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MEDIATION OF COMPLAINTS AGAINST POLICE: PROGRAM IMPLEMENTATION IN THE DENVER POLICE DEPARTMENT

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Abstract: Civilians lodge complaints against the police because they believe they have been wronged. Equally, police officers become hardened by the public negativity that goes with the job, yet rarely have an opportunity to voice their perspective. Historically, the most common method of dealing with complaints against police has been a departmental police-conducted process. However, research has found widespread stakeholder dissatisfaction with this mechanism. Some police jurisdictions have implemented an independent complaints mediation program as an alternate, non-adversarial and potentially restorative option. Complainants and police officers have the opportunity for open and frank discussion and to reach a mutual understanding on the incident that led to the conflict. Denver has been seen as a model program on some criteria, such as high participant satisfaction rates and program longevity. This paper examines the Denver civilian-police complaints mediation program to determine the reasons for and the challenges faced in implementation and the strengths that underpin its continuity. This has been done through a qualitative analysis of publicly available documents and semi-structured interviews with key stakeholders, including the Denver Police Department, the Office of the Independent Monitor and Community Mediation Concepts. The findings indicate that civilian-police complaints mediation programs are most effective when well supported at the highest levels of governance and specifically designed for the locality. These findings add to the growing body of literature on mediation of police complaints and provide lessons for police services considering implementation.

Keywords: civilian complaints, police, oversight, mediation, implementation

INTRODUCTION

The fact that civilians lodge complaints against the police is indicative of their beliefs that they have been wronged and that they will receive a meaningful resolution.[1] However, the traditional complaints processes in many countries, which involve internal investigation, have left many complainants dissatisfied. The main criticism of traditional complaints processes has been that they are potentially biased.[2] Police officers often feel traditional complaints processes favour civilians.[3] Many feel angry about having a complaint made against them while performing their duties and frustrated by the absence of an opportunity to explain their actions to civilians. However, police officers also have a vested interest in the service and therefore, naturally, want the service to be seen in the best light. Equally, the service may consider what is in the public's interest as secondary to risk management.[4] However, over the past thirty years, the gradual introduction of non-adversarial complaints resolution processes, such as conciliation and mediation, have gone a long way to providing disputants with more options that better meet their needs.[5] Mediation – which is a voluntary and confidential process that brings together people in conflict with a neutral third party to discuss their differences - has been implemented in some police jurisdictions to fill the 'face-to-face encounter' gap between complainants and police officers, in existing processes.[6] Since the start of the mediation movement in the United States, approximately sixteen civilian-police complaints mediation programs have been implemented[7]. Many continue to grow and share their approaches with other police jurisdictions, while some have started but fallen into disuse.

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[1] Andrew Faull, 'Monitoring the Performance of Police Oversight Agencies' (2013) *APCOF Policy Paper* (African Policing Civilian Oversight Forum, September 2013) 3.
[2] Ian Waters and Katie Brown, 'Police Complaints and the Complainants' Experience' (2000) 40 *British Journal of Criminology* 624, 638.
[3] Lonnie Schaible, Joseph De Angelis, Brian Wolf and Richard Rosenthal, 'Denver's Citizen/Police Complaint Mediation Program: Officer and Complainant Satisfaction' (2012) 24(5) *Criminal Justice Policy Review* 628, 650; Michele Sviridoff and Jerome McElroy, *Processing Complaints Against Police: The Civilian Complaint Review Board* (Vera Institute of Justice, New York, 1988) 9.
[4] Richard Ericson and Kevin Haggerty, *Policing the Risk Society* (University of Toronto Press, 1997) 49.
[5] David Brereton, 'Evaluating the performance of external oversight bodies" in Andrew Goldsmith and Colleen Lewis (eds), *Civilian Oversight of Policing: Governance, Democracy and Human Rights* (Hart, 2000) 106.
[6] AJ Clemmons and Richard Rosenthal, 'Mediating Citizen Complaints: The Denver Program' (2008) 75(8) *The Police Chief* 32, 36.
[7] Samuel Walker and Carol Archbold, 'Mediating Citizen Complaints Against the Police: An Exploratory Study' (2000) 2000(2) *Journal of Dispute Resolution* 236, 244.

The Denver civilian-police mediation program has been operating since 2005. It has been seen as a model program on some criteria, including high participant satisfaction rates,[8] timeliness and civilian-police relationship building.[9] However, the Denver program deserves to be investigated in-depth to identify areas that might usefully be replicated by other police departments and areas where improvements could be made. This paper starts with a thematic review of the literature on the implementation of civilian-police complaints mediation programs. It then examines the Denver mediation program through an analysis of its conception, impediments to implementation, and the strengths that underpin its continuity, such as stakeholder support and local design. This has been done through a qualitative analysis of publicly available documents and semi-structured interviews with key stakeholders, including the Denver Police Department, the Office of the Independent Monitor and Community Mediation Concepts.

THEORETICAL PERSPECTIVE ON MEDIATION OF COMPLAINTS AGAINST POLICE

Until the latter part of the twentieth century, the standard police approach to dealing with complaints involved formal, internal investigations.[10] The traditional processes adopted adversarial characteristics which resulted in blame being assigned and a win-lose outcome. However, growing public dissatisfaction with perceived 'biased' complaints processes and low substantiation rates; increased public mistrust of the police; and consequent threats to the public's compliance with the law, in some jurisdictions;[11] prompted the overhaul of complaints systems to better provide outcomes aligned with public expectations.

The introduction of alternative dispute resolution processes in civil law[12] provided a benchmark for police initiatives. Mediation proffered a specific form of alternative dispute resolution through the face-to-face meeting of those in conflict, under the

[8] Schaible et al, (n 3) 643.
[9] Clemmons and Rosenthal (n 6) 32.
[10] Frank Harris, 'Holding Police Accountability Theory to Account' (2012) 6(3) *Policing: A Journal of Policy and Practice* 241, 249.
[11] Samuel Walker, Carol Archbold and Leigh Herbst, 'Mediating Citizen Complaints Against Police Officers: A Guide for Police and Community Leaders' (Washington, DC: Government Printing Office, 2002) 71, 111.
[12] Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 5th ed, 2016) 294.

guidance of a trained mediator. The independence, neutrality and confidentiality of the mediation process provided parties with an opportunity for mutual understanding and conflict resolution through dialogue.[13] The focus of the process was on the outcome sought by the parties and not on a determination of right or wrong, or penalty.[14] In the context of police complaints, that transposed to complainants having the opportunity to express how the incident affected them; gain knowledge of police procedures; and retain some control over how their grievance was addressed. For police officers, that meant gaining an understanding of the impact of their actions, learning how to self-correct, if necessary, and avoiding future complaints.[15] Therefore, mediation was viewed as providing a mechanism to increase outcome satisfaction, improve civilian-police relations through increased trust, and ultimately achieve community protection.

Civilian-police complaints mediation exemplifies restorative justice theory. Restorative justice, understood as a theory of relational justice,[16] focuses, in this context, on healing the harms caused by police wrongdoing (e.g., abusive, discriminatory or unfair treatment) by taking a "needs-based" approach.[17] Complainants' needs and expectations are met through voicing their perspective, being listened to, acknowledged and respected in a safe, third-party facilitated encounter with the subject police officer.[18] Through open and honest dialogue complainants and police officers are given the opportunity to collaboratively work toward a better understanding of each other and reconciliation.[19] Restorative justice adds a dimension to mediation that rarely exists in civil mediation. It moves beyond resolution of the issue in dispute to addressing the personal harm that is caused by conflict. At its core, restorative justice holds that "empathy and consideration for others is crucial to the health and wellbeing of us all" and that feelings inform

[13] Ibid 295.
[14] Police Training and Standards Commission, Maryland (PTSC), 'Community Member – Police Complaint Mediation Program (2017) *Reference Guide* 4, 99.
[15] Jon Proctor, AJ Clemmons and Richard Rosenthal, 'Discourteous Cops and Unruly Citizens: Mediation Can Help' (2009) 2(3) *Community Policing Dispatch*, e-newsletter.
[16] John Braithwaite, "Restorative Justice and Responsive Regulation: The Question of Evidence'. (2016). *Working Paper No. 51*, School of Regulation and Global Governance (RegNet); and Jianhong Liu, *Culture and Criminal Justice - An Asian Paradigm Theory* (2014, June) Presidential Address at the Asian Criminological Society Annual Meeting. Osaka, Japan.
[17] Dennis Sullivan and Larry Tifft, 'Needs-Based Justice as Restorative' in Gerry Johnstone (ed), *A Restorative Justice Reader*, 2nd ed (Routledge, New York, 2013) 208.
[18] Ibid 213.
[19] Ibid 214.

behaviour.[20] Therefore, restorative justice mediation transforms negative emotions such as fear and hostility into "positive feelings of solidarity".[21] As such, mediation underpinned by restorative justice principles in the context of complaints, offers reparation to the important civilian-police relationship.

The implementation of civilian-police complaints mediation programs, however, has not been a seamless process. Several themes have been identified, including dissatisfaction with traditional method of complaints resolution; necessity for implementation; establishment of civilian oversight agency; commitment to program; eligibility for referral of complaints; use of independent mediators; and obstacles to program success.

The traditional, internal, investigative police complaints process has long been considered by many police services as sufficient for resolving civilian complaints against the police.[22] However, public perceptions of the process being an "inside job", [23] and therefore biased; [24] complainant frustration with the bureaucratic process and the time taken to resolve complaints; [25] and the exclusion of complainants from a process which directly affects them has led to consideration of alternative approaches. [26] Mediation, at times based on restorative justice theory, has been implemented in a small but growing number of police jurisdictions around the world[27] in response to the research.

In the United States, some mediation programs were formed in response to changes in local laws; following policy evaluations by the United States

[20] Belinda Hopkins, 'From Restorative Justice to Restorative Culture' (2015) 14 (4) *Social Work Review* 25.
[21] Meredith Rossner, 'Emotions and Interaction Ritual: A Micro Analysis of Restorative Justice' (2011) 51 *British Journal of Criminology* 95.
[22] Timothy Prenzler and Carol Ronken, 'Models of Police Oversight: A Critique' (2001) 11(2) *Policing and Society* 155, 180.
[23] John Liederbach, Lorenzo Boyd and Robert Taylor, 'Is it an Inside Job?' (2007) 18(4) *Criminal Justice Policy Review* 368, 377.
[24] Waters and Brown (n 2) 624.
[25] Mike Maguire, Claire Corbett and Great Britain, Home Office, *A Study of the Police Complaints System* (London: Her Majesty's Stationery Office: 1991).
[26] Schaible et al, (n 3) 643.
[27] Elizabeth Bartels and Eli Silverman, 'An Exploratory Study of the New York City Civilian Complaint Review Board Mediation Program' (2005) 28(4) *Policing: An International Journal of Police Strategies & Management* 619-630; Lars Holmberg, 'In service of the truth? An evaluation of the Danish Independent Police Complaints Authority' (2019) *European Journal of Criminology* 1-20; Richard Young, Carolyn Hoyle, Karen Cooper and Roderick Hill, 'Informal Resolution of Complaints Against the Police' (2005) 5(3) *Criminal Justice* 279-317.

Department of Justice; or following judgments imposed by the courts.[28] Generally, three types of civilian-police complaint mediation programs exist – those administered directly by law enforcement agencies, which engage a local mediation service; those administered by an independent civilian oversight agency or civilian police-review panel established by a local ordinance; and those co-administered by a law enforcement agency and a civilian police-review panel.[29]

Some programs have been extensions of pre-existing neighbourhood justice mediation programs, such as the Portland program [30]; others have been extensions of existing police complaints procedures, such as Maryland [31] and Minneapolis; [32] but most have originated from, and are funded under, the ordinances that created the local civilian oversight agencies, such as New Orleans.[33] In many instances, civilian oversight agencies were introduced because of the belief that "police were unable to effectively investigate themselves".[34] The oversight agencies worked in partnership with police services to develop mediation programs demonstrably independent from the police. For example, in 1997, the Civilian Complaint Review Board in New York, comprised solely of civilians, was authorised to investigate complaints, determine which complaints were appropriate for mediation, conduct mediations and make recommendations to the police regarding allegations of police misconduct.[35] In 2010, the Calvert County Sheriff's Office launched the state's first police mediation program – *Operation True Perspectives.*[36] The program had statewide impact and in 2016 the Baltimore Police Department in partnership with the Civilian Review Board and Community Mediation Maryland, developed their own mediation process based on Calvert's work. Research by the Maryland Police Training Commission into mediation programs found that the development of one policy or program would not suit the specific needs of every law enforcement agency across the state and that

[28] PTSC (n 14) 7.
[29] Ibid 7.
[30] Office of the Independent Monitor, Denver (OIM), *Annual Report 2005* 6.2, 188.
[31] PTSC (n 14) 7.
[32] Department of Civil Rights, Minneapolis, 'Office of the Police Conduct Review' (2018), http://www.minneapolismn.gov/civilrights/policereview.
[33] Office of the Independent Police Monitor, New Orleans, *Annual Report 2017* 5, 38.
[34] William Terrill and Jason Ingram, 'Citizen Complaints Against the Police: An Eight City Examination' (2016) 19(2) *Police Quarterly* 154, 179.
[35] Bartels and Silverman (n 27) 620.
[36] PTSC (n 14) 8.

programs needed to be locality specific. In 2014, the New Orleans Police Department and the Office of the Independent Police Monitor commenced the Community-Police Mediation Program – mandated under the modified Consent Decree.[37] The Monitor had sole oversight responsibility of the Police Department. Prior to the introduction of the program, there were no alternatives to the traditional adversarial investigation process and the 'health' of the civilian-police relationship had suffered due to civil rights violations and inappropriate complaints handling.[38] Mediation was viewed as a promising mechanism for addressing police accountability issues and improving civilian-police relations "while often creating systemic social change and impacting officers' work in the long term".[39]

Similar implementation processes occurred in the United Kingdom. In 2000, the Thames Valley Police Department in England implemented restorative justice mediation/conferencing for the resolution of civilian complaints against police due to poor public confidence in the internal complaints handling process. The establishment of the Independent Police Complaints Commission followed the growing global trend for 'external' review of complaints.[40] In Northern Ireland, following years of politico-religious conflict – that included paramilitary-style policing, high numbers of civilian complaints and very low substantiation rates, the Office of the Police Ombudsman in Northern Ireland was established in 2000. As a non-departmental public body of the Department of Justice, accountable directly to the Northern Ireland Assembly,[41] it was completely impartial and independent.[42] Unlike other complaints systems across the globe, it reflected a pure "civilian control model"[43] that dealt with *all* complaints against police. The Ombudsman was initially well received by complainants and the police,[44] but did not offer mediation until 2017 following a government review. The newly formed complaints team, with in-house, trained mediators, offered mediation, underpinned by

[37] OIPM (n 33) 4.
[38] Ibid 4.
[39] Ibid 8.
[40] Young et al, (n 27) 280.
[41] Police Ombudsman of Northern Ireland (PONI), *Annual Report & Accounts 2017*, 10, 92.
[42] Police Ombudsman of Northern Ireland, (PONI), *Pilot Mediation Project Report, September 2008 – March 2009,* 5, 28.
[43] Prenzler and Ronken (n 22) 156.
[44] Police Ombudsman of Northern Ireland (PONI), *Annual Report & Account 2009*, 5, 80.

restorative justice principles, for minor complaints. The Ombudsman believes that "many more complaints can be resolved through this approach".[45]

A significant obstacle to the implementation and development of some programs, regardless of their origin, has been the absence of a "key local official who fully understands and is committed to the mediation program".[46] For example, in 2002, Portland, Oregon, followed the national trend of implementing independent mediation to resolve civilian-police complaints. However, the pilot program experienced problems such as a "lack of dedicated staff and funding, as well as unclear expectations and performance measures. There was no clear-cut criteria for selecting cases, and mediation was used rarely enough that the procedure was unclear".[47] Subsequently, mediation was included as a resolution option within the Portland Police Bureau. However, its use diminished in favour of other internal processes, with only 1% of complaints mediated in 2018.[48] Other programs have struggled from insufficient promotion, including the Pasadena mediation program. An evaluation after its first year of operation revealed that only 19 percent of citizens were aware of its existence.[49] However, in Northern Ireland, the Police Ombudsman actively conducts public education meetings across the country to raise awareness of the mediation program.[50] In Minneapolis, the independently operated Citizen-Police Mediation Program was established in 2012 with the full support of the City Council. Mediation was widely promoted and complainants were made aware that they can request a civilian to investigate their case.[51] This approach has given them "significant control over police misconduct investigations (…) and the ability to have a strong voice in case outcomes and shaping the MPD police and procedure".[52] Similarly, in San Francisco, the well-established Office of Citizen Complaints

[45] PONI (n 42) 8.
[46] Walker et al, (n 11) 44.
[47] Independent Police Review, Portland, Oregon, *Annual Report 2002*, Mediation Chapter, https://www.portlandoregon.gov/IPR/article/26982.
[48] Independent Police Review, Portland, Oregon, *Annual Report 2018*, 11.
[49] Schaible et al, (n 3) 631.
[50] PONI (n 42) 8.
[51] Minneapolis City Council (MCC), 'Scope of Authority of the Office of Police Conduct Review', 2012, September 21, Public Hearing, Chapter 172.20, 732, http://www.minneapolismn.gov/www/groups/public/%40council/documents/proceedings/wcms1p-098903.pdf.
[52] Office of Police Conduct Review (OPCR), 2017, *Factsheet,* http://www.minneapolismn.gov/www/groups/public/@civilrights/documents/agenda/wcmsp-205658.pdf.

