin said that mediation in Australia — both judicial and private — has proven to be an effective means of resolving disputes, including commercial disputes. The experience to date, however, suggests that mediation is often less effective for disputes involving Asian parties or parties with an Asian background. Professor Godwin discussed the possible reasons for this and proposed some solutions.

For example, under the Civil Procedure Act 2010 in Victoria, the Court may order judicial mediation or private mediation. A referral to mediation may occur at any time during the dispute. Mediation must be attended by the parties or their representatives. Although mediation has proven effective feedback on mediation involving Asian parties (or certain parties with an Asian background) suggests the following:

- Language barriers are often present, and interpreters are required;
- Overseas parties often send Australian-based representatives with limited authority to negotiate;
- Loss of "face" can significantly hinder negotiations: parties can be unwilling to put forward a first offer or compromise for fear of how they will be perceived (including in the local community);
- Sometimes the mere fact that litigation has been commenced is seen as relationship-destroying and can act as a barrier to commercial negotiations; and
- Parties approach negotiations not through an analysis of risk but simply by reference to what they are prepared to pay to settle the dispute.

In addition, there is often a reluctance to engage with legal issues, a lack of familiarity with the legal system and the legal process in Australia, and a reluctance or inability on the part of lawyers to challenge their client's underlying thinking or to suggest possible settlement terms.

Professor Godwin spoke of different approaches to mediation — the Western "neutral" (or "facilitative") mediation versus the Asian "evaluative" mediation. He discussed Judges acting as mediators (for example, in certain civil law jurisdictions), and the perceived similarities between litigation and judicial mediation.

Professor Godwin then posited the following solutions, the most striking of which is that orders be made for mediators to have their own interpreter, so they speak with their own voice instead of the voice of the interpreter paid for by the parties or their lawyer who ends up interpreting what the mediator says back to their client. Increased cultural capability on the part of judicial officers, mediators and practitioners and ensuring that Asian parties understand the discovery process in common law jurisdictions are critical, as is making the most of the pre-trial context.

NEED FOR GREATER CULTURAL SOPHISTICATION

These findings mean that greater cultural sophistication is needed amongst judges, lawyers, mediators and those involved in other dispute resolution mechanisms to understand that disputes between two parties from different parts of Asia will mean they cannot just both be treated as "Asian". They will have different cultural and language imperatives which means they may act differently and be differently motivated. Just as there is sometimes a fundamental lack of understanding and communication breakdown between pākehā and Asians, the same can happen between parties from different countries in Asia. There is research about the different conflict resolution styles between parties in different parts of Asia (Jeffrey Allan "Japanese Conflict Resolution: Cultural Differences, Contrasts, and Styles" (paper for the Department of Psychology, University of North Dakota, May 2015).

For example, one study (Tae-Yeol Kim and others "Conflict management styles: the differences among the Chinese, Japanese and Koreans" (2007) 18 International Journal of Conflict Management 23 at 35) states:

> First, this study found that the Chinese, Japanese, and Koreans are somewhat different from one another in dealing with interpersonal conflicts with their supervisors. For example, Koreans, compared with the Chinese and Japanese, are more likely to compromise with their supervisors to solve an interpersonal conflict. Another example is that the Japanese, compared with the Chinese and Koreans, are more likely to yield their interests and are less likely to dominate over their supervisors.

The Chief Justice's Annual Report — statistics on judges for 2024 reported the following on the ethnicity of judges: 83.27 per cent NZ European; 21.67 per cent Māori; 1.90 per cent

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Evidence Act. While the Court did not consider it necessary to recalibrate s 30, the decision goes some way to correcting the path the lower courts have taken since *Hamed,* in often failing to recognise that an effective and credible system of justice is not simply one that ensures the guilty are convicted, but that also respects the rule of law, which is undermined by failure to provide remedies for breaches of important rights.

The Law Commission in its third review of the Evidence Act (NZLC R148), recommended reform of s 30 that would essentially go back to a starting point of exclusion where evidence is improperly obtained (at [7.33(a]). The recommendation was due to a concern, evidenced in some judgements, that sometimes less weight is given to the impropriety than is appropriate and was anticipated when the balancing test from *R v Shaheed* [2002] 2 NZLR 377 was codified in s 30 (at [7.24] and [7.54]). The Law Commission noted *Shaheed* envisaged the balancing test would give significant weight to the impropriety and that the public interest in convicting those guilty of serious crimes would not usually outweigh an egregious breach of rights (at [7.24] citing *Shaheed* at [143]).