Mediation Program was invigorated in 2015 with a police-focused promotional drive, which carried the endorsement of the Chief of Police.[53]

The types of police complaints for mediation have often been 'carefully selected',[54] low level misconduct allegations and procedural issues, such as misunderstandings and perceptions of rudeness and discourtesy. Many complaints are rejected at intake as being "unfounded and malicious"[55] and not considered for mediation – which could be problematic as some may be "genuine and justified".[56] However, there is some consensus of opinion in the literature that not all civilian complaints should be mediated.[57] Complaints that involve serious misconduct, or disciplinary issues that would result in dismissal, demotion or suspension, have typically been excluded from mediation.[58] Yet, in Minneapolis the Office of Police Conduct Review has the responsibility of handling all internal and external complaints made against the Minneapolis Police Department, except human resources complaints. [59] Complaints can be referred to mandatory mediation at any time during investigation and sessions are conducted by trained mediators with no affiliation to any police or government agency.[60]

There are significant differences between the mediation of complaints against police and other types of mediation. In the case of disputes, such as neighbourhood disputes, the parties have already acknowledged that a problem exists between them and they seek a resolution. This is generally not the case with police and complainants. Police officers usually learn about a complaint through internal notification, and a request to address the allegations through mediation can evoke concerns and frustration.[61] Mediation is a foreign concept to many police and the informality of the mediation process does not fit well with the

[53] San Francisco Police Department Professional Standards & Principled Policing Bureau, Department of Justice Compliance, 2017, February 3, *Report,* Recommendation Number 29.4, https://www.sanfranciscopolice.org/sites/default/files/2018-11/SFPD-response-DOJ-COPS-Recommendation-29.4.pdf.
[54] PTSC (n 14) 8.
[55] Waters and Brown (n 2) 635.
[56] Ibid 635.
[57] Walker et al, (n 11) vii.
[58] Schaible et al, (n 3) 633.
[59] OPCR (n 52) 1.
[60] MCC (n 51) 732.
[61] Police Ombudsman of Northern Ireland (PONI) *Annual Report & Accounts 2014*, 23, 92.

regulated nature of police work.[62] Some police officers do not believe that civilian mediators hold the commensurate knowledge of police policy and procedures to facilitate a mediation.[63]

In addition to the preceding themes, four common obstacles to the implementation and ongoing use of mediation programs were identified in a study by Walker et al., in 2000. These included: police officer and police union opposition; lack of understanding of mediation by both police officers and civilians; inadequate resourcing of mediation programs; and insufficient incentives for police officers and civilians to participate.[64]

The legislative framework that surrounds policing gives officers the commensurate authority to act in ways that preserve law and order. As such, when civilian complaints arise, most police services view the internal management of the allegations as appropriate.[65] Police and police unions often resist placing officers "on an equal footing with complainants";[66] and in situations where the officers may feel forced to admit to things they did not do.[67] They view that as "compromising their status",[68] and hold that the internal disciplinary and training processes are the mechanisms for correcting behaviour and improving performance; and conciliatory processes, such as informal resolution, are sufficient for resolving complainants' concerns.[69]

A lack of understanding of the purpose, process and outcomes of mediation by the public and police has led to some implementation obstacles. Studies in the US and England[70] have revealed that complainants with negative past experiences of police viewed mediation with scepticism. Specific concerns that reduced complainant receptiveness included: intimidation; fear of future mistreatment or

[62] Ibid 92.
[63] R W Patterson, 'Resolving Civilian-Police Complaints in New York City: Reflections on Mediation in the Real World' (2006) 22(1) *Ohio State Journal on Dispute Resolution* 190, 226.
[64] Walker and Archbold (n 7) 236.
[65] Schaible et al, (n 3) 627.
[66] Ibid 630.
[67] Walker et al, (n 11) vii.
[68] Ibid 27.
[69] Ibid.
[70] Bartels and Silverman (n 27) 641; Young et al, (n 27) 279.

disadvantage; lenience of the process and its acknowledgement of officer innocence; process complexity and effort required.[71] For the police, the notion of engaging in mediation without a legal representative and responding to a mediator's effort to "coach and empower",[72] have raised opposition to the process. Additionally, there has been a concern that some police officers could use mediation to avoid investigation and disciplinary action "as opposed to seeking authentic reconciliation with the complainant".[73] These challenges have been compounded by a lack of sufficient planning and inadequate resourcing which undermine mediation implementation and practice.[74] The number of mediated complaints across programs has remained low,[75] despite the fact that traditional complaints investigations are generally more costly and time consuming.[76]

The polarized nature of civilian complaints against police (i.e., 'he said/she said') has affected the willingness of some parties to mediate. As substantiation rates have consistently been low, the police have little incentive to participate;[77] and complainants often view the pursuit of their grievance as futile. However, unresolved conflict with the police threatens public trust in the service and compliance with the law.[78] A 2005 study of New York's mediation program found that complainants who went through mediation were more likely to trust police in the future than those who went through the traditional complaints process.[79] For police officers, incentive existed in the form of removal of the allegation, a notation of "mediated" and no further disciplinary action on their service file, following completion of mediation.

The success of mediation programs has close links with behavioural improvements and the reduction in complaints against police. In 2017, a formative evaluation of the

[71] Schaible et al, (n 3) 630.
[72] Vivian Berger, 'Civilians Versus Police: Mediation Can Help to Bridge the Divide' (2000) 16(3) *Negotiation Journal* 213, 235.
[73] Schaible et al, (n 3) 630; Walker et al., (n 11) 24.
[74] Walker et al, (n 11) 55.
[75] Bartels and Silverman (n 27) 621; Schaible et al, (n 3) 6; Walker et al, (n 11) 42.
[76] Walker et al, (n 11) 47.
[77] Walker and Archbold (n 7) 238.
[78] Jane Goodman-Delahunty, 'Four Ingredients: New Recipes for Procedural Justice in Australian Policing' (2010) 4(4) *Policing: An International Journal of Police Strategies & Management* 405, 419.
[79] Bartels and Silverman (n 27) 627.

Los Angeles Police Department's Biased Policing Complaint Mediation Program [80] revealed that 50 cases were mediated in that year (an increase of 22 cases on 2016).[81] Exit questionnaires were provided to participants and additional interviews were conducted with a small group of police officers, complainants, mediators and program managers. Overall, the findings indicated that complainant and police satisfaction rates with the process were high, and the majority of participants reported that they would recommend mediation to friends and colleagues. The interviews revealed promising findings on attitudinal and behavioural change, including one mediator's observation that a complainant's anger was significantly reduced during mediation when the police officer "offered different procedural choices that he would be willing to consider for future situations".[82] The mediation had a transformative effect on the participants which aligns with restorative justice theory that posits that change is possible through the willing exploration of another person's perspective and emotions.[83]

The outcome of stakeholder satisfaction supports a reduction in future complaints. However, improved complaints processes have also been found to increase complaint numbers as civilians gain confidence in the system.[84] Since the New York program began, the number of annual mediated complaints have increased steadily, making the program the largest civilian-police mediation program in the United States (e.g., 32 in 2001; 91 in 2003).[85] Statistics for 2017 revealed that 417 complaints were referred to mediation, of which 204 were mediated and 213 were attempted.[86] The program has continued to operate with the Board reporting the unavailability of complainants as the main reason mediations do not take place. [87]

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[80] Howard P. Greenwald, Professor, Sol Price, School of Public Policy, University of Southern California, and Charlie Beck, Chief of Police, Los Angeles Police Department, 'Bringing Sides Together: Community-Based Complaint Mediation' (2017) Police Chief Magazine, International Association of Chiefs of Police, https://www.policechiefmagazine.org/bringing-sides-together/?ref=7e7204767b0ac016b78ddc36cbb613a8.
[81] Los Angeles Police Department 'Evaluation of the Biased Policing Complaint Mediation Pilot Program' (2017, January 30), Internal Affairs Group, Los Angeles Police Department, California.
[82] Greenwald et al, (n 82).
[83] Josephine Dobry, *Restorative Justice and Police Complaints: A Report by the Independent Police Complaints Authority* (2001, March), The Police Complaints Authority, London, 41.
[84] John Worrall, 'If You Build It, They Will Come: Consequences of Improved Citizen Complaint Review Procedures' (2002) 48(3) *Crime & Delinquency* (Sage Publications: 2002) 362, 379.
[85] Bartels and Silverman (n 27) 621.
[86] Civilian Complaints Review Board, *Annual Report 2017*, 37, 68.
[87] Civilian Complaints Review Board, Executive Director's Monthly Report, (October 2017) 38, http://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/monthly_stats/2017/20171108_monthlystats.pdf.

The literature has established that civilian-police complaints mediation programs provide complainants and police officers with an independent and substantially satisfying alternative to traditional complaints resolution processes. However, there are more lessons to be learned about sustainability and the Denver Mediation Program provides some of these lessons.

DENVER MEDIATION PROGRAM

In 2005, the Office of the Independent Monitor in Denver was established. It was given the responsibility of monitoring the Denver Police Department and the Denver Sheriff Department, and the establishment of the community-police complaint mediation program. The Office has been pivotal to the longevity of the mediation program through its promotion of external mediation to the public via community meetings, police education, such as during academy training sessions, and the maintenance of senior police support through collaborative discussion over behavioural improvements.

The mediation program has been formally evaluated on two occasions. In 2009, an evaluation by Proctor et al., considered the effect of mediation on police behaviour by measuring variables such as discourtesy, force and improper procedure allegations.[88] The evaluation found significant decreases in these variables for police officers who had engaged in mediation over the traditional process. Mediation had proved to be more effective in assisting police officers avoid future complaints and helped them learn how and why to self-correct their own behaviour.

A 2012 evaluation by Schaible et al., analysed complainant and police officer satisfaction in relation to "mediation, perceptions of procedural fairness, and demographic information".[89] The study found that between 2005 and 2008, 126

[88] Jon Proctor, Richard Rosenthal and AJ Clemmons, 'Denver's Citizen/Police Complaint Mediation Program: A Comprehensive Evaluation' (2009) 3, 34.
[89] Schaible et al., (n 3) 8.

civilian-police complaints mediations, involving 328 participants took place,[90] (since then an average of 50 mediations per year have been conducted).[91] The findings revealed an overall preference for mediation over the traditional complaints process; higher levels of satisfaction for Latino and African American complainants than for whites, and higher levels of satisfaction for female and Latino police officers with mediation over their white and African American colleagues.[92] This supports the dispute resolution literature on "cultural preferences for interpersonal interaction"[93] and provides guidance for program implementation in culturally diverse communities. The findings also identified areas for improvement such as public education on external mediation. Some complainants reported confusion about the independence and neutrality of mediation over the traditional complaint process.[94] However, the Denver mediation program uses the professional services of a local mediation vendor, which specifically trains mediators in civilian-police complaints resolution and allocates them to those cases. The skilled mediators assist complainants through the inherent power differential to express their concerns and hear the police viewpoint and "help sensitize officers to community perspectives".[95]

Limited empirical studies of civilian-police complaints mediation programs have been undertaken to date, yet the Denver program continues to deliver a program that meets participants' expectations. Further investigation of the program was required to identify why it is a model program; the implementation learnings that could be replicated by other police departments; and the areas where improvements could be made. This study used a two-phase qualitative approach which consisted of (1) content analysis of publicly available and confidential documentation and (2) analysis of semi-structured interviews with eight key informants. The following reports provided by or accessed from the Office of the Independent Monitor's website were analysed: annual reports covering the period

[90] Denver Police Department (DPD), *Denver Discipline Handbook: Conduct Principles and Disciplinary Guide*, *Community Law Enforcement Mediation Program – Protocols – Office of Independent Monitor City and County of Denver,* (2012), 39.
[91] Office of the Independent Monitor (OIM), Denver, *Annual Report 2014*, 60, 168.
[92] Schaible et al., (n 3) 14.
[93] Jennifer Holt and Cynthia DeVore, 'Culture, Gender, Organisational Role, and Styles of Conflict Resolution' (2005) 29 *International Journal of Intercultural Relations*, 166, 196.
[94] Schaible et al, (n 3) 629.
[95] Schaible et al, (n 3) 634.

2005 to 2018 and case handling policy documents; also, annual data on the Denver Police Department which are reported in the annual reports of the Monitor's Office. In addition, primary sources such as the program evaluation and secondary sources specific to Denver, including those identified in the literature review search [96] were searched to provide further information. Keyword, and keyword combination searches, including 'complaints', 'police', 'civilian', 'oversight', 'mediation' 'program' and 'implementation' were used.

The semi-structured interviews were conducted with key stakeholders in the Denver Police Department (Interviewees 1-2), Office of the Independent Monitor (Interviewees 3-6 from the Policy, Monitors and Community Outreach Departments) and Community Mediation Concepts (Interviewees 7-8). The interviews took place over a four-day period from 18 December 2019 to 21 December 2019. The group interview with the Denver Police Department was held in the Denver City Police Headquarters with two sergeants who had been members of the service for approximately 19 years and worked for the past two years in Internal Affairs and/or Conduct Review. The group interview with the Office of the Independent Monitor was held in their Denver offices with four interviewees, all of which held senior positions in the organisation. One of the interviewees who had been with the organisation since its establishment, provided background information; the other interviewees held various roles with extensive experience in policy direction and case management. The group interview with Community Mediation Concepts, included discussions with the foundational member of the mediation program and an experienced civilian-police complaints mediator. Interviewees were provided with copies of the interview questions prior to the interviews. The questions were designed to gain individual and organisational perceptions and experiences regarding the implementation of the mediation program, its current status and the lessons learned.

[96] Schaible et al, (n 3) 643; Walker and Archbold (n 7) 236; Walker et al, (n 11) 71.

FINDINGS

The findings are analysed under two separate sections: documentary analysis and semi-structured interviews. The findings show that the success of the Denver mediation program has been due to the comprehensive approach to the implementation of the program; the commitment of several key individuals over time and the local focus of the program. These areas of success also had the converse effect of highlighting areas where improvements can be made.

Findings 1: Documentary Sources

1. Denver Police Department

In 2003, the complaints policy of the Denver Police Department underwent a major review. The existing system did not clearly distinguish complaints containing serious misconduct issues from minor allegations,[97] and a full investigation of all complaints was the practice. This was to avoid criticism "for ignoring complaints and potentially failing to hold officers accountable for misconduct".[98] However, 'timeliness' became problematic. The delay between the time complaints were lodged and disciplinary recommendations made, had often "been years instead of months".[99] The Denver Police Department, like other departments across the country, had faced challenging economic and political conditions [100] and controversy over incidents involving police officers. For example, the 2005 shooting death of an armed robbery suspect "exemplified gaps in the existing internal and external processes and department viewpoints; growing public concern about safety; and the need for investigations to be monitored".[101] The Denver Police Department had done work on modernising operations and methods but the complaints process was flawed and the concept of informally handling complaints was in its preliminary stage.[102] As noted in the literature review, the implementation of a civilian-police mediation program was often preceded by the establishment of a civilian oversight agency. That was true for Denver.

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[97] DPD (n 97, rev ed 2019) 39.
[98] OIM (n 30) 1-5.
[99] Ibid 9-10.
[100] Ibid Appendix E.
[101] Ibid 5-6.
[102] Ibid 9-15.

Since the establishment of the Office of the Independent Monitor and the mediation program, complaints against police have trended downward. For example, from 2015 to 2018, the number of complaints decreased by 21 percent from 403 to 323.[103] Although, a significant number of civilian complaints (69%) were declined after the intake investigation. Of the remainder, 11 percent were mediated, 8 percent were resolved informally, and 12 percent were sustained.[104] The Denver Police Department has developed practices and programs to maintain this trend and support the disciplinary system. The strategies may "assist officers in modifying behaviours without the imposition of disciplinary sanctions". [105] Mediation is one of the behavioural improvement strategies in the police Discipline Handbook and is "strongly endorsed and encouraged by the Department".[106] The Department views mediation as providing a system of 'lessons learnt'. Mediation provides officers with an opportunity to educate the community on Department policy and police perspective; and the opportunity, in lieu of an internal investigation, to understand the effects of their behaviour on the public,[107] and to modify that behaviour to avoid future complaints.

A total of 585 mediations have been completed since 2006. The rate has been consistent although in 2018 it decreased to 32. The decrease was reportedly "due, in part, to the overall decrease in community complaints". [108] However, the complainant and police officer mediation satisfaction rates, for the four years to 2018, remained high at between 71-82 percent, and 95-98 percent, respectively. Mediation has also contributed to a reduction in complaints workload and improved efficiencies. From 2017 to 2018, the processing time for full investigations decreased by 11 days and 5 days for IAB cases.[109] The Denver Police Department maintains the authority to discipline police officers. However, the Office of the Independent Monitor is tasked with reporting findings and

[103] Office of the Independent Monitor (OIM), Denver, *Annual Report 2018*, 11, 112.
[104] Ibid 16.
[105] DPD (n 97) 6.
[106] Ibid 7.
[107] Ibid.
[108] OIM (n 103) 11.
[109] Ibid 16.

complaints patterns to the public, thereby ensuring transparency and accountability in the complaints process.[110]

2. Office of the Independent Monitor

In 2005, the Mayor of Denver with the support of the Denver City Council established the Office of the Independent Monitor (OIM) – an organisation with the key role of providing oversight of investigations into allegations of police misconduct. A new city ordinance was enacted which replaced the existing Public Safety Review Commission with the Office of the Independent Monitor. The new Monitor's Office was viewed as adding "civilian eyes and voices into investigatory and disciplinary proceedings"[111] in relation to the police. The first Monitor, Richard Rosenthal, was selected by the Mayor and the Office of the Independent Monitor commenced operations in August of that year.[112] Rosenthal had come from Portland, Oregon where he had been instrumental in establishing a civilian oversight agency and complaints mediation program. Immediately, insight into the successes and challenges faced by other oversight agencies was sought; the Monitor's Office became a member of the National Association for Civilian Oversight of Law Enforcement (NACOLE). Satisfaction surveys were conducted with previous complainants and police officers, which revealed that seventy-five percent of complainants and sixty-four percent of police officers were dissatisfied with the existing complaints process.[113] Other tasks undertaken by the Monitor's Office included the finalisation of a contract with the Los Angeles-based Police Assessment Resource Centre (PARC) which had reviewed officer-involved shootings from a policy, training and tactics viewpoint;[114] and gained access to the Denver Police Department's administrative investigation database.[115]

By the end of 2005, the Office of the Independent Monitor had been embedded into police policy. This included the establishment of a civilian-police complaints mediation program.[116] The program was designed to be voluntary – which meant that parties could not be forced to admit to anything; and confidential – which

[110] Schaible et al, (n 3) 632.
[111] OIM (n 30) 1-2.
[112] Ibid.
[113] Office of the Independent Monitor (OIM), Denver, *Annual Report 2007*, 7-3, 7-11.
[114] OIM (n 30) 5.
[115] Ibid ii.
[116] Ibid 1-4.

required participants to sign a legally binding confidentiality agreement prior to mediation. The agreement was to allay any fears that comments made in mediation could be used against a party in litigation. Additional concerns about potential unpleasantness during mediation or use of the session to berate the police officer, were negated by the engagement of a professional mediation vendor. The Office of the Independent Monitor also addressed issues raised during the program implementation planning stage, such as resistance to participation and lack of incentives. The Monitor's Office provided education on mediation, including a training video, to the Denver Police Department. Presentations were routinely made at police roll call and academy events. As an incentive for police officer participation, they (and the public) were informed that 'good faith' participation in mediation would mean no Internal Affairs investigation or disciplinary action, and case closure upon completion of mediation.[117]

Community Mediation Concepts, a non-profit organisation in Denver, was contracted to provide mediation services. A cadre of eleven mediators were given specific training on mediation involving police officers.[118] Two professional mediators from Portland "who together had mediated more community-police mediations than any other mediators in the country" conducted the training; and several police officers volunteered to participate in the role plays.[119] This was the first civilian-police mediation training program of its kind in the country.

Mediations were scheduled by the mediation vendor and held in various locations around the city. Brochures on the mediation process and how to mediate constructively, were provided. The aim of the Monitor's Office was to mediate within a few weeks of a complainant's agreement – the median timeframe in 2007 was 40 days. Timeliness, which has continued to improve since then, was crucial for two reasons:[120]

> *"First, having fresh memories of the incident promotes more constructive dialogue. Second, the quick resolution adds to both parties' satisfaction with the process."*

The Monitor's Office and the Internal Affairs Bureau of the Denver Police Department worked collaboratively to filter complaints and assign those requiring

[117] OIM (n 113) 7-4.
[118] OIM (n 30) 1-12.
[119] Ibid.
[120] OIM (n 113) 7-4.

informal handling to mediation – with the first civilian-police mediation in late 2005.[121] The filtering process did not, however, strictly prevent more serious misconduct matters from mediation. While participants had to agree to mediation, it was possible for serious cases to proceed with the agreement of the "Manager of Safety, the Chief of Police and the Monitor".[122] Unlike many other jurisdictions, the Denver Office of the Independent Monitor encouraged consideration of a wide range of cases for mediation, such as use of force. Their philosophy was that the:[123]

> *"[C]ategorical exclusion of cases means losing valuable opportunities for community members and police to better understand each other's perspective, to explore how they might prevent similar problems in the future, and to reach a satisfying resolution."*

The Office of the Independent Monitor and Denver Police Department would not, however, allow for serious issues of corruption or misconduct to "disappear into the confidential process of mediation".[124] The screening and intake processes were regularly reviewed by the Monitor's Office, which also created 'Case Monitoring Guidelines' (based on the Portland model) to ensure the case assignment decisions of the Denver Police Department met the criteria.[125] The Monitor's Office acknowledged that the guidelines were not "mechanical rules"[126] and that no two complaints were identical, but they provided the principles to enable "informed judgments that are rational, independent, consistent and transparent".[127] The Monitor's Office also acknowledged that while the swift and certain resolution of complaints benefits all parties, they have an obligation to "use public resources wisely, which means making choices about priorities".[128] Cases were therefore approved for mediation on the basis that they would likely[129]: (1) Result in greater complainant satisfaction; (2)Result in improved officer conduct; and/or (3) contribute to community policing goals of improved community-police relations.

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[121] OIM (n 30) 5.
[122] Ibid 1.
[123] OIM (n 113) 7-2.
[124] Ibid 7-3.
[125] OIM (n 30) 1-5.
[126] DPD (n 97) 7.
[127] Ibid.
[128] Ibid.
[129] OIM (n 113) 7-3.

The guidelines, as well as the case-selection protocols and mediation operation procedures,[130] were placed on the Monitor's website for public access. A Community Relations Ombudsman was also appointed to educate the public and to meet with police to discuss their issues, the guidelines and protocols.[131] To ensure the efficacy of the mediation program the staff of the Monitor's Office regularly observed mediations during the first nine months of operation. The appropriateness of case selection and the conduct of mediators were examined; and participants and mediators were asked to complete evaluation surveys. Monthly meetings involving the Monitor, police and mediation vendor were organised for the purpose of improving and expanding the program.[132]

The collaborative approach of stakeholders resulted in the following management of complaints in the first year of operation: 997 complaints were investigated by the Denver Police Department, of which 689 involved formal investigation and 308 were classified as informal complaints. Of these, 593 were civilian complaints (18% sustained; 28% not sustained; 24% unfounded) and 13 were referred to mediation. Four of these were completed by the end of December 2005 and virtually all complainants and police reported 100 percent satisfaction with the process.[133] In 2007, the Office of the Independent Monitor reported that 91 percent of police officers had accepted complainants' requests to mediate. Police officer willingness to participate was not generated by a desire to avoid discipline but rather as a service to the community. Further, due to mediation, dissatisfaction rates had "plummeted" to ten percent for complainants and four percent for police officers.[134] By 2017, the annual figure for completed civilian-police complaints mediations had reached 53, which represented a 43 percent increase from 2016.[135]

[130] Office of the Independent Monitor, Denver, *Office of the Independent Monitor & Community Mediation Concepts – Standard Operating Procedures* (2005), 1-7.
[131] OIM (n 30) 8-2.
[132] OIM (n 113) 7-10.
[133] OIM (n 30) vi.
[134] OIM (n 113) 7-3.
[135] Office of the Independent Monitor, Denver, *Annual Report 2017*, 26, 68.

Findings 2: Semi-Structured Interviews

1. Denver Police Department

The two police officers interviewed[136] were not in senior positions at the time mediation was introduced and admitted to knowing very little about its implementation. Additionally, neither has been involved in a mediation. However, they were able to discuss the civilian complaints process and how mediation has been 'sold' to and received by police officers.

Interviewee 1 advised that complainants have three options available for the resolution of a complaint – formal investigation, informal resolution or mediation. However, it was emphasised that "once you commit to one, that's the option". Complainants do not have the option of attempting another course of action if they are dissatisfied with the initial outcome. Mediation has a restorative value because "the outcome of that, like any relationship or any conversation is going to be a positive thing".

Mediation was stated as being an accepted part of police procedure. Although, Interviewee 1 noted that police "hate change" and were likely sceptical of the role of the new Monitor's Office and mediation program. Nonetheless, crucial to the program's acceptance has been the way in which mediation has been 'sold' to police officers. Interviewee 1 said:

> *"if you sell it as 'it's something else you have to do, you have to go and listen to this person complain' … then it's a negative thing, but … if officers understand that if it goes to mediation then that's where it ends, it's probably the best benefit for it."*

Mediation was not viewed a "safe route" for officers to avoid discipline because under the Monitor's protocols, the complaint would not proceed to mediation. If mediation was appropriate and the police officer refused to attend, a conversation between Internal Affairs staff and the officer would take place to help the officer "understand why it is beneficial to you". However, as the process is voluntary, police officers are never directed to attend mediation.

Interviewee 2 discussed the significance of the intake process as a step toward mediation. An up-front apology to the complainant – that they had a negative experience with police, was reported to "soften the complainants up for mediation."

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[136] Conversation with Interviewees 1 and 2 (Denver Police Department (DPD), Denver Police Department Headquarters, Semi-Structured Interview, 20 December 2018).

Complainants reportedly become more responsive to the idea of mediation and investigators are spared the volume of work involved in investigations. Police promote mediation because "the number [of complaints] that go to mediation equates to the speed at which things are resolved".

The independence of the mediation process posed no concern to the interviewees. Police officers are informed that mediations are conducted by a third party contracted company "so there is no bias from the Department". In fact, the feeling was that the absence of a police presence was beneficial to both parties – the complainant would not feel as though the process favoured the officer; and the officer could "be honest in their answers" without the fear that there would be repercussions at work.

Police officers report back informally to Internal Affairs Bureau after mediation sessions. Many officers have reported that they gained an understanding of why the complainant was upset, and that after they explained their actions "we left shaking hands and seeing eye to eye". There were, however, some reported incidents of complainants simply yelling at the officers. Overall, the interviewees held the view – "it's not for everybody but it benefits everybody for cases to go to mediation".

2. Office of the Independent Monitor

The background to the establishment of the Office of the Independent Monitor was discussed by Interviewee 3,[137] who had longevity with the agency. It was reported that during the early 2000s, the United States Department of Justice had been prepared to intervene in Denver following a string of controversial police shootings. The city responded with a proposed moratorium while they implemented the Monitor's Office. The comprehensive approach to its implementation, including the establishment of the civilian-police mediation program; contracted mediation vendor; and full support of the Denver police union – the Police Protective Association, prevented the need for further federal government action. The program was 'sold' to the Denver Police Department as an outreach process.

[137] Conversation with Interviewees 3 to 6 (Office of the Independent Monitor (OIM), Denver, Semi-Structured Interview, 19 December 2018).

Interviewee 4 said that is “how we like them to view it … this is your [police] chance to make a friend in the community”.

The mediation of civilian-police complaints was described as a jurisdictional matter. Interviewee 3, who had discussed the Denver mediation program with NACOLE members, said that some programs were “so specific to their jurisdiction that …it wouldn’t be something that would transpose pretty easily”. The Denver mediation program has, however, been adopted by other jurisdictions.

The importance of the Monitor’s Office support for the continuity of the mediation program was raised by Interviewees 5 and 6. Mediation continues to be covered by the city ordinance, but without promotion by the Monitor’s Office it could disappear. The ongoing efforts by the Monitor’s Office to build the program have, at times, required some “pushing on the police department”. It was reported that mediation may not always be offered by the police because “sometimes they want to handle things internally because its more convenient”. The challenge for the Monitor’s Office has been the varying attitudes towards mediation over time by those in command at the police service. The aim of the Monitor’s Office has been to mediate “at least 10 percent of complaints”. Interviewee 6 said the reason the figure is not higher, rests with the voluntary nature of mediation. However, for those that are referred “it is fairly rare that a mediation is not successful and is sent back for investigation”.

The mediation referral process has been streamlined over time with the Denver Police Department referring cases directly to the mediation vendor. The Monitor’s Office is then notified and retains the right to decline mediation for some cases. Interviewee 3 advised that on rare occasions in the past, cases had been referred to mediation following completion of the investigation. Those cases usually involved children and the belief was that mediation would provide “a chance for the police department to do outreach, or it may be a high-profile thing – but rare now as the police chief wants matters closed”.

The Interviewees concurred that the Monitor’s Office constantly investigates ways to improve the complaints mediation process. Data are collected from the surveys completed by all participants at the end of mediations and satisfaction rates are

tracked – which were reportedly still very high. The Monitor's Office strives to "speed up the process … [and] get more people into that pipeline, so we just fix things as we go along, if it turns out to be an issue, we will consider changing it".

3. Community Mediation Concepts

Community Mediation Concepts conduct between 700 and 800 complaints per year. Approximately 50 of these are complaints against the police. The Interviewees[138] advised that the program has been well received with 98 percent police officer participation. The challenge has been getting complainants to commit to participation. The Interviewees have found that "the more people who talk to the complainant on the police side, the less likely they [complainants] are to go to mediation". Complainants become frustrated by having multiple conversations and lose trust in the police service and the complaints process. Also, the longer the time period between the incident and mediation, the more difficult it becomes for the mediator to get complainants "to the table." Community Mediation Concepts have expedited the process, through "trial and error". They have taken the Office of the Independent Monitor "out of the loop" and now get 75 percent of referrals directly from the police. The process from lodgement to mediator contact averages 2-3 days – down from the previous 30-45 days; with mediation scheduled in 7 to 10 days. Interviewee 8 added that seven to eight percent of complaints are now mediated on the phone: "some people lodge complaints at the airport and then return to their hometowns and want to mediate – so it's done over the phone".

Community Mediation Concepts has a small but skilled group of mediators who conduct civilian-police complaints mediations. The mediators work very hard to build personal connections with the police because as one Interviewee summed up:

> *"within the police culture they're only going to trust you if you take charge over them, just like their supervisors, it's one of those weird nuances that we've learned over time. You have to be nice, you have to be benevolently in charge, but if you don't establish that authority right up front, they're not going to respect you, they're not going to listen to you ('...')."*

[138] Conversation with Interviewees 7 and 8 (Community Mediation Concepts (CMC), Denver, Semi-Structured Interview, 21 December 2018).

Restorative elements are at the core of mediation, however, Interviewee 7 said: “we don’t mediate an outcome, we mediate a level of communication, understanding and empathy”. The process is structured to “facilitate apologies or transformation or learning, but we don’t ever expect that”.

The use of civilian mediators has been well received by police officers in Denver. Interviewee 7 said “there’s a sense of relief that you [mediators] are not internal”. Interviewee 8 felt that police officers could not “adequately mediate these kinds of situations, not because they lack the skills, it’s because of perception”. Police officers are stoic; they attend mediation in uniform, wearing Kevlar vests and carrying a gun – because that is how the public encounters them. However, for mediation to be effective, mediators help police shift from “I’m a police officer, into a mom, a dad, a human – we call it giving them a human face”. Nonetheless, police officers are not used to having an individual question their authority. Therefore, civilian-police complaints mediations take no more than one hour and “get straight to the point”.

Mediation sessions are confidential which creates a “safe place” for all participants. The Interviewees advised that under Denver law, neither mediators nor their notes can be subpoenaed in court. Community Mediation Concepts requires participants to sign a mediation agreement which forbids the electronic or digital recording of sessions, and police officer must remove their body-worn cameras during mediation.

Community Mediation Concepts provides mediation education to officers at the police academy before graduation and “lateral training sessions” when officers face promotion, to reinforce its presence and role. The Interviewees agreed that a successful, ongoing civilian-police complaints mediation program must have the enthusiastic support of the police Chief, command staff and police unions. Police officers rely on those higher in the police hierarchy to convince them of the benefits of mediation. Therefore, education and promotion, as well as program development, remain constant because as Interviewee 7 said, mediation programs “dry up if you don’t take care of them”.

CONCLUSIONS

The results of this study of the Denver civilian-police complaints mediation program were insightful from the perspective that the institutional implementation and ongoing 'care' of the program are at the core of its success. The interview findings largely support the documentary evidence that the Denver program has both achieved milestones and requires ongoing work.

The investigation of the Denver program revealed that from adversity comes success. The difficult politico-economic-social environment of the early 2000s, led to the establishment of a solid structure around police complaints that would provide better transparency and accountability of police practices and better community involvement in the resolution of issues directly affecting them. The establishment of the Office of the Independent Monitor; support from the Chief of Denver Police Department and various police unions; and the engagement of Community Mediation Concepts were integral steps in the implementation of a complaints program likely to endure.

The Denver program has encountered the obstacles identified in the literature review during its fourteen years of operation. However, an experiential approach has been taken whereby lessons have been learned and improvements made. Police and community awareness and education on mediation, and specifically mediation of civilian-police complaints, has grown significantly over the past twenty years. Therefore, the 'lack of understanding' obstacle, as noted by Walker and Archbold,[139] has become negligible. The Office of the Independent Monitor and Community Mediation Concepts constantly promote mediation to the police from new recruits to senior staff. They also advertise mediation guidelines on their websites for the benefit of the public. Police opposition to mediation has lessened to the extent that officers are often more willing to participate than complainants. The incentive for them is that the matter is finalised after mediation and no record of the complaint appears on their service record.[140] Mediation has improved the timeliness of complaints resolution – "the removal of minor complaints to mediation

[139] Walker and Archbold (n 7) 236.
[140] Walker et al, (n 11) 34.

has freed up time for the more serious complaints requiring formal investigation."[141] Also, the range of complaint types mediated has addressed specific issues faced in Denver, which emphasises the fact that mediation programs benefit from a local focus.[142] For example, the mediation of racial bias complaints has improved the civilian-police relationship as complainants have reportedly been satisfied that the matter has not been covered up and police officers have appreciated the opportunity to discuss the allegations.[143] In some instances, police union opposition has been identified as a major deterrent to police officer participation in mediation.[144] However, the unions in Denver continue to support the program due to the routine communication of survey data by the mediation vendor and Monitor's Office. Finally, the contracted availability of professional mediators[145] and funding under the city ordinance has alleviated the issue of resources.[146] The replication of any of these areas could be useful in other police jurisdictions.

There are, however, areas of the Denver model where improvements could be made. Some doubt was expressed about the purpose of the Monitor's Office and its goal in implementing the mediation program. There was concern that the aim of the Monitor's Office was to scrutinize the police to find fault and that mediation was the mechanism for this. The impact was the varying attitudes towards mediation over time by those in command at the police department. As noted by Walker et al.,[147] this level of support is vital to the success of any mediation program. As such, improved communication between all stakeholders would provide reassurance that the confidential, non-adversarial nature of mediation enables complainants and police officers to better understand each other, not to impose a sanction.[148] This is particularly important as the professionalisation of police over time has brought with it an impersonal style of policing,[149] something which can lead to misunderstandings and loss of community trust. Interestingly, there was

[141] OIM (n 91) 60.
[142] Young et al, (n 27) 309.
[143] OIM (n 113) 7-3.
[144] Walker and Archbold (n 7) 236.
[145] Schaible et al, (n 3) 629.
[146] Walker et al, (n 11) 55.
[147] Ibid 44.
[148] Proctor et al, (n 95) 3.
[149] Walker and Archbold (n 7) 241.

some variation in views between police and mediators around intake discussions with complainants. The police felt they 'softened' complainants in preparation for mediation while mediators suggested that too much talking by police can be detrimental to getting a complainant to mediation. Further discussion between the stakeholders would refine this aspect and help to address the significantly high number of complaints (69%) that are rejected at intake. Some of these complaints may contain legitimate grievances which could be addressed through mediation.[150] Changing the investigative mindset of intake officers may also help reveal what complainants want as an outcome (e.g. a face-to-face encounter to voice their grievance; [151] have it acknowledged and receive an apology. [152]) Mediation sessions that are conducted by trained mediators with knowledge of police culture can break down the 'us and them' barrier. The further inclusion of restorative justice principles in mediation that strive for reparation through healing would benefit civilian-police relations through the increased satisfaction of both parties. As noted by Young et al., civilians and police officers who participated in restorative justice mediations "felt they had learned something and were likely to change".[153]

The issue of complaints reduction and police behavioural improvements are crucial elements to the success of the mediation program, as the legitimacy of mediation is undermined if problematic behaviour behind complaints continues. The level of complaints against police in Denver have continued a downward trend since the commencement of the program. This has occurred while the number of uniformed police officers has remained at 700. [154] The changes to police disciplinary processes; development of mediation guidelines and protocols; ongoing information sessions for police on the benefits of mediation; better transparency of the police complaints process through greater public awareness strategies; and refinements to expedite complaints to mediation; have arguably had a positive impact on complaint numbers.

[150] Waters and Brown (n 2) 635.
[151] Patterson (n 63) 197.
[152] Prenzler and Ronken (n 22) 171.
[153] Schaible et al, (n 3) 630.
[154] DPD (n 145).

The evaluation of the Denver mediation program is somewhat old and a new evaluation is recommended to analyse current data on complainant and police officer satisfaction levels. This would provide further insight into the program's responses to challenges that have arisen. Nonetheless, the areas for improvement identified in this study will not only benefit Denver but other police jurisdictions.

SELF-DETERMINATION, EMPOWERMENT AND EMPATHY IN MEDIATION: REHUMANISING MEDIATION'S EFFECTIVENESS

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Abstract: This paper canvasses the concept of self-determination in the context of mediation, including examples of the range of interpretations that appear in the mediation literature and of the reported paradoxes and limitations to its implementation. The paper also explores Self-Determination Theory and the relevance of its core components to the practice of mediation. Empowerment, empathy and rapport are reviewed because they, too, are considered to be important to effective mediation. It is proposed that such an approach clarifies the differences between self-determination, empowerment, and empathy in mediation, and has the capacity to address some of the limitations that have been associated with self-determination in the context of mediation. The paper concludes with suggestions for future research in the mediation field.

Keywords: self-determination, mediation, empowerment, empathy

INTRODUCTION

For many years, it has been said that disputant "self-determination" is a central, or fundamental, principle of mediation.[1] In itself, such an assertion raises many questions, including: What does self-determination mean, in the context of mediation? Why is it so important? How do disputants achieve self-determination? How do we know if and when they do? What is the mediator's role in such achievement? Drawing from existing empirical and theoretical research about mediation, as well as mediation practice, this paper briefly canvasses the concept of self-determination in the context of mediation, including examples of the range of interpretations that appear in the mediation literature, and of the reported paradoxes and limitations to its implementation. The paper also explores Self-Determination Theory and the relevance of its core components to the practice of mediation. Empowerment, empathy and rapport are reviewed because they, too, are considered to be important to effective mediation.[2] An "Empathy Continuum" is proposed for the context of mediation, drawing on potential links between the components of that continuum through Self-Determination Theory to self-determination itself. It is proposed that such an approach clarifies the differences between self-determination, empowerment, and empathy in mediation, and has the capacity to address some of the limitations that have been associated with self-determination in the context of

[1] For example, see: Kovach, K. K., and L. P. Love, '"Evaluative" Mediation is an Oxymoron' (1996) 14(3) *Alternatives to the High Cost of Litigation*; Welsh, N. A., 'The Thinning Vision of Self-Determination in Court-Connected Mediation: the Inevitable Price of Institutionalization' (2001) 6(1) *Harvard Negotiation Law Review*; American Arbitration Association, American Bar Association, and the Association for Conflict Resolution, *Model Standards of Conduct for Mediators* (2005); available at: https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf ; accessed 7 October 2015; Capulong, E. R. C., 'Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines' (2014) 27(3) *Ohio State Journal on Dispute Resolution*.