The Law Commission further noted that despite the Supreme Court making it clear in *Hamed* that the need for an effective and credible system of justice is not a counterpoint to the impropriety, and does not necessarily favour admission of evidence, recent case law suggests this misapprehension is still at play, with some cases treating an effective and credible justice system as equivalent to the public interest in conviction (at [7.89]). The Law Commission considered it likely the misapprehension around the need for an effective and credible system of justice is contributing to, among other things, the concern that some judgments appear to give insufficient weight to the impropriety (at [7.91]).

The outcome of the Law Commission's recommendations are yet to be seen, but in the meantime, this further Supreme Court decision enforces the position that impropriety needs to be given significant weight and that the long term protection of an effective and credible justice system requires that important breaches of rights are remedied through the exclusion of evidence, even when offending is serious and the evidence important to the Crown case. ❐

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Samoan; 1.14 per cent Chinese; 1.14 per cent Indian; 0.38 per cent Tongan; 10.65 per cent Other ('Other' not defined). The "Origins of judges" shows that 29 immigrated to New Zealand, 40 have one parent who immigrated to New Zealand, and 28 have two parents who immigrated to New Zealand. And on "Religion" 54 per cent identified with a religion, most of which are Christian. This compares with the general population in the 2023 census of 32.3 per cent of the total population Christian; 2.9 per cent Hindu; 1.5 per cent Islam; and 1.1 per cent Buddhist.

I included religion because it may be impacted by ethnicity. I was raised as a Buddhist until we immigrated to New Zealand. My father's day job to support his role as Coach to the New Zealand Gymnastics team was to work at the YMCA. Once my father found out that the "C" stood for Christian and the devotional he was required to deliver each day had to be from the Bible and not from Buddha, he accepted the kind offer of the YMCA folk to take his daughters to church. That is how I learned about Christianity.

New Zealand is in the Asia Pacific and closer to Asia than England. Māori paddled from Taiwan (see Kerry Howe "Ideas about Māori origins" Te Ara — Encyclopaedia of New Zealand: "[i]t is now agreed that Māori are Polynesians whose ancestors lived in the Taiwan region") and then to Hawaiki through to New Zealand — the Asia pacific (Rāwiri Taonui "Canoe traditions" (8 February 2005) Te Ara — Encyclopedia of New Zealand: "[t]he canoe (waka in Māori) traditions or stories describe the arrival in New Zealand of Māori ancestors from a place most often called Hawaiki"). Yet this country has always had a closer connection with England, due to our history of colonisation. Nevertheless, the Asia New Zealand Foundation's "Perceptions of Asia and Asian Peoples" survey in June 2024 found that fifty-nine per cent of respondents reported knowing 'at least a fair amount' about Asia. This is a significant increase from 10 years ago: in 2013 only one-third (33 per cent) of New Zealanders considered themselves knowledgeable about Asia (Asia New Zealand Foundation and Colmar Brunton New Zealanders' Perceptions of Asia and Asian Peoples — 2013 Annual Survey (March 2014)).

SECOND CONFERENCE ON ADR FOR ASIAN PARTIES

Based on the above analysis, I decided that New Zealand Asian Lawyers needed to run a second conference on "Mediation for disputes between and with Asian parties contemplating court action". This will tackle the practical obstacles to Asian parties settling when it is in their best interest to do so, by:

(a) Remedying any information gap about ADR option(s) or lack of knowledge of mediators who have expertise to assist;

(b) Informing us as to what Asian parties lack knowledge of concerning ADR and mediation to ensure those gaps can be plugged in future; and

(c) Encouraging Asian lawyers and non-lawyer Asian leaders to train as mediators and in ADR since their cultural and language skills and the respect in which they are held in their own community means they can play a pivotal role in resolving disputes which would otherwise go to court.

The Ministry for Ethnic Communities is partnering by inviting Asian leaders and groups on the Ministry's database. Chapman Tripp will host the conference on Thursday 14 August (5–7pm). The Conference will open with a keynote address from former High Court judge, and now mediation specialist, the Hon Kit Toogood KC. Lawyers and their Asian clients are welcome. ❐