[2] For example, see: Alberts, J. K., B. L. Heisterkamp and R. L. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16 *The International Journal of Conflict Management*; Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41 *Journal of Social Issues*; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26 *Alternatives to the High Cost of Litigation*; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17 *Law and Human Behavior*; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly*; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Conference Presentation, 22nd Annual International Association of Conflict Management, June 2009); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles, and Roles' (1983) 32 *Family Relations*; Welton, G. L., D. G. Pruitt and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32 *The Journal of Conflict Resolution*; Zubek, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 30 *Journal of Conflict Resolution*.

mediation. The proposal emphasises a humane and responsive approach by the mediator, resulting in a mediation process from which a greater number of agreements is likely to be achieved, with the potential for those agreements to have greater durability. Given the existing relevant literature in fields outside mediation (of which only a fraction is referenced in this paper), it is suggested that mediators' facilitation of effective disputant self-determination might be enhanced through better understanding of self-determination, what contributes to it, and how it is likely to be achieved. The paper concludes with suggestions for future research in the mediation field.

WHAT IS SELF-DETERMINATION IN THE CONTEXT OF MEDIATION?

In the USA, the most frequently cited description of self-determination in mediation occurs in the Model Standards for Mediators (the "Model Standards"), in which Standard 1 deals specifically with self-determination.[3]

> *"Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes."*[4]

The standard makes clear that self-determination includes participation in the selection of the mediator, and in the design of the specific mediation process, as well as in choosing whether to actively participate in the mediation session (or to leave at any time), and in its outcomes. The Standard does not specify what is encompassed in any of these.[5] For example, when the standard mentions exercising self-determination in the mediation 'outcomes',[6] which of the following does it intend to be included: devising options and alternatives; discussing those options and

[3] American Arbitration Association, American Bar Association, and the Association for Conflict Resolution, *Model Standards of Conduct for Mediators* (2005); available at: https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf ; accessed 7 October 2015.
[4] American Arbitration Association, American Bar Association, and the Association for Conflict Resolution, *Model Standards of Conduct for Mediators* (2005); Standard 1; available at: https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf ; accessed 7 October 2015.
[5] Standard 1 does caution that a mediator not let the participants' exercise of self-determination prevent the conduct of a 'quality process'; the subject of Standard IV is 'Quality of the Process'.
[6] American Arbitration Association, American Bar Association, and the Association for Conflict Resolution, *Model Standards of Conduct for Mediators* (2005); Standard 1; available at: https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf ; accessed 7 October 2015.

alternatives; crafting the final terms of agreement; and agreeing to those final terms? Perhaps that is a matter to be decided by the mediator and the parties in any given mediation session. The Standard is similarly unclear about what level of disputant participation is sufficient to be accepted as self-determination.

Prior to the promulgation of the Model Standards, the mediation literature in the USA applied several interpretations of self-determination in the context of mediation. These encompass disputant participation in the mediation process, including: controlling the process, [7] attending (and choosing whether to leave at any time), [8] making active contributions (e.g., disputants' communication directly with each other), [9] and contributing to uncoerced decision-making (including any outcomes of the mediation session). [10] The potential scope of self-determination has also included disputants' contributions to the overall dispute system design within which the relevant mediation program is situated.[11]

The diversity of interpretations has continued elsewhere. For example, self-determination has been described recently as including disputants themselves being able to '… delimit …' the agenda in any given mediation.[12] In Australia, the mediation literature also accords self-determination the status of being a core principle of mediation, and includes similar interpretations of it. Australia's National Mediator Accreditation System was established in 2008 as a nationally applicable set of standards for the conduct of a mediation process, and for the role of a mediator. Although the System's Standards refer to self-determination several times, they do not include any explicit description of how the term should be interpreted in the context, and practice, of mediation.[13]

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[7] For example, see: Herrman, M. S., N. L. Hollett, D. G. Eaker, and J. Gale, 'Mediator Reflections on Practice: Connecting Select Demographics and Preferred Orientations' (2003) 20(4) *Conflict Resolution Quarterly*.
[8] For example, see: Hedeen, T., 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but some are More Voluntary than Others' (2005) 26(3) *The Justice System Journal*.
[9] For example, see: Welsh, N. A., 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization' (2001) 6(1) *Harvard Negotiation Law Review*.
[10] For example, see: Hedeen, T., 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but some are More Voluntary than Others' (2005) 26(3) *The Justice System Journal*; and Welsh, N. A., 'The Thinning Vision of Self-Determination in Court-Connected Mediation: the Inevitable Price of Institutionalization' (2001) 6(1) *Harvard Negotiation Law Review*.
[11] For example, see Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research.*
[12] Douglas, S., 'Neutrality, Self-Determination, Fairness and Differing Models of Mediation' (2012) 19 *James Cook University Law Review*, p 23.
[13] National Mediation Accreditation System [Australia] (2005); available at: https://msb.org.au/themes/msb/assets/documents/practice-standards.pdf; accessed on 5 October 2015.

For the purposes of this paper, self-determination is accepted as encompassing all disputant decision-making within, and directly relevant to, any given mediation session.

REPORTED LIMITATIONS AND PARADOXES OF SELF-DETERMINATION

The mediation literature includes suggestions of limitations on the exercise of self-determination, and paradoxes that are likely to emerge when people do exercise self-determination within the context of mediation. These include:

- Both disputants cannot be self-determining at the same time;[14]
- One disputant can make self-determinative decisions at the expense of the other disputant;
- Statutory requirements can limit mediation's capacity for self-determination;
- Increasing use of so-called evaluative mediation;
- Lawyers speaking and acting on behalf of their (disputant) clients; and
- Disputants' exercise of self-determinative participation is limited either by their capacity, or by their unfamiliarity with the mediation process.

It has been suggested that, where limits are placed on the confidentiality of any given mediation, those limits can influence disputants' willingness to be self-determinative.[15] A self-determination dilemma has also been raised: what happens when a disputant exercises their self-determination by choosing not to participate, or demands that the mediator act only in ways demanded by that disputant?[16]

An extra dimension is added to self-determination when the mediator's own interests are included. How might the disputants' exercise of self-determination be restricted if the mediator exercises her/his own self-determination in terms that reflect a need to demonstrate competency by resolving the dispute, a need to feel "in control" by

[14] These dot points are derived from: Boulle, L., *Mediation: Principles, Process, Practice* (3rd Edition, LexisNexis, Australia, 2011); Douglas, S., 'Neutrality, Self-Determination, Fairness and Differing Models of Mediation' (2012) 19 *James Cook University Law Review*; Akin-Ojelabi, L., 'An Access to Justice Approach to Mediation and the Construction of Positive Legal Professional Identity' (2016) 23(3) *International Journal of the Legal Profession*; Press, S., and P. M. Lurie, 'Protecting Self-Determination in Mediation' (2014) 20(3) *Dispute Resolution*.

[15] Boulle, L., *Mediation: Principles, Process, Practice* (3rd Edition, LexisNexis, Australia, 2011).

[16] Press, S., and J. B. Stulberg, 'Variations on a Theme by Sander: Does a Mediator Have a Philosophical Map?' (2016) 31(2) *Ohio State Journal on Dispute Resolution*.

improving the disputants' situation, and a need to be socially acceptable by helping others (i.e., the disputants)?[17] The same researchers suggest that, the more the mediator enables the disputants' exercise of their own self-determination, the less the mediator can exercise her/his own.

Prescribed interpretations of self-determination have been held out as being an impediment to the exercise of self-determination itself: situations have been described where pre-established and prescribed notions of self-determination have precluded the exercise of self-determination by indigenous communities whose expectations of active participation in mediation differ markedly from the established norms of the relevant dominant social group.[18]

These identified limitations and paradoxes have the potential to restrict the disputants' exercise of self-determination in any given mediation session. On the other hand, exploring the nature of self-determination, and its antecedents, might provide opportunities for addressing some of these limitations and paradoxes.

WHY IS SELF-DETERMINATION IMPORTANT IN MEDIATION?

The mediation literature includes many explanations and measures of what makes a mediation successful, or effective. It has been suggested that success, or effectiveness, in mediation can be measured through either "simple effectiveness" which is limited to the achievement of an agreement, or "complex effectiveness" which can incorporate the achievement of an agreement in addition to any of a range of other measures, including: disputant satisfaction (incorporates disputant perceptions of fairness), rates of compliance with the agreement, personalised terms of agreement, and improvement in the disputants' post-mediation relationship.[19] In the mediation literature, simple effectiveness has been measured more often than complex effectiveness.

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[17] Imperati, S. J., and S. M. Maser, 'Why Does Anyone Mediate if Mediation Risks Psychological Dissatisfaction, Extra Costs and Manipulation – Three Theories Reveal Paradoxes Resolved by Mediator Standards of Ethical Practice' (2014) 29(2) *Ohio State Journal of Dispute Resolution*.
[18] Capulong, E. R. C., 'Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines' (2014) 27(3) *Ohio State Journal on Dispute Resolution*.
[19] Boyle, A. 'Effectiveness in Mediation: A New Approach' (2018) *12 University of Newcastle Law Review* 148-161.

In the context of mediation, the characteristics of undifferentiated self-determination and empowerment have been said to contribute to the achievement of simple effectiveness by providing: '… psychological ownership of the agreement …'[20] as well as incorporating important fairness concepts such as being heard and understood, which are said to contribute to the achievement of '… a just outcome …'.[21] In the context of complex effectiveness, it has been reported that, through empowerment and/or the exercise of self-determination in any mediation session, disputants can: perceive higher levels of fairness in the process and its outcomes;[22] report higher levels of satisfaction with the process and the mediator;[23] be more likely to produce an agreement; and to produce more durable agreements.[24] More specifically, it has been reported that achieved agreements are likely to be more durable when the mediator facilitates constructive interactions with and between the participants during the mediation session.[25] Although the research for the latter is limited, it is a promising subject area for further research.[26] In summary, the exercise of self-determination in mediation is said to be important because of its reported contributions to the achievement of simple and complex effectiveness.

[20] Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs. the Problem-Solving Style in Custody Mediation' (1994) 50(1) *Journal of Social Issues*, P 75.
[21] Akin-Ojelabi, L., 'An Access to Justice Approach to Mediation and the Construction of Positive Legal Professional Identity' (2016) 23(3) *International Journal of the Legal Profession*, P 329.
[22] Meierding, N. R., 'Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements' (1993) 11(2) *Mediation Quarterly*; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, and L. M. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior*.
[23] Meierding, N. R., 'Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements' (1993) 11(2) *Mediation Quarterly*.
[24] Meierding, N. R., 'Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements' (1993) 11(2) *Mediation Quarterly*; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, and L. M. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior*; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs. the Problem-Solving Style in Custody Mediation' (1994) 50(1) *Journal of Social Issues*.
[25] Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16 *The International Journal of Conflict Management*; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50 *Journal of Social Issues*; Meierding, N. R., 'Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements' (1993) 11(2) *Mediation Quarterly*; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17 *Law and Human Behavior*.
[26] As noted earlier, the mediation literature does not routinely or consistently differentiate between "self-determination" and "empowerment". It is therefore difficult to draw conclusions about findings that refer to the influence of disputant participation without specifying the nature of that participation, or without differentiating between empowerment and self-determination.

Self-Determination Theory

Self-Determination Theory (SDT) developed in the research field of psychology,[27] and has since appeared in the mediation literature.[28] The theory is based on humans' continual and ongoing personal growth, and our need for what is called psychological 'integrity and well-being'.[29] SDT developed from the proposition that certain psychological needs are met through the exercise of self-determination. Those needs can be summarised as:[30]

- Our human need to "grow", and attain a unified sense of self within a larger social structure;
- Our need to take actions to achieve this, rather than just wait for it to magically happen;
- The importance of external motivators;
- Our need for psychological well-being – a sense that our psychological needs are satisfied;
- Our need to feel competent;
- Our need to have a sense of relatedness to others (i.e., a sense of belonging and security); and
- Our need to have a sense of autonomy, which is reported to relate more to a sense of 'freedom and coherence' than to a sense of 'being in control [and] independent'.[31]

SDT is said to incorporate three core components expressed as key personal perceptions:

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[27] For example, see: Deci, E. L., and R. M. Ryan, 'The "What" and "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior' (2000) 11 *Psychological Inquiry*; Reis, H. T., K. M. Sheldon, S. L. Gable, J. Roscoe, and R. M. Ryan, 'Daily Well-Being: The Role of Autonomy, Competence, and Relatedness' (2000) 26(4) *Personality and Social Psychology Bulletin*.

[28] Sourdin, T., *Alternative Dispute Resolution* (5th Edition, Thomson Reuters, Australia 2016); Imperati, S., and S. Maser, 'Why Does Anyone Mediate if Mediation Risks Psychological Dissatisfaction, Extra Costs and Manipulation?' (2014) 29(2) *Ohio State Journal of Dispute Resolution*.

[29] Reis, H. T., K. M. Sheldon, S. L. Gable, J. Roscoe, and R. M. Ryan, 'Daily Well-Being: The Role of Autonomy, Competence, and Relatedness' (2000) 26(4) *Personality and Social Psychology Bulletin*, p 420.

[30] The dot-pointed list of psychological needs is derived from: Deci, E. L., and R. M. Ryan, 'The "What" and "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior' (2000) 11 *Psychological Inquiry*; and Reis, H. T., K. M. Sheldon, S. L. Gable, J. Roscoe, and R. M. Ryan, 'Daily Well-Being: The Role of Autonomy, Competence, and Relatedness' (2000) 26(4) *Personality and Social Psychology Bulletin*.

[31] Imperati, S., and S. Maser, 'Why Does Anyone Mediate if Mediation Risks Psychological Dissatisfaction, Extra Costs and Manipulation?' (2014) 29(2) *Ohio State Journal of Dispute Resolution*; both quotes from p 229.

- A sense of competence: '… the experience that one can effectively bring about desired effects and outcomes …';[32]
- A sense of autonomy: '… perceiving that one's activities are endorsed by or congruent with the self …';[33] and
- A sense of relatedness: '… feeling that one is close and connected to significant others.'[34]

According to the psychological needs listed above, like all people, disputants in mediation need to have a sense of "freedom and coherence" during a mediation session, and a sense of competence, autonomy and relatedness – as explained above – in order to feel able to exercise "self-determination". Separate research suggests that, in addition, they need to demonstrate a capacity for exercising self-determination. It has been observed (in a non-mediation context) that a person's capacity for self-determination is characterised by '… a sense of personal responsibility …' for the events in which the person is involved.[35] In other words, a person's self-awareness and understanding of their ability to choose their own behaviour at any given time are key indicators of their capacity for exercising self-determination.

A reported study of SDT in the context of adolescent engagement in sport suggests that the three core components of SDT must *all* be met for the positive effects to be achieved; if any of the three is not met, people have been observed to withdraw from engagement and become passive and disaffected.[36] The same study also found that, if a sporting coach encouraged player autonomy from the start of the sporting season, the players were more likely to remain engaged for a longer period, whereas, if the coaches were controlling of players from the start of the season, the players quickly became disengaged. The findings also suggest that, the more the players' self-determination needs were met, the more 'dynamic' their engagement

[32] Reis, H. T., K. M. Sheldon, S. L. Gable, J. Roscoe, and R. M. Ryan, 'Daily Well-Being: The Role of Autonomy, Competence, and Relatedness' (2000) 26(4) *Personality and Social Psychology Bulletin*, p 420.
[33] Reis, H. T., K. M. Sheldon, S. L. Gable, J. Roscoe, and R. M. Ryan, 'Daily Well-Being: The Role of Autonomy, Competence, and Relatedness' (2000) 26(4) *Personality and Social Psychology Bulletin*, p 420.
[34] Reis, H. T., K. M. Sheldon, S. L. Gable, J. Roscoe, and R. M. Ryan, 'Daily Well-Being: The Role of Autonomy, Competence, and Relatedness' (2000) 26(4) *Personality and Social Psychology Bulletin*, p 420.
[35] Maksimenko, S., and L. Serdiuk, 'Psychological Potential of Personal Self-Realisation' (2016) 6(1) *Social Welfare Interdisciplinary Approach*, P 98.
[36] Curran, T., A. P. Hill, N. Ntoumanis, H. K. Hall, and G. E. Jowett, 'A Three-Way Test of Self-Determination Theory's Mediation Model of Engagement and Disaffection in Youth Sport' (2016) 38(1) *Journal of Sport and Exercise Psychology*.

became and the more self-determination they sought.[37] As the researchers note, these findings suggest that a feedback loop might exist within which self-determination and active engagement do reinforce each other, and that they do so in ways that appear to demand continuing incremental increases. For example, as the subject adolescents were observed to become more actively engaged, they appeared to need additional opportunities for exercising self-determination, and, as those additional opportunities were provided, their active engagement was observed to increase further. And so on. Specifically, the study reports that, as the study subjects became more and more actively engaged, they required incrementally increasing autonomous opportunities for establishing competence and relatedness with each other.

Although these findings have not yet been explored in the context of mediation, they suggest that disputants might engage more actively in mediation if they have an initial sense of autonomy that is continuously reinforced during the mediation session through incremental increases in their senses of competence and relatedness – and that the reinforcement derives from disputants themselves, as well as from the mediator. It is also possible that, as they become more actively engaged in the mediation session, disputants will seek their own opportunities to reinforce their senses of competence and relatedness with each other. The psychology literature has acknowledged that people's psychological and emotional well-being is constantly fluctuating, and is dependent upon the effects of daily activity, in particular the effects on individual perceptions of competence, autonomy, and relatedness.[38]

People and change

There is a substantial body of research showing that we do not ever attain a *fixed* adult state of "personhood": our identity continues to change and develop throughout our lives.[39] Our behaviour and our psychology are very responsive to anything that

[37] Curran, T., A. P. Hill, N. Ntoumanis, H. K. Hall, and G. E. Jowett, 'A Three-Way Test of Self-Determination Theory's Mediation Model of Engagement and Disaffection in Youth Sport' (2016) 38(1) *Journal of Sport and Exercise Psychology*, P 26.
[38] Reis, H. T., K. M. Sheldon, S. L. Gable, J. Roscoe, and R. M. Ryan, 'Daily Well-Being: The Role of Autonomy, Competence, and Relatedness' (2000) 26(4) *Personality and Social Psychology Bulletin*, p 420.
[39] Wood, D., and J. J. A. Denissen, *A Functional Perspective on Personality Trait Development* in: K. J. Reynolds and N. R. Branscombe (Eds) *Psychology of Change: Life Contexts, Experiences and Identities* (Psychology Press, UK and USA, 2015). This reference is useful for more detailed coverage of the issues raised in this section.

we perceive will help us attain whatever we are seeking to attain at any given time; that behaviour and that psychology change when what we want to attain changes. Our behaviour and our psychology also change according to our perception of our competence, autonomy, and relatedness at any given time, and in any given context.

It is possible that, in mediation, what each disputant seeks to attain changes as their active engagement in the mediation session increases (e.g., from wanting to attain blunt personal retribution, to seeking more complex, and mutually beneficial, outcomes). According to the psychology literature noted above, these changes are likely to lead to adjustments in the disputant's behaviour and psychology, especially in relation to their perceptions of their own competence, autonomy, and relatedness. This suggests that a mediator needs to be constantly alert and responsive to all disputants, and mindful of their levels of engagement in the mediation session.

It has been suggested that a mediator should accept responsibility for ensuring that any given mediation process, and the mediator's role within it, is designed to enable the disputants' active participation, taking into account the participants' skills and knowledge levels at any given time.[40] Such an approach would be consistent with the mediator being aware of the disputants' changing (or developing) senses of competence, autonomy, and relatedness throughout the mediation session – demonstrated through their levels of active engagement in the mediation session.

Self-determination or empowerment?

The modern concept of empowerment that includes a person being enabled to speak and act on their own behalf is recognised as having arisen in the field of social work.[41] The premise of such empowerment is that any individual can act in her/his own best interests, and is presumed to have the inherent skills and competencies to do so.[42] In the field of social work, empowerment is not limited to decision-making.

[40] Crawford, S. H., L. Dabney, J. M. Filner, and P. R. Maida, 'From Determining Capacity to Facilitating Competencies: A New Mediation Framework' (2003) 20(4) *Conflict Resolution Quarterly*.

[41] Mahoney, K. J., and K. Zgoda, Approaches to Empowering Individuals and Communities, in B. Berkman and S. D'Ambruoso (Eds) *Handbook of Social Work in Health and Aging* (Oxford Scholarship Online, University Press Online, UK, 2010) available on: http://www.oxfordscholarship.com.ezproxy.lib.monash.edu.au/view/10.1093/acprof:oso/9780195173727.001.0001/acprof-9780195173727-chapter-75 ; accessed: 22 January 2016.

[42] Mahoney, K. J., and K. Zgoda, Approaches to Empowering Individuals and Communities, in B. Berkman and S. D'Ambruoso (Eds) *Handbook of Social Work in Health and Aging* (Oxford Scholarship Online, University

Self-determination and empowerment might appear to be similar concepts, and, although they are mentioned frequently in the mediation literature, they are not always clearly differentiated. Nor is there always clear differentiation of the mediator's role in establishing disputant empowerment or achieving disputant self-determination. Sometimes commentators admit to treating empowerment and self-determination interchangeably. [43] Where the two have been differentiated, it has been said that empowerment is about participation while self-determination is about choice and decision-making.[44] For example, it has been proposed that, when a mediator empowers disputants, s/he is supporting a disputant's right to be heard and understood (i.e., a participant's "voice"), and thus reinforcing and protecting procedural justice within any given mediation. The same proposal suggests that disputant self-determination is limited to the development of, and agreement to, the final terms of any mediated agreement.[45]

When a mediator supports the disputants' right to be heard and understood, is that mediator acting in ways that facilitate the disputants' active engagement in the mediation session, and their concomitant perceptions of competence, autonomy, and relatedness – the latter having already been shown to be pre-cursors to the exercise of self-determination? This paper proposes that it is through this sequence that a mediator facilitates disputants' exercise of self-determination in a mediation session. Further, that it is the disputants' active engagement and their increasing perceptions of competence, autonomy, and relatedness that are encapsulated in the concept of empowerment in mediation.

It is further proposed that, in mediation, establishing (and maintaining) empathy, rapport and trust – and their attendant senses of competence, autonomy and relatedness – is the foundation upon which disputants are able to become increasingly actively engaged in the mediation session, and to gain an increasing sense of competence, autonomy, and relatedness, leading to an exercise of self-determination sufficient to create mutually beneficial outcomes.

Press Online, UK, 2010) available on: http://www.oxfordscholarship.com.ezproxy.lib.monash.edu.au/view/10.1093/acprof:oso/9780195173727.001.0001/acprof-9780195173727-chapter-75 ; accessed: 22 January 2016.

[43] For example, see Baruch Bush, R. A., and J. P. Folger, 'Reclaiming Mediation's Future: Focusing on Party Self-Determination' (2015) 16 *Cardozo Journal of Conflict Resolution*.

[44] Sourdin, T., *Alternative Dispute Resolution* (5th Edition, Thomson Reuters, Australia 2016).

[45] Sourdin, T., *Alternative Dispute Resolution* (5th Edition, Thomson Reuters, Australia 2016).

The empathy continuum

Empathy and rapport are different states that are complex aspects of human interaction, and there is a significant literature on them dating back at least to Alfred Adler in the 1920s. The literature occurs principally in the research fields that include sociology, linguistics, neuroscience, social psychology, and cognitive psychology. Within these fields of research, it has been established that empathy is the capacity to identify with another person, and to '… understand what it is like to be that particular individual …',[46] while retaining a '… sense of self [and] emotional regulation …'.[47] It has also been recognised widely in the empathy/rapport literature that there is a developmental relationship between establishing empathy, building rapport, and developing trust, which, in itself leads to the creation of a cooperative atmosphere in which mutually beneficial outcomes can be crafted.[48]

Drawing from the established links between empathy, rapport, trust, and cooperation, an "Empathy Continuum" is proposed. The Empathy Continuum is intended to encompass all these states and their developmental relationships, in the context of mediation. It is proposed as a continuum because the relationships in any mediation have been said to be constantly changing and dynamic,[49] and, at any time during a mediation session, the mediator might need to shift back and forth on the Continuum to maintain disputant engagement by re-establishing empathy and/or re-building rapport. The sequential components of the Empathy Continuum support the developing relationship between each disputant and the mediator, and in the developing mediation relationship between the disputants.

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[46] Clark, A. J., 'Empathy and Alfred Adler: An Integral Perspective' (2016) 72(4) *The Journal of Individual Psychology*, P 238.

[47] Lietz, C., K. E. Gerdes, F. Sun, J. M. Geiger, M. A. Wagaman, and E. A. Segal, 'The Empathy Assessment Index (EAI): A Confirmatory Factor Analysis of a Multidimensional Model of Empathy' (2011) 2(2) *Journal of the Society for Social Work and Research*, P 105.

[48] Holmberg, U., and K. Madsen, 'Rapport Operationalized as a Humanitarian Interview in Investigative Interview Settings' (2014) 21(4) *Psychiatry, Psychology, and Law;* Vallano, J. P., J. R. Evans, N. S. Compo, and J. M. Kieckhaefer, 'Rapport-Building During Witness and Suspect Interviews: A Survey of Law Enforcement' (2015) 29 *Applied Cognitive Psychology.*

[49] Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research*.

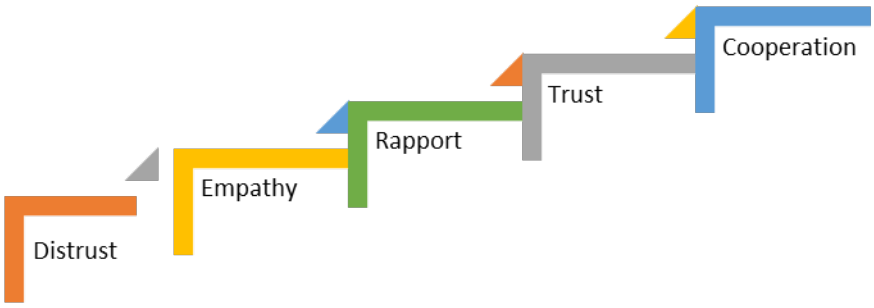

Figure 1. The Empathy Continuum – throughout any mediation session, the mediator will be constantly alert to the disputants' progress and regress on the Continuum – knowing if and when to intervene.

Given empathy's primal position in relation to rapport and trust, investigations have been conducted into the influence of social power, social status, and social desirability, on any individual's increased capacity for empathy,[50] as well as the positive influence of empathy on people's sense of satisfaction with business services. [51] These suggest that there is scope for investigations into how conflict might influence empathy between disputants, as well as any influence mediator behaviours might have when they are intended to enable the establishment of empathy, rapport, and trust in the specific context of a dispute.

The so-called 'rules of communicative competence'[52] are reported to underpin empathy: individuals calculate appropriate levels for relating to others, taking into account any cultural and personal influences at any given time. High levels of communicative competence enable a person to remain sufficiently aware of the presence of others that their behavioural and linguistic preferences enable them to assume an appropriate level of relationship with them.[53] These rules of communicative competence have become better known as the 'Rules of Rapport'.[54]

The mediation literature rarely differentiates between empathy, rapport, and trust, and includes very few explanations of how the terms should be interpreted in the context of mediation research. Establishing empathy and building rapport are

[50] Côté, S., M. W. Kraus, B. H. Cheng, C. Oveis, I. van der Löwe, H. Lian, and D. Keltner, 'Social Power Facilitates the Effect of Prosocial Orientation on Empathic Accuracy' (2011) 101(2*) Journal of Personality and Social Psychology*; Zaki, J., 'Empathy: A Motivated Account' (2014) 140(6) *Psychological Bulletin*.
[51] Davis, C., L. Jiang, P. Williams, A. Drolet, and B. J. Gibbs, 'Predisposing Customers to be More Satisfied by Inducing Empathy in Them' (2017) 58(3) *Cornell Hospitality Quarterly*.
[52] Lakoff, R. T., *Stylistic Strategies Within a Grammar of Style* (Annals of the New York Academy of Sciences, USA, 1979), P 62.
[53] Lakoff, R. T., *Stylistic Strategies within a Grammar of Style* (Annals of the New York Academy of Sciences, USA, 1979).
[54] Tannen, D., 'Framing and Face: The Relevance of the Presentation of Self to Linguistic Discourse Analysis' (2009) 72(4) *Social Psychology Quarterly*, P 300.

mentioned often in the empirical mediation literature as important mediator abilities and actions,[55] though there is rarely any detail about the practicalities of what mediators might have said and/or done to establish empathy and build rapport. In addition, when reporting on empirical studies, researchers rarely include details of the mediators' tone of voice, manner, or demeanour while they speak with disputants, despite the literature on empathy and rapport[56] recognising the importance of these non-verbal factors to the establishment of empathy, building of rapport, and development of trust.

Earlier in this paper (p 5), reference was made to reports in the mediation literature that constructive exchanges between the mediator and the disputants and between the disputants themselves have been reported to contribute to durability in mediated agreements.[57] It is proposed that those "constructive exchanges" are likely to be demonstrations of: empathy, rapport, and trust; as well as the resulting active and dynamic engagement based on perceptions of competence, autonomy, and relatedness.

[55] For example, see: Alberts, J. K., B. L. Heisterkamp and R. L. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16 *The International Journal of Conflict Management*; Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41 *Journal of Social Issues*; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26 *Alternatives to the High Cost of Litigation*; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17 *Law and Human Behavior*; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly*; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Conference Presentation, 22nd Annual International Association of Conflict Management, June 2009); Vanderkooi L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles, and Roles' (1983) 32 *Family Relations*; Welton, G. L., D. G. Pruitt and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32 *The Journal of Conflict Resolution*; Zubek, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 30 *Journal of Conflict Resolution*.

[56] See: Holmberg, U., and K. Madsen, 'Rapport Operationalized as a Humanitarian Interview in Investigative Interview Settings' (2014) 21(4) *Psychiatry, Psychology, and Law*.

[57] Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16 *The International Journal of Conflict Management*; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50 *Journal of Social Issues*; Meierding, N. R., 'Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements' (1993) 11(2) *Mediation Quarterly*; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17 *Law and Human Behavior*.

WHAT MIGHT THE EMPATHY CONTINUUM CONTRIBUTE TO SELF-DETERMINATION?

Research noted above suggests that, before a mediator can convince disputants to exercise self-determination within a mediation session, that mediator must have ensured that the process and the mediator's role within it have provided the disputants an appropriate sense of their competence, autonomy, and relatedness, in the context of the mediation. Other research noted above (P 9) suggests that it is likely that this will lead to the development of a cooperative environment, within the mediation, in which the disputants can work together with a common understanding of their situation and of the many ways in which it can be resolved. Although the disputants are likely to have entered the mediation as individuals, the concept of self-determination assumes that they will work together cooperatively, at least in the development of any resolution to their dispute; and that they will work as a joint entity for that purpose. The mediator's role is to help the disputants make the practical transition from participating as individuals to participating as a cooperative joint entity, exercising cooperative self-determination. Research noted above (P 9) shows that establishing empathy, building rapport, and developing trust lead to cooperation, and it is proposed that the same applies in mediation: the mediators' establishment of empathy, building of rapport, and development of trust, with and between the disputants, underpin the pivotal transition from individual disputants to a cooperative, self-determining joint entity.

Based on existing knowledge about empathy, rapport, trust, and self-determination, the cooperative and self-determining joint entity is likely to be achieved when the mediator is working simultaneously on three approaches:

- Establish empathy, and build rapport *with each disputant*, taking into account their apparent and differing needs for competence, autonomy, and relatedness;
- Facilitate the disputants establishing empathy, and building rapport *with each other*, enabling them to increasingly meet each other's needs for competence, autonomy, and relatedness; facilitate them developing a cooperative working relationship *between themselves* within the mediation context that enables

them to work together, as a joint entity: clarifying their situation and developing ideas for its resolution;

- Maintain and support these individual and joint relationships for the duration of the mediation session; where any of the relationships breaks down, the mediator may need to re-commence establishing empathy and building rapport.

Ideally, this sequence would enable the disputants each to accommodate the other's interests rather than to allow either's interests to be subordinated. At the same time, it should give the mediator a sense of her/his own competence and relatedness. Applying an empathy-based approach rather than a prescribed interpretation of self-determination might enable mediators to better ascertain and accommodate the types of active engagement that are preferred by minority social groups.

Although the progression towards self-determination is described here as a linear sequence of developments, research noted earlier (Pp 6, 7) suggests that the whole process may operate less definitively. As with the adolescent sports participants described earlier, it is more likely that disputants will achieve progress in an apparently piecemeal way, as their engagement–self-determination feedback loop increases their confidence in and capacity for increased competence, autonomy, and relatedness. Attaining any component of the Empathy Continuum might be jeopardised if the mediator were to discount or ignore either of the disputant's willingness and capacity for active engagement in the process.

It is possible that so-called "evaluative" mediators could adopt the principles of the Empathy Continuum and adjust their implementation in accordance with the expressed needs of the disputants in any given case.

CONCLUSIONS

Much of this paper is based on extrapolation from what is known about empathy, rapport, trust, and self-determination in fields of research other than mediation. Investigation of the impacts of these human behaviours on mediation might improve what is known about mediation, and about the role of mediators. Published research findings in fields other than mediation suggest there are important links between people's perceptions of their own competence, autonomy, and relatedness, their active engagement, and their capacity and willingness to exercise self-determination.

Research also suggests that establishing empathy, building rapport, and developing trust are important precursors to those perceptions of competence, autonomy, and relatedness. Although the mediation literature includes theoretical consideration of some of these issues,[58] there is yet to be significant empirical exploration of how any of them might be achieved in the practical context of mediating conflicts and disputes.

It is likely that, because of mediation's essential links to conflict and disputes, empirical studies would be a significant contribution to knowledge about empathy, rapport and trust. Well-designed, rigorous empirical studies could investigate: how empathy, rapport, and trust can be established and maintained in situations of conflict; how the indicators of empathy, rapport, and trust differ (or not) in the context of conflict; how the effects of empathy, rapport, and trust differ (or not) in the context of mediation generally, when compared with other contexts; and how they differ between mediations conducted in different contexts. Knowledge about mediator effectiveness might be enhanced if empirical research can confirm that, in the context of mediation, there are clear relationships between empathy, rapport, trust, and cooperation. In addition, it is important to know how mediators can ascertain (in any specific mediation) which aspects of self-determination disputants are able and willing to exercise, and how they can then build levels of empathy-rapport-trust-cooperation that appropriately engage disputants in the mediation process. The proposed Empathy Continuum is only one of many possibilities.

[58] For example, see Irvine, C., and L. Farrington, *Mediation and Emotions: Perception and Regulation*, in H. Conway and J. Stannard (Eds) *The Emotional Dynamics of Law and Legal Discourse* (Bloomsbury, UK, 2016).

EXPLORING THE RELATIONSHIP BETWEEN CONFIDENTIALITY AND DISPUTANT PARTICIPATION IN COURT-CONNECTED MEDIATION

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Abstract: Confidentiality, though rarely straightforward or well understood in the court-connected context, has been widely perceived as a core defining characteristic of mediation. The limits of mediation confidentiality and the uses to which confidential information may be put has created uncertainty in the legal profession and operates as a disincentive to active disputant participation in mediation sessions. Drawing on empirical research interviews conducted for a doctoral research project, this paper explores the relationship between confidentiality and active disputant participation. It argues that a greater degree of certainty around confidentiality would enhance the opportunity for active disputant participation in the court-connected mediation process and reduce the level of adversarialism which remains evident in mediation events.

Keywords: confidentiality, disputant participation, mediation

INTRODUCTION

This paper reports the outcome of one of several themes which emerged from a PhD research study into lawyers' engagement with court-connected mediation. It also discusses the legal implications of confidentiality in mediation and the effect of confidentiality on disputants' active participation in mediations where the disputing parties are represented by lawyers. Ultimately, it concludes that there is a tension between the rules-based notion of confidentiality and the interests-based notion of disputant participation that is not easy to reconcile. Arguably some of the tension could be resolved if there was greater certainty around the limits of mediation confidentiality but that would involve statutory intervention which might be counterproductive if it also reduced the fluidity of process design which mediation presently enjoys.

The research was conducted in New South Wales (NSW) which is one of six States of Australia. Australia is a federation comprising a central government, six States and a number of Territories. Each of the States and Territories has its own legislature, executive and judiciary. The Federal Parliament legislates for the whole of Australia on matters prescribed by the Australian Constitution. All other matters are left to the States. NSW is a particularly interesting setting for the study of court-connected mediation because it has been less than enthusiastic to introduce some innovative dispute resolution provisions that already operate successfully in other States and under the Federal law and it is not altogether clear why that is so.[1]

METHODOLOGY

The study was an empirical qualitative study comprising in-depth interviews with thirty-five lawyers and mediators operating within NSW. Each research respondent was asked a number of questions from a prepared semi-structured interview questionnaire and the questions were open-ended enough to encourage discussion of matters which were considered important to the respondent but which may not have featured so prominently in the mind of the researcher. The set questions were designed to elicit responses which would reveal the respondent's alignment with one

[1] Note for example the failure to implement the pre-action procedures amendment to the *Civil Procedure Act, 2005* (NSW) in 2009.

or more of the three populist adversarial stereotypes posited by Macfarlane[2] who identified lawyers as people who tend to default to a rights based system of justice in resolving disputes, who regard justice as being equivalent to process and who perceive themselves as the expert in conflict resolution discourse.

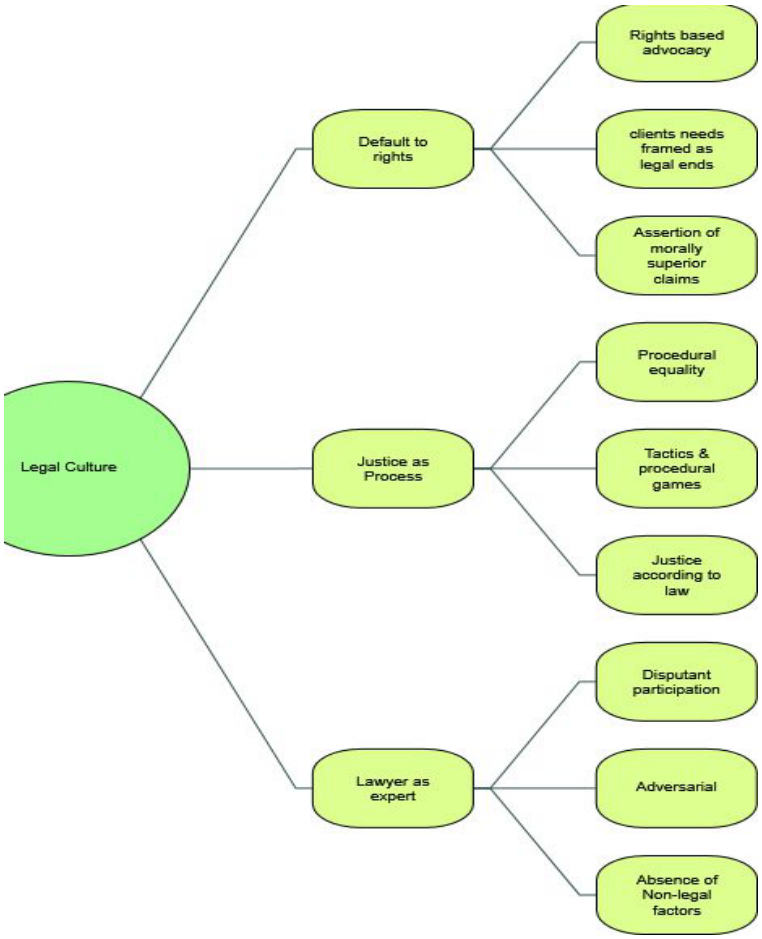

Fig 1. A diagrammatic representation of the three core elements of legal professional identity

By viewing lawyer behaviour through the prism of cultural identity, it was considered possible to reach some firm conclusions about what in fact lawyers are doing when they say they are mediating. In this way, we can form an evidence-based view of whether, in the practice of court-connected mediation, lawyers are honouring the values and beliefs that dispute resolution practitioners hold as essential to qualify a process as mediation.

[2] J Macfarlane, *The New Lawyer: How settlement is transforming the practice of law* (UBC Press 2008) 47.

The sample population demographics of the study are set out in the following tables. Table 1 provides the gender and geographic distribution of respondents and Table 2 shows the distribution of respondent lawyers by work mix and geographic location.

	Lawyers	Mediators
Male	15	3
Female	12	5
City	4	4
Regional	18	4
Rural	5	--

Table 1 Gender and geographic distribution of respondents

	City	Regional	Rural
Family Law		6	3
Personal Injury		1	
Estate litigation		4	
Commercial Litigation	1	4	1
Insurance litigation		1	
Banking and compliance	3		
General practice		2	1
TOTALS	**4**	**18**	**5**

Table 2 Distribution of respondent lawyer sample by work mix and geographic location

THE NOTION OF CONFIDENTIALITY

Confidentiality has long been valued as a defining element of mediation.[3] The promise of confidentiality is one of the reasons why disputants choose mediation rather than to agitate their dispute under the rules-based system of the court where disputes are determined (not resolved)[4] and controversies are quelled in a very public forum where reputations can be harmed and businesses and personal

[3] L Boulle, *Mediation: Principles, Process, Practice* (3rd edition, Lexis Nexis Butterworths 2011) p 669; D Spencer *Essential Dispute Resolution* (2nd edition 2005) p 65-9.
[4] L Street, *Foreward to the First Edition* T Sourdin *Alternative Dispute Resolution* (4th edition, Thomson Reuters 2012) p 12.

relationships damaged. Indeed, it has been considered that some disputes where confidentiality is not in the interests of the parties are for that reason not suitable for mediation at all. Those cases include claims of defamation and sexual harassment where the prevailing interests of the parties are for public denunciation of reprehensible conduct or repair of tarnished reputations. There may be other examples.

From a cultural perspective, the notion of confidentiality has its genesis in the Chinese and other Asian traditions of resolving civil disputes quietly within the household or the immediate circle of people involved in the dispute and not allowing personal conflict to become widely known in the broader community which regarded inability to resolve conflict as shameful and to be avoided.[5]

Within the western legal tradition, the notion of confidentiality arises from the principle of settlement privilege – a concept that was designed to allow litigants to engage in frank discussions about a case in a bid to settle it and to have those discussions protected from the parties' fears that something they say might later be held to have been an admission or otherwise used against them should, despite their best efforts, the case not settle. In this way it was considered that parties would speak more freely about their grievances and the prospects of settlement would be enhanced. Conversely, if settlement discussions were not held in confidence, then disputants would be less inclined to speak openly lest something they say might be used against them in the litigation and so discussion would be stifled and the prospects of settlement reduced. This principle was said to be justified upon the basis that it is in the public interest for disputes to be settled and there is therefore a public interest in respecting the principle of settlement privilege in aid of reducing the amount of litigation before the courts.

Recognising the importance of this principle, the law in Australia has jealously protected the privacy of settlement discussions by embedding settlement privilege into the statutory laws about evidence and section 131 of the *Evidence Act, 1995*

[5] J Gibbs, *The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes* in K Avruch *Context and Pretext in Conflict Resolution: Culture, Identity, Power and Practice* (Paradigm 2013) 64; R Danzig *Towards the Creation of a Decentralized System of Criminal Justice* Stanford Law Review 26:1-54, 1973.

(NSW) provides that evidence of any document or communication is not, without the consent of the parties, to be adduced if the communication or document were brought into existence in connection with settlement of the proceedings. Within the context of mediation in NSW this protection is reinforced by section 30 of the *Civil Procedure Act, 2005* (NSW). Settlement privilege has also been reinforced by the courts. As one judge said:

> *"It is of the essence of successful mediation that parties should be able to reveal all relevant matters without an apprehension that the disclosure may subsequently be used against them. As well, were the position otherwise, unscrupulous parties could use and abuse the mediation process by treating it as a gigantic, penalty free discovery process."*[6]

There are many other instances in Australian law where the principle of settlement privilege is protected by statute.[7] Considered upon this basis, it would seem to follow logically that communications made between parties to a mediation process, the object of which is to reach agreement about ending a dispute, should at the least attract the same level of confidentiality as protects settlement negotiations conducted with the context of legal proceedings.

THE LIMITS OF MEDIATION CONFIDENTIALITY

Notwithstanding these measures, settlement privilege has not always served the interests of mediating disputants and this has become problematic. There are a number of reasons for this. Firstly, the settlement privilege accorded to mediation communications is not absolute and includes limits both as to content of the communication and its proximity to the mediation event. The statutes which protect mediation communications from admission into evidence often prescribe the limits of the protection which may include statements that may be misleading, deceptive or contrary to the requirement of good faith and communications which go to the question of whether a binding agreement has been concluded at the mediation event.[8]

There are also common law exceptions which include communications that cannot objectively be considered as part of the settlement negotiations, statements that are

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[6] *AWA Limited v George Richard Daniels* (1992) 7 ACSR 463 at 468 Rogers CJ Comm D.
[7] See for example *Farm Debt Mediation Act 1994* (NSW) s 18F; *Federal Court of Australia Act 1976* (C'th) s 53B; *Community Justice Centres Act 1983* (NSW) s 28; *Civil Proceedings Act 2011* (Qld) s 53; *Strata Schemes Management Act 2015* (NSW) s 222.
[8] *Boardman v Boardman* [2012] NSWSC 1257.

not concerned with the same subject matter as the negotiations and communications, the disclosure of which will prevent a party from misleading the court.[9]

In *Field v Commissioner for Railways* (1957) 99 CLR 285 (*Field*), a case decided well before mediation was introduced to the Australian dispute resolution landscape, the plaintiff was injured whilst alighting from a train at a remote NSW railway station which had a short platform. It was necessary for the train to make several stops along the platform to disembark its passengers. The plaintiff fell and sustained injury and the question was whether he had contributed to his own literal downfall by stepping off the train while it was moving. The parties entered into negotiations with a view to settlement and the plaintiff agreed, for the purposes of damages assessment, to attend upon the defendant's medical expert, who later gave evidence at the trial. The medical evidence included a statement (admitted into evidence over objection) that the plaintiff had made certain admissions during the consultation and the question was whether those admissions were protected by the settlement negotiation privilege attaching to the ongoing negotiations. The High Court found that they were not. It said (per Dixon CJ, Webb, Kitto and Taylor JJ):

> *"The question really is whether it was fairly incidental to the purposes of the negotiations…To answer this question in the affirmative stretches the notion of incidental protection very far. The defendant's contention that it was outside the scope of the purpose of the plaintiff's visit to the doctor to enter upon such question seems clearly right…* [The admission] *was made without any proper connexion with any purpose connected with the settlement of the action."*[10]

That case was decided a very long time ago and, but for a single intervening matter, might be thought no longer to represent an accurate statement of the law of settlement privilege today. However, in 2012, in *Liu v Fairfax Media Publications Pty Ltd*[11] the NSW Supreme Court expressly adopted the principle set out in *Field* and held that *Field* was concerned with admissions against interest which come within the scope of settlement negotiations and that the test for determining that scope "depends upon what formed part of the negotiations for the settlement of the action and what was reasonably incidental thereto."

These are not simple matters to resolve and, whilst what is *said* in mediations and documents produced in mediation may (subject to some exceptions) be protected by

[9] L Boulle, *Mediation: Principles, Process, Practice* (3rd edition, Lexis Nexis Butterworths 2011) p 675.
[10] *Field v Commissioner for Railways* (1957) 99 CLR 285 293.
[11] *Liu v Fairfax Media Publications Pty Ltd* [2012] NSWSC 1352 [46].

settlement negotiation privilege, there must be considerable doubt about the use to which, for example, lawyers may put information gleaned from mediation in making independent forensic enquiries to further their clients' cases in subsequent litigation, should the mediation not result in resolution of the dispute. This concern was clearly reflected in the data collected for this research.

The second reason why mediation confidentiality has not always served the interests of disputants is because there remains an unresolved difficulty around the meaning of the term confidentiality as it is used in mediation discourse and what precisely is said to be protected by statutory provisions in mediation legislation. It is here worth recalling that Boulle described mediation as being:

> *"…attractive to potential users wishing to avoid adverse publicity and increases parties' willingness to enter mediation and engage in open and frank negotiations in the knowledge that disclosures cannot damage them publicly among competitors or prospective adversaries."*

But the avoidance of adverse publicity or public knowledge is not protected either by statute or by the common law. The protection afforded by the *Civil Procedure Act, 2005* (NSW), the *Evidence Act, 1995* (NSW) and the other statutory provisions dealing with mediation confidentiality is limited to the exclusion of mediation communications and material from *evidence* not from disclosure and not from misuse. Both in the literature and in the statutory response to it, the separate interests of settlement privilege and mediation confidentiality have been conflated with the consequence that the legislation does not guarantee mediation confidentiality and those attending court-connected mediations are not receiving the benefit of it.

Take, as an example, the *Civil Procedure Act, 2005* (NSW). The issues of confidentiality and privilege are dealt with in separate sections of the Act. The issue of privilege is considered in section 30(4) which provides that, subject to section 29(2) of the Act:

> *"(a) evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court or other body, and*
>
> *(a) a document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body."*[12]

[12] *Civil Procedure Act, 2005* (NSW) section 30(4).

Section 29(2) provides that a person may call evidence from any person including the mediator to prove whether an agreement was concluded at a mediation and, if so, the terms of the agreement. This is effectively what happened in *Boardman v Boardman,* [13] an application for specific performance of a mediation agreement where the solicitors who were in attendance at the mediation were called to give evidence of what was said in order to establish that the defendant had willingly executed a mediation agreement upon advice from his legal representatives.

The issue of confidentiality is dealt with in section 31. As a number of lawyer research respondents observed, the confidentiality provision contained in section 31 expressly applies only to the mediator and there is no other provision in the Act which binds either the parties or their legal representatives to confidentiality. According to the usual rules of statutory construction that apply in Australia, the principle *expressio unius est exclusio alterius* would suggest that only mediators are bound by mediation confidentiality in NSW.

The objection is sometimes made that issues of confidentiality should be explored at the intake stage of the mediation process and are in any event covered by the agreement to mediate which is signed by all parties before any exchange of information occurs. People who are involved in mediations but are not parties (such as company employees, directors and the like) usually sign a confidentiality agreement so that they are bound in the same terms as the parties to whose mediation they are privy. Whilst this may be true in the context of large commercial litigation where the parties are all well represented and the mediation occurs in a much more considered environment, the argument overlooks the fact that, increasingly, as mediation becomes more widely accepted as an integral part of the traditional legal institution, courts are referring people to mediation conducted by court registrars and other court officials with whom there is no intake process, no agreement to mediate and no confidentiality protections other than those provided by the statutes referred to above.

It is useful in this context to consider the practice which prevails in the Supreme Court of NSW Family Provisions List. The Family Provisions List is a list maintained by the Equity Division of the Court for the purposes of determining

[13] [2012] NSWSC 1257.

disputes which arise under the contested wills provisions of the *Succession Act, 2006* (NSW). Section 98(2) of the *Succession Act, 2006,* provides that unless the Court, for special reasons otherwise orders, it *must* refer family provisions applications for mediation. There is no provision, either in the Act or the court practice notes which imposes any obligation of confidentiality on the parties to a family provisions mediation. On the contrary, there is a practice note[14] that requires court mediators to lodge with the court a statistical return which shows the name of the mediator, dates of the mediation, whether the parties were legally represented and, to the extent that any terms of settlement are not confidential to the parties, any terms of settlement that are agreed. Nowhere else in the document is there any mention of confidentiality. It is, as one research respondent noted, *"…an administrative tick of the box."*

THE CONSEQUENCES OF UNCERTAINTY AROUND MEDIATION CONFIDENTIALITY

The research data contained numerous examples of lawyers actively discouraging their clients from participating or speaking at the mediation event. Repeatedly, clients were told to be careful what they said, not to say anything unless to answer a direct question or not to say anything without having "run it by" their lawyer beforehand. In some cases, disputants were told not to speak at all and to leave the negotiations entirely up to the lawyers.

The data collection instrument for lawyers contained a question in the following terms: "When attending an ADR event, do you have a practice regarding the level of your client's involvement in the process: that is, do you prefer to speak on behalf of the client or do you prefer to have the client speak during the process?"[15] Invariably the responses to this question were linked directly to the respondents' perceptions of confidentiality security and fears that information disclosed in mediation would either be compromised by disclosure or misused in some other way. The following are some examples of answers to that question. One lawyer respondent said:

> *"It tends to be that either I, or if counsel is involved, counsel, opens and I think that is generally safer but there are instances where the client is sufficiently switched on and intelligent and eloquent and confident*

[14] Practice Note SC Gen 6 of the Supreme Court of NSW.
[15] J Woodward, *Lawyer Approaches to Court-connected Mediation: A New Case Study* University of Newcastle 30th January 2019 Appendix 6.

> *enough to open and is not going to end up doing more harm than good but…it tends to be the exception rather than the rule. I cannot think of an instance where the client has spoken…"*

Another respondent said:

> *"Mostly our clients don't speak. We have said to them that they are more than welcome to but if you're going to get emotional or hysterical then our preference would be don't. Mostly the clients don't. They choose not to."*

Yet another lawyer respondent said:

> *"…I think that they might blurt something out without thinking so I would encourage them to go into one of the breakout rooms and discuss it…"*
> *Q. Alright I just want to take you back to something you said about 'blurting out' something in the mediation. Is that a concern for you that someone would do that?*
> *A. Yes.*
> *Q. Why is that a concern?*
> *A. Just because the clients have engaged their lawyers for a reason so they might say something that would be prejudicial to their case without realising it and they might say something that is privileged and even though I understand that mediation is not allowed to be used in court, I still think it is best if they be advised against giving away anything because it could assist the other side to subpoena them for something or to send them a notice to produce about information or a document that they might not otherwise have known about."*

More extreme examples of lawyer responses to the client participation issue included outright refusals to allow the client to be involved in any discussion during the mediation session. They included the following:

> *"No, I like to do the talking or let counsel do the talking. I use the 'speak if you're spoken to' approach. And I justify that on the basis of, you know, you could get yourself into trouble. You could give away something that you really don't want to give away."*

Another example of this approach to mediation was reflected in the following response:

> *"No, I don't think it is a good idea for the client to be doing the talking. No, not at all. It's for the professionals. It's a much more subtle process – the whole negotiation and the whole process. A client could sour the whole thing so quickly. Forty years of legal experience allows me to be involved in the process."*

The common thread which is discernible in the pattern of these responses is that the cost of permitting (much less encouraging) active client participation in conversation in the mediation process is the risk of "giving away" or "blurting out" something or facilitating another line of enquiry by the opponent or otherwise compromising the integrity of confidential information. What that suggests is that lawyers do not trust the security of mediation confidentiality and, perhaps, do not understand it.

A further indirect consequence of the uncertainty around mediation confidentiality arises from the lawyer's intermediary role between the client and the mediator and the distribution of power in the professional relationship between the lawyer and

client. Rosenthal[16] produced research to show that the outcome of personal injury litigation is directly and proportionately related to the level of involvement which the client has in the lawyer/client relationship. His findings are reproduced in the table below.[17]

Result	*Active Client*	*Passive Client*	
Good	75%	41%	
	(21)	(12)	N = 33
Poor	25%	59%	
	(7)	(17)	N = 24
	N = 28	N = 29	N = 57

Table 3. Client Participation Related to Case Result

Rosenthal's research is quite dated. However, the findings seem to have survived the passage of time. In 1986 Carnevale and Ison carried out a series of social experiments that were designed to discover the conditions and processes which lead to or detract from the discovery of integrative solutions in negotiations around conflict. Participants in the study were subject to a contrived negotiation under control conditions in which some respondents were provided with supportive and positive reinforcement (called 'positive affect') and others were not. The study concluded that negotiators in whom positive affect had been induced achieved consistently higher outcomes than negotiators not in a positive state.[18] Similar results to those reported in Carnevale and Ison's research have been reported in several other studies in the United States including those by Pruitt,[19] Isen,[20] Isen and Daubman[21] and Isen, Johnson, Mertz and Robinson[22] who concluded that contentious or adversarial tactics interfere with the discovery of integrative solutions

[16] D Rosenthal, *Lawyer and Client: Who's in charge* (Sage 1977) 57.
[17] Ibid.
[18] P Carnevale and A Isen, *The Influence of Positive Affect and Visual Access on the Discovery of Integrative Solutions in Bilateral Negotiation* (1986) 37.
[19] D Pruitt, *Negotiation Behaviour,* Academic Press, 1981.
[20] A Isen, *The Influence of Positive Affect on Cognitive Organization* (Paper presented at the Stanford Conference on Aptitude, Learning and Instruction: Affective and Cognitive Processes, 1983)
[21] A Isen and K Daubman , *The Influence of Effect on Categorisation* (1984) 47 Journal of Personality and Social Psychology, p 1206.
[22] A Isen, M Johnson, E Mertz, and G Robinson, *The Influence of Positive Affect on the Unusualness of Word Associations* (1985) 48 Journal of Personality and Social Psychology, p 1413.

and that problem-solving tactics enhance the prospect of discovering integrative solutions.

CONCLUSIONS

This paper argues that when lawyers prepare their clients for mediation by providing them with 'positive affect,' reinforcing the integrative and participatory dimensions of mediation and encouraging them to address issues directly with the other parties, they place their clients in an optimal frame of mind to take full advantage of the mediation process. Conversely, if lawyers act defensively and caution their clients against 'giving something away' or to check with their advisers before allowing the client to speak, the advice is likely to have a negative effect on the process, which is less likely to result in reaching a truly agreed outcome. It is further suggested that negative or defensive attitudes on the part of lawyers and restraints on their clients' active participation in mediation are likely to result in cautious approaches by the clients, an increase in unhelpful adversarial conduct and suspicion or lack of conviction about the terms of any settlement reached.

At the commencement of this paper it was noted that, although confidentiality is often perceived to be one of the defining characteristics of mediation, its path is never straightforward or easily understood by lawyers who are engaged in court-connected mediation. Those claims were confirmed by the data collected for this research project and revealed an issue which does not ever appear to have been satisfactorily resolved in the literature. Essentially, the issue is that uncertainty around the issue and extent of confidentiality in court-connected mediation continues to operate as a disincentive to active disputant participation and provides a powerful legal reason why lawyers should advise their clients not to say anything and to allow the lawyer experts to take charge of the mediation discussions. This was the single most powerful and consistent theme which emerged from the data of lawyer interviews. In almost every case, the question with respect to their clients' involvement with the mediation process was met with provisos that the lawyer would discuss beforehand what is to be said, would retain control of the mediation process and would make decisions about whether the client should speak or not.

Lawyer respondents repeatedly expressed concerns that "…you know whatever they say will not help their case" or that clients would "…end up doing more harm than good…" or that "They say the wrong things. Some people are just stupid. You can't shut them up and they will say all sort of stupid things which do not enhance the position so you have to judge the position as to when and if you get them to speak." One lawyer said: "There are some clients that I think could hurt themselves and I will caution them about leaving some matters to either myself or the barrister." Undoubtedly, this approach suppresses consensus-building and innovative thinking about dispute resolution and detracts from the overall benefits of the mediation including the sustainability of agreements reached,[23] but it does not protect the client's legal position. Pressed on why, given the confidential nature of mediation, this should be a problem, most lawyer respondents gave answers that amounted to uncertainty around the limits of confidentiality. Whilst they were happy to acknowledge that what was said in mediations is confidential and therefore protected, their concerns were that the other party could use information obtained in mediation to issue a subpoena or undertake further collateral investigations which would provide information harmful to their case and which was not caught by mediation confidentiality. Examination of the legal authorities of *Field v Commissioner for Railways* (1957) 99CLR 285 (*'Field'*) and *Liu v Fairfax Media Publications* [2012] NSWSC 1352 reveals that those concerns are well justified.

There are, of course, as Boulle has pointed out[24] compelling reasons why confidentiality should not be unlimited and perhaps the most persuasive of them is the principle that all relevant evidence should be available to judges and tribunals whether or not it has been adduced in mediation. In the end it will probably come down to a balancing of competing policy objectives. However, it should be accepted that, to the extent that mediation confidentiality is qualified, there will remain a reluctance on the part of lawyers to encourage active client participation in mediations and that, in turn, is likely to inhibit the opportunity for disputant ownership of the mediation process and its outcomes when there is litigation in the background

[23] T Brennan, *An Evaluation of the Sustainability of Agreements Reached through Mediations Conducted by the Dispute Resolution Centres of the Department of Justice and the Attorney General Queensland Between 1999 to 2003* (LLM Thesis, Queensland University of Technology, 2010) 146 where it was expressly found that those who felt that they were heard during the mediation were associated with a greater proportion of sustainable agreements.

[24] L Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths 3rd edition 2011) p 670.

and lawyers are involved. This was an important finding of the research because it goes directly to the compatibility of court-connected mediation with the traditional adversarial system of justice.

IS PARTY SELF-DETERMINATION A CONCEPT WITHOUT CONTENT?

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Abstract: Party self-determination is a central concept in mediation theory, yet many basic questions about it remain unaddressed. Does it describe only how mediating parties, acting together, resolve their dispute or does it also describe how they act towards each other? If the former, the name of the concept is confusing and the concept itself adds little to the existing distinction between a dispute resolved by agreement of the parties and one where a result is imposed on the parties by an adjudicative decision-maker. If party self-determination describes how mediating parties act towards each other, it loses all content. The cause of the loss of content is misplaced concern that mediated agreements may be substantively unfair as a result of power imbalances between the parties. The concern is misplaced because a mediator cannot know whether a mediated agreement is substantively unfair and, for practical and legal reasons, cannot even up power imbalances. Next, does party self-determination purport to prescribe how mediation should be conducted or does it merely describe its conduct? If the former, there does not appear to be any authority for its prescriptions. If the latter, its description of mediation diverges widely from conventional Australian practice. Finally, party self-determination fails to explain the two central mechanisms that make mediation such an effective method of dispute resolution: The power of doubt and the terrible choice that mediating parties are forced to make during the "end game" of mediation. Given these deficiencies, the concept of party self-determination should be abandoned as lacking utility.

Keywords: party self-determination, power imbalances, the *end game* of mediation

INTRODUCTION

This paper considers several sets of questions about party self-determination. The concept is considered by the literature on mediation theory to be of great importance.[1] Even the Chief Justice of New South Wales, when addressing issues arising for barristers appearing at mediations rather than in court, referred to the need to allow for party self-determination which, his Honour noted, had been described as the "most fundamental principle of mediation".[2] Yet many basic questions about party self-determination seem not to have been addressed. This paper attempts to fill some of the more significant gaps.

First, does party self-determination describe only how the parties to a mediation, viewed collectively, resolve their dispute? Or does it also deal with how the parties, during a mediation, act towards each other? If it is the latter, does the concept make sense or, by attempting the second step, does it lose all content? This first set of questions concerns the scope and content of the concept of party self-determination.

The second set of questions stems from what the writer regards as the loss of content of the concept of party self-determination. What, it is asked, caused the collapse of what is regarded as such an important concept in mediation theory? The

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[1] See, *e.g.*, Rachael Field and Jonathan Crowe, "*The central role of party self-determination in mediation ethics*", The Australian Dispute Resolution Research Network 17 December 2017, https://adrresearch.net/2017/12/19/the-central-role-of-party-self-determination-in-mediation-ethics; Rachael Field and Jonathan Crowe, "*Playing the Language Game of Family Mediation: Implications for Mediator Ethics*" in Lola Ojelabi and Mary Noone (eds), "*Ethics in Dispute Resolution*" (Federation Press, 2017) at 92; Jonathan Crowe, "*What Comes After Neutrality in Mediation Ethics?"*, The Australian Dispute Resolution Research Network 10 October 2017, https://adrresearch.net/2017/10/10/what-comes-after-neutrality-in-mediation-ethics/ Susan Douglas, "*Ethics in Mediation: Centralising Relationships of Trust*", in Ojelabi and Noone, "*Ethics in Dispute Resolution*" at 45, 49; Susan Douglas, "*Neutrality, Self-Determination, Fairness and Differing Models of Mediation*", JCU Law Review 2012/2 at 38; Mediator Standards Board, "*National Mediation Accreditation System*" (revised effective 1 July 2015) Part 111, cl 10.1c(iii) (describing mediation as a "*process that promotes the self-determination of the participants*"); Laurence Boulle, "*Mediation: Principles, Process, Practice*" (LexisNexis Butterworths, 1996) at 65; Bobette Wolski, "*An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making"*, in Ojelabi and Noone, above, at 68; Samantha Hardy and Olivia Rundle, "*Mediation for Lawyers*" (CCH 2010) at 208 (referring to "*Empowerment*", namely "*supporting a client to participate in the mediation and take ownership of the process and outcome*" as a "*value of the dispute resolution field* that lawyers should promote).

[2] The Hon T F Bathurst AC, Chief Justice of New South Wales delivered a paper to Australian Disputes Centre, 30 March 2017), "*Off with the wig: Issues that arise for advocates when switching from the courtroom to the negotiating table,"* http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Bathurst%20CJ/Bathurst_20170330.pdf. His Honour was quoting Bobette Wolski, "*On Mediation, Legal Representatives and Advocates*" (2015) 38(1) University of New South Wales Law Journal 5, 30, herself quoting James J Alfini, "*Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators*" (2008) 49 South Texas Law Review 829, 830. I am indebted to one of the anonymous reviewers of this paper for alluding to the Chief Justice's speech.

answer, it is suggested, is misplaced concern about whether agreements reached via mediation by parties in dispute are substantively unfair as the result of a power imbalance between the parties. The article argues that there are two reasons that this concern is misplaced. First, whether an agreement which the parties to a mediation intend to enter into is substantively unfair cannot be known by the mediator, for reasons explained in the paper. Second, even if the mediator knew that the agreement was substantively unfair because of a power imbalance between the parties, the mediator would not be able to even up the imbalance, for a practical and a legal reason, both explained in the paper. Accordingly, concerns about power imbalance and substantive unfairness not only cause the concept of party self-determination to lose all content, but also constitute a distraction from understanding why and how mediation is a powerful method of dispute resolution.

The third set of questions concerns whether the concept of party self-determination prescribes how mediation should be practised in Australia, or whether it merely purports to *describe* how mediation is in fact practised in Australia. Two subsidiary sets of questions flow from this question. If party self-determination is prescriptive, who prescribed it and by what authority? If, on the other hand, party self-determination is descriptive, how accurately does it reflect the contemporary practice of mediation in Australia? These questions concern the nature of the concept of party self-determination and are dealt with by reference to concerns voiced by prominent dispute resolution academics about party self-determination.

The fourth and final question is how useful is the concept of party self-determination in a discourse about mediation. The issue that arises is how comprehensive the concept of party self-determination is in its description of the essential features of mediation. The author suggests that it does not include two central mechanisms within mediation which explain mediation's enormous power to resolve disputes and thus is of limited usefulness. The overall conclusion of the paper is that, given its limitations, the concept of party self-determination should be abandoned as lacking utility.

PARTY SELF-DETERMINATION AS REFERRING TO THE RELATIONSHIP BETWEEN PARTIES IN DISPUTE AND THE REST OF THE WORLD

Field and Crowe describe party self-determination this way[3]:

> *"Party self-determination is a process goal of mediation driven by the value of party autonomy. The notion encompasses a number of related ideas, including direct participation, control over the content of a dispute, and party dignity, self-agency and empowerment. As Nancy Welsh notes, party self-determination is widely described as 'the fundamental principle of mediation'. Welsh usefully summarises party self-determination in terms of four core characteristics: active and direct participation by the parties in communicating and negotiating; party choice and control over the substantive norms that guide their decision-making; party involvement in the creation of settlement option; and party control over the terms and adoption of any agreement."*

Similarly, Boulle and Field describe party self-determination as[4]:

> *"Party self-determination is the major and most fundamental value proposition behind the mediation process. It connotes party empowerment and party autonomy and posits a procedure that engenders respect and dignity for the parties along with acknowledgment of their expertise in, and capacity to resolve, their own disputes. It is the 'ultimate value' of mediation."*

"Party self-determination" thus is used to contrast mediation with other forms of dispute resolution, particularly adjudicative methods such as Court determination and arbitration. The phrase makes the point that what is distinctive about mediation is that the parties themselves decide many important things necessary for resolving their dispute. Most importantly, it is the parties who decide how and whether their dispute has been resolved and, if so, on what terms. The phrase thus contrasts the role of the parties in resolving their dispute with the roles of external third parties like mediators, arbitrators and judges. Ideally, in resolving their dispute, the parties are deeply involved in every aspect of the process.

In a recent post entitled "The central role of party self-determination in mediation ethics", party self-determination was described by Rachael Field and Jonathan Crowe as "the primary ethical imperative of mediation".[5] They say:

> *"The possibility of achieving self-determination for the parties is what distinguishes mediation from other dispute resolution processes and makes it a distinct and valuable process in its own right ... [T]he achievement of party self-determination provides a principled foundation for the legitimacy of the mediation process ... Party self-determination is the key factor distinguishing mediation from litigation and other dispute resolution processes, because mediation provides the parties with the ultimate power to decide how to resolve their dispute. A mediator's role is to use their expertise so as to enable and empower the parties to reach their own decision. This characteristic of mediation is special and unique."*

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[3] Rachael Field and Jonathan Crowe, "*Playing the Language Game of Family Mediation: Implications for Mediator Ethics*", n 2, 92.
[4] Laurence Boulle and Rachael Field, "*Mediation in Australia"* (LexisNexis Butterworths 2018) 40-41.
[5] Field and Crowe, "*The central role of party self-determination in mediation ethics*", n 2.

This passage emphasises how party self-determination distinguishes mediation from other dispute resolution processes: It is the parties themselves who have the ability and responsibility to resolve their dispute. It thus describes how the parties, acting together, participate in a dispute resolution process different from adjudication by a court, tribunal or arbitration. "A central aspect of the mediator's ethical role"[6], somewhat paradoxically, is to assist the parties themselves to reach agreement on how to resolve their dispute. Thus, while a mediator may well work hard throughout a mediation, the ultimate decision whether to resolve the dispute and, if so, on what terms, is made by the parties. In the facilitative model of mediation, the mediator is not permitted to express views on the strengths and weaknesses of the parties' respective factual and legal claims. Rather, it is "the achievement of party self-determination", namely the parties' agreement on how to resolve their dispute, which "provides a principled foundation for the legitimacy of the mediation process".

If this is the content of the concept of party self-determination, it must be said that the name given to the concept is confusing. The natural meaning of "party self-determination" is that an individual party in dispute can herself, himself or itself determine the outcome of the dispute. It is clear, however, that the concept does not mean this at all, for at least two reasons. First, it refers to parties in dispute working together towards resolving their dispute by agreement, not to an individual party determining the outcome of the dispute. Second, because mediation is a structured negotiation, an individual party cannot determine how the dispute will be resolved, for the reason that it requires the agreement of all parties to resolve the dispute. Perhaps the concept should have been called "parties' self-determination" or even "parties' determination of their dispute".

DOES PARTY SELF-DETERMINATION ALSO DESCRIBE THE RELATIONSHIP BETWEEN PARTIES IN DISPUTE?

Does the concept of party self-determination only refer to parties in dispute working together to resolve their dispute? Or does the concept go further and also encompass how parties to a dispute relate to each other in the course of resolving

[6] Field and Crowe, "*Playing the Language Game of Family Mediation: Implications for Mediator Ethics*", n 2, 92.

the dispute? As already noted, the natural meaning of "party self-determination" is that a party can herself, himself or itself determine the outcome of the process engaged in. But mediation is a structured negotiation; unlike an adjudicative process such as going to court, mediation will not produce a result unless the parties agree on a result. It seems to follow that one party cannot self-determine the outcome of a mediation because achieving that result requires the agreement of the other party.

This tends to indicate that the concept of party self-determination is inappropriate to describe the behaviour of parties towards each other at a mediation. The use of "self" is particularly inappropriate, suggesting as it does that each party's aim is to get the best possible deal for itself.

As noted, party self-determination may be a useful concept for describing the conduct of the parties collectively in relation to the outside world, in the sense that it is they, and no-one else, who determine how and whether their dispute is resolved. Given this, can the concept meaningfully refer to the relationship between the parties? As described by Field and Crowe, party self-determination also encompasses how the parties relate to each other in the course of resolving their dispute by mediation. They contend[7]:

> *"Party self-determination in mediation is also distinctive because it is relational - grounded in connection, cooperation and collaboration. This concept of self-determination is very different from an atomistic notion of autonomy that emphasises privacy and self. An atomistic conception of autonomy arguably underpins the adversarial legal system because each party is encouraged to advocate single-mindedly for their own interests. In mediation, by contrast, party self-determination does not exist on an individual level; rather, it is holistic and relational, encompassing the needs and interests of both parties. If only one party experiences self-determination, the process has not succeeded in its aims."*

Party self-determination thus also refers to the way in which parties relate to each other during the process of resolving their dispute by mediation. It is based on a model of mediation in which the parties are not free "to advocate single-mindedly for their own interests" but must engage in "connection, cooperation and collaboration" and, during their negotiations, must have regard for "the needs and interests of both parties". If "only one party experiences self-determination"(i.e., apparently, one party gets its way at the expense of the other and, literally, achieves party self-determination) then (apparently paradoxically), "the process has not succeeded in its aims" because "party self-determination does not exist on an individual level".

[7] Field and Crowe, "*The central role of party self-determination in mediation ethics*", n 6.

This is quite difficult to understand. First, if party self-determination does not exist on an individual level, it does not seem possible for one party alone to experience it. Second, it seems that either both parties achieve party self-determination, or neither of them does. Third, it is apparent that focussing on the terms of the agreement made by the parties at the end of the mediation produces a seismic shift away from the significance of the fact that they themselves reached agreement. While Field and Crowe tell us that "mediation provides the parties with the ultimate power to decide how to resolve their dispute", it seems that their reaching agreement may not necessarily result in party self-determination. Presumably, this is because one party has been able to cause the other to enter into an agreement that does not meet the interests and needs of the latter.

Susan Douglas has made this point explicitly in her discussion of self-determination:

> *"In principle substantive fairness is equated with the parties' self-determined outcomes - the agreements they reach consensually. The limitation of this logic in practice is that imbalances of power as between parties can produce outcomes that are not substantively fair though consented to. Creating a procedurally fair process may not be enough to safeguard the self-determination of one party where a structured or entrenched inequality between parties impedes the personal autonomy of the vulnerable or disadvantaged."*[8]

If the concept of party self-determination extends to the relationship between the parties, this passage and the earlier passage by Field and Crowe seem to reveal a contradiction at the heart of the concept of party self-determination. On the one hand, it is the agreement of the parties on how to resolve their dispute that constitutes party self-determination, defines the process of mediation, distinguishes it from other dispute resolution processes, ensures substantive fairness, provides a principled foundation for the legitimacy of the mediation process and forms the basis of an entire system of mediation ethics. Yet, on the other hand, it is said that the presence of a power imbalance may lead the parties to agree on an outcome that is not substantively fair and does not safeguard the party self-determination of the weaker party.[9] It is noted that the emphasis has shifted away from the process by which and the fact that the parties reached agreement, to consideration of the *content* of the agreement. The contradiction that arises is that, although party self-

[8] Susan Douglas, "*Neutrality, Self-Determination, Fairness and Differing Models of Mediation*", n 2, 38.
[9] Boulle and Field argue that at that consensuality as to outcome is a "*key element*" of party self-determination, that this requires full equality of bargaining power but that, in practice, there are few mediations where full equality exists. This seems to constitute a recognition that in practice, as between parties in dispute, party self-determination is a concept without significant content.

determination is defined and achieved by the parties reaching agreement, it seems that, sometimes, despite the parties reaching agreement, party self-determination is not achieved. Failure to achieve party self-determination occurs when mediation results in "outcomes that are not substantively fair but are consented to."

In practice, massive and probably insoluble problems arise from this concept of party self-determination[10]. But, even if one puts aside the practical problems, there is a much deeper problem arising from extending party self-determination to the relationship between the parties themselves and by focussing on the content of their agreement rather than on the fact of agreement. If party self-determination is the quality that arises from the parties' agreement to resolve their dispute, how can it be that not all resolutions agreed to by the parties generate party self-determination?

If some agreed settlements are judged not to generate party self-determination, that must be because the settlement agreement has been found lacking by reference to criteria that are independent of whether the parties reached agreement. That in turn must mean that the presence of party self-determination is not created and defined by the parties' agreement but, instead, by their agreement satisfying some external criteria of substantive fairness. This gives rise to a host of questions: What are these criteria; who laid them down; who applies them in order to assess whether, in a particular case, the parties' agreement achieves party self-determination; and by what authority do they do this? The writer is not aware of answers to any of these questions.

Yet further, and alarmingly, the use of external criteria to establish whether party self-determination exists destroys the original concept of party self-determination as the result of the parties' agreement. This is because, of necessity, the use of external criteria to assess whether party self-determination is present has the effect that party self-determination is not, or is not necessarily, the product of a process by which "mediation provides the parties with the ultimate power to decide how to resolve their dispute". Indeed, party self-determination no longer necessarily is the product of any particular process at all.

[10] For example, how could such agreed but substantively unfair outcomes be detected, given that mediations invariably take place in private? What should be done in this situation, and by whom? How, by whom and by what authority could such agreed outcomes be revoked or modified?

In short, one cannot conceptually have it both ways: On the one hand, define party self-determination as the product of the parties' agreement on how to resolve their dispute and, on the other hand, contend that, in some cases, their agreement has not produced party self-determination because it failed to satisfy external criteria of substantive fairness. One cannot regard the parties as free to resolve their dispute in any manner on which they can agree but deny in some cases that they have achieved party self-determination despite their having reached agreement. Party self-determination thus has been redefined: Its presence is independent of whether the parties have reached agreement. It is present if and only if their agreement satisfies external criteria about substantive fairness.

Focussing on substantive fairness thus causes the concept of party self-determination to lose all content relating to the process by which the parties in dispute themselves reached agreement on a resolution of their dispute, despite this being the core content of the concept. Indeed, in principle, if the adjudicated resolution of a dispute imposed on parties by a court or an arbitrator satisfied external criteria about substantive fairness, it could be said to have achieved party self-determination. Such an absurd result appears to indicate a fundamental flaw in the reasoning that led to it.

THE CORROSIVE EFFECT ON MEDIATION THEORY OF CONCERNS ABOUT SUBSTANTIVE UNFAIRNESS RESULTING FROM POWER IMBALANCES

Retracing our steps, it can be seen that the theory of party self-determination went off the rails at the point where concerns about the substantive fairness of agreements reached by the parties were raised. It is important to analyse why this train wreck happened.

Dr Douglas, it will be recalled, said "imbalances of power as between parties can produce outcomes that are not substantively fair though consented to".[11] On analysis, inherent in this statement are an empirical, a logical, a legal and a practical difficulty.

[11] Susan Douglas, n 9.

The empirical difficulty is establishing, as a matter of fact, that imbalances of power have any particular effect on the results of mediations. That problem is considered in this part of the paper, together with a critically-important related problem: On the assumption that imbalances of power affect the results of mediations, there is both a practical and a legal reason why the mediator cannot prevent this happening.

The logical difficulty is that, if party self-determination means that a mediated outcome is regarded as fair if the parties agree to it, how can a particular outcome not be substantively fair, despite having been agreed to by all parties? For this to be possible, substantive fairness must be assessed by criteria independent of what the parties to the dispute believe to be the appropriate resolution of the dispute.

The legal difficulty is that the law of contract holds parties to agreements that they have struck, power imbalances and unfairness notwithstanding. It does not render contracts or deeds revocable or void unless they were entered into as the result of undue influence, unconscionable conduct, fraud, coercion or some other vitiating factor such as mental incapacity. In the absence of one of these vitiating factors, the law holds the parties to a contract or a deed to their bargain.

In general, unfair contracts thus are valid and enforceable. When the civil law renders a contract or deed revocable or void, it does so not because the agreement is regarded as substantively unfair, but because some vitiating factor renders it unsafe[12]. Why should a settlement agreement or deed entered into at the end of a mediation be treated differently?[13]

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[12] For example, in *Louth v Diprose* [1992] HCA 61, 175 CLR 621 at 631 Brennan J quoted with approval Salmond J in *Brusewitz v Brown* (1923) NZLR 1106 at 1109: "The law in general leaves every man at liberty to make such bargains as he pleases, and to dispose of his own property as he chooses. However improvident, unreasonable, or unjust such bargains or dispositions may be, they are binding on every party to them unless he can prove affirmatively the existence of one of the recognized invalidating circumstances, such as fraud or undue influence."

[13] A recent decision of the Supreme Court of Queensland shows that mediation settlement agreements are not treated differently. In the case of *Collins v State of Queensland [2020] QSC 154*, appeal filed 29 June 2020 arose out of proceedings in negligence and breach of statutory duty brought by Mr Collins against Queensland, in which he claimed that Queensland's failure to provide a navigation light in a particular place had caused the wreck of his yacht, for which he claimed damages of about $1.5 million. The dispute was settled at a court-ordered mediation, but Collins then brought proceedings to have the settlement agreement set aside. The Court held: 1) There was no evidence that the mistake made by the mediator was made other than in good faith ([41]); 2) Under the mediation agreement, the mediator was entitled to put to Collins observations about the practicality of proceeding to litigation, "which plainly enough would include pointing out poor prospects on the facts as he saw them (correctly or otherwise)": (id.) and 3) There was no basis for a finding that the mediator applied illegitimate pressure to Collins: (id.).

The practical difficulty overwhelms all the others. It does not seem to be acknowledged as a difficulty by those concerned about whether mediation may result in substantively unfair (but agreed to) agreements. The practical difficulty is that a mediator cannot know whether an agreement that the parties are proposing to enter into to resolve their dispute is substantively fair. This is not to suggest that mediators are insensitive, uncaring or unperceptive. It follows from the fact that, in any particular case, the mediator cannot know whether a proposed settlement agreement is substantively fair.

How could the mediator determine whether substantive fairness was present in an agreement proposed to be entered into by the parties? There is no point asking the parties because they will disagree. It the parties agreed on what constituted a substantively fair agreement, they would not need a mediation or a mediator. The reason they are having a mediation is that they disagree about what a substantively fair outcome is.

Thus, if the mediator asked the plaintiff what she regarded as a substantively fair outcome, she probably would say something like:

> *"My lawyer tells me that if I don't settle at mediation, my BATNA is an award of damages of about $1 million for my terrible injuries, plus an order that the defendant pay all my costs of about $150,000. So that's what I regard as a fair outcome."*

And the defendant, asked the same question, probably will say something like:

> *"The plaintiff claims to have slipped and fallen on grapes on the floor of the fruit section of my supermarket. But we have CCT footage of a vacuum machine going over the floor a few minutes before the fall, so we think the Court will find that the plaintiff carelessly dropped the grapes herself and then slipped on them. My lawyer tells me that, as a result, the plaintiff will probably fail to prove negligent breach of a duty of care by the supermarket. At worst, the Court will find significant contributory negligence by her. Anyway, my lawyers also have clandestine video showing that the plaintiff has recovered from any injury suffered and once again is participating in tango competitions. So if I don't settle at mediation, my BATNA is: Verdict for the defendant and an order that the plaintiff pay my costs, which are about $100,000. So that's what I regard as a fair outcome."*

So an inquiry by the mediator to the parties as to what constitutes a substantively fair result produces a range of results from $1,150,000 (plaintiff receives damages of $1,000,000 plus reimbursement for the plaintiff's costs, totalling $1,150,000) to plaintiff paying both sets of costs (i.e, $150,000 plus $100,000 = ($250,000)) - a total

range of $1,400,000. This is no help at all to the mediator in terms of knowing what a substantively fair outcome of the dispute is.[14]

How else could the mediator know what a substantively fair resolution of the parties' dispute is? Experienced mediators know that they only know as much about the dispute as the parties choose to tell them. Sometimes, they are provided only with the pleadings and short position papers. Often, they know that they only see the tip of the tip of an iceberg of dispute which largely floats below the waterline, out of sight.

Therefore, the mediator knows she or he is in no position to form an opinion on what a substantively fair resolution of the dispute is[15]. Indeed, the only way to get an objective answer to this question is to submit the dispute to arbitration or to trial by a court - but that, of course, is what the parties are trying to avoid by having a mediation.

All discussion about whether mediators have an obligation to attempt to ensure a substantively fair outcome is necessarily based on the assumption that a mediator can know what the substantively fair outcome is. That assumption is false. In the writer's view, it follows that none of the four problems created by concerns about the substantive fairness of agreements reached at mediation is soluble. This is a valid reason not to give weight to such concerns.

Moreover, those concerns are inconsistent with giving primacy of place to the fact that mediation is very successful in assisting parties to resolve their own disputes on

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[14] Nussen Ainsworth and Svetlana German in "*NMAS and the distinction between process and substance in Court-Connected Mediations*", The Australian Dispute Resolution Research Network 9 January 2020 https://adrresearch.net/2020/01/09/nmas-and-the-distinction-between-process-and-substance-in-court-connected-mediations/ address whether mediators have an obligation to ensure a just outcome. They say: "In court connected mediation there is an additional argument that the outcomes should be measured by legal standards, as parties in court connected mediation should be entitled to expect "equivalency justice" which has both procedural and substantive components." If "*equivalency justice"* means that a party should be entitled to expect the same result at mediation as if they went to Court, there are three large problems with this argument. The first, already discussed, is that the parties will disagree on what "*equivalency justice*" is and the mediator cannot know what it is. The second problem, discussed in Part 6 of this paper, is that because there necessarily is doubt as to the outcome of the Court case, each party will have to compromise away from its BATNA in order to settle at mediation and thus will not achieve as good a result as if it went to Court and won . The third problem is that, if the parties went to Court, one would lose and get nothing except a costs order against it. It certainly is not part of a mediator's role to pick winners and penalise losers. In any event, why would a party to a mediation enter into a settlement agreement that gave it nothing?

[15] A mediator who was required to form an opinion as to the substantively fair outcome of the dispute would in effect be acting as an evaluative mediator rather than a facilitative one. If the dispute were then settled in accordance with the mediator's evaluation, the parties would be deprived of party self-determination. Ironically, a mechanism intended to enhance party self-determination would deprive the parties of it.

their own terms. And, as has been seen, the concerns destroy the concept of party self-determination[16]. They also divert attention from very significant questions, such as why mediation works and how mediation works (See discussion in detail below).

As has already been noted, it is thought that power imbalance in mediation may lead to substantively unfair agreements. Perhaps as a result, power imbalance has long been a major concern to academics writing about mediation. Concern about the effects of power imbalances has led to discussion about whether mediators have a duty to even up imbalances of power.

In the writer's view, most discussion of this issue assumes that power in mediation is a monolithic and fixed entity. But the reality is that power in mediation comes in many shapes and forms[17], some of which may balance out others. Consider a simple example: Which is the more powerful at a farm debt mediation: A Big Bank with vast financial resources that has a weak case in law and is represented by a leading senior counsel who, because of the press of High Court appearances, is very underprepared for the mediation or - on the other hand - the small-time farmer indebted to Big Bank whose case in law is strong, who will fight to the death not to be dispossessed of the farm that has been in her family for six generations, and who is represented by a superbly-prepared, lateral-thinking country solicitor experienced in appearing at farm debt mediations? It is not at all obvious which party is the more powerful. It thus is often difficult to work out who is the more powerful party, and why[18]. And power in a mediation may not be static but can move around.[19]

But the greatest obstacles to power-balancing by a mediator are practical and legal and these obstacles render discussion of power-balancing by mediators entirely academic. The practical problem is this: If a mediator disclosed before the mediation - say, in their mediation agreement or at the preliminary conference - that they intended to attempt to level up the parties' power at the mediation, imagine the reaction of a party who had spent a lot of time and money preparing for the

[16] Susan Douglas, n 9.
[17] In "The Power of Parties in Mediation: What is the Mediator's Role?", posted on 4 July 2019 on The Australian Dispute Resolution Research Network: https://adrresearch.net/2019/07/04/, the writer created a taxonomy of the types of power that might be present at a mediation.
[18] *Id.*
[19] *Id.*

mediation, in order to bolster its negotiating power. That party would say something like this to the mediator:

> *"You can't be serious. I've spent a lot of time and money preparing for this mediation and I happen to know that the other party has been lazy and stingy in its preparation. They're planning just to turn up and hope for the best. You're telling me that, if we hire you as the mediator, I'll end up paying you good money to undo the effect of all the preparation that I've spent a lot of money on ... just because the other party is lazy and stingy and won't be prepared for the mediation. There are lots of other mediators available on the day of the mediation and we're going to go and hire one who won't undo all the good work we've done."*

Thus, a mediator who discloses an intention to engage in power-balancing is very unlikely to be hired as the mediator and therefore will not have any opportunity to balance power.

The legal problem is even worse. A mediator who discloses that they intend to balance power is unlikely to be hired as the mediator. On the other hand, a mediator who intends to engage in power-balancing but does not disclose their intention to the parties will probably breach the mediation agreement and almost certainly will breach the *Australian Consumer Law*[20]. It follows that, unless mediators are prepared to engage in prohibited conduct that may render them liable in damages, they will not in practice have an opportunity to balance parties' power.

Further, the reason a mediator might want to balance the parties' power is to increase the likelihood that the mediation will result in a substantively fair agreement - but, as already discussed, a mediator cannot know what result is substantively fair. Therefore, even if power-balancing by a mediator were possible, it would be pointless.

Yet further, concerns about power differentials may be misplaced because, if a dispute is not resolved at mediation, the alternative usually is going to court. If the plaintiff has a good and valuable cause of action against the defendant, he or she is powerful by virtue of having very real prospects of success in court. Nonetheless, disputes will settle at mediation on bases that may strike us as unfair but which are agreed to by the parties. This is often caused by legal costs rules, which can have a profound influence on mediation outcomes.

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[20] *Id.*

Consider a simple and common example. In Australian law, a plaintiff may discontinue her or his proceeding at any time but, on discontinuing, will be ordered to pay the defendant's costs unless the defendant agrees otherwise[21]. This rule means that, in order for a plaintiff to get to the point of running a court case against the defendant, she or he has to spend money on her own lawyers and has also to incur a liability to pay the defendant's costs should she wish to discontinue the proceedings.

The plaintiff reaches a point at which, in order to succeed against the defendant, she will have to incur the costs of running the trial. She or he may not be able to afford to pay these costs. But the alternative - discontinuing the proceedings - carries with it the obligation to pay both the plaintiff's and the defendant's costs to date, which the plaintiff cannot afford either. The plaintiff is caught in a costs trap; she or he cannot afford to run a trial, but also cannot afford the cost of discontinuing the proceedings and not running the trial.

The plaintiff thus may have a very valuable cause of action against the defendant but not be able to afford to prosecute it. In this situation, plaintiffs may agree to settle their claim in exchange for being relieved of some or all of the burden of paying the defendant's costs and perhaps, for a token award of damages payable by the defendant, which can be used to pay some of the plaintiff's own costs.[22]

Is this substantively fair? On the one hand, the plaintiff has received damages far lower than might be awarded to her for her cause of action if successfully prosecuted at trial. On the other hand, the plaintiff has been relieved of costs burdens (both hers and the defendant's) that might have ruined her had the proceedings been unsuccessful. If the plaintiff is prepared to settle on this basis, who is to say that the outcome is substantively unfair?

Defendants also can be caught in costs traps. The first problem for them is that, unless the Court orders that the defendant's costs be paid on the indemnity basis, a defendant who is successful in defeating the plaintiff's claim will only recover costs

[21] See, *e.g.*, *Uniform Civil Procedure Rules 2005* (NSW), Rules 12.1(1), 42.19(2).
[22] In the case of *Collins v State of Queensland [2020] QSC 154*, appeal filed 29 Jun 2020 concerns an attempt to set aside an agreement reached at mediation and illustrates the predicament of a plaintiff caught in a costs trap. It is unusually enlightening because evidence of virtually the entire mediation was admitted without objection. Please see [2020] QSC 154 at footnote 1.

assessed on "*the ordinary basis*"[23] and thus will recover only about half to two-thirds of her costs. It thus costs defendants money - sometime very considerable amounts - to be successful.

The second problem for defendants is that many plaintiffs are incapable of satisfying a costs order made against them. Thus, as many defendants become aware to their chagrin, plaintiffs often are not well off but can bring proceedings because their lawyers - solicitors and barristers alike - are appearing on a no-win-no-pay basis. It is almost impossible to obtain an order for security for costs against natural person plaintiffs[24], so a defendant being sued by an impecunious plaintiff is in a very difficult situation. It will cost him or her a considerable amount to "win"- that is, to defeat the plaintiff's claim - but there is almost no chance of recovering the costs of doing so even if the plaintiff is ordered to pay them (as would be normal, because costs usually follow the event).

The defendant's resulting dilemma can have a profound influence on their behaviour at mediation. If it will cost a defendant about $100,000 in legal costs to defend itself against a claim, but none of this amount will be recoverable, the defendant would be $50,000 better off paying $50,000 to the plaintiff to settle at mediation than "*winning*" the court case at a cost of $100,000. Thus, a defendant who could have defeated the plaintiff's claim outright at trial instead feels compelled to bear his or her own costs and to pay the plaintiff $50,000 to give up its claim. If a defendant is prepared to settle at mediation on this basis, who is to say that the outcome is substantively unfair?

Concerns about power imbalances and substantive fairness thus distract attention from understanding the factors which explain how and why mediation works - the power of doubt and the resulting need to compromise to mitigate risk, and the terrible power of the end game of mediation. Part 6 of this article deals with these important factors.

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[23] *E.g., Uniform Civil Procedure Rules,* n 21, rule 42.2.

[24] *Id.* Rule 42.21(1): "The basic rule that a natural person who sues will not be ordered to give security for costs, however poor, is ancient and well established." Pearson v Naydler [1977] 3 All ER 531; [1977] 1 WLR 899 at 902 (WLR).

A CONCEPT OF MEDIATION DIVERGING WIDELY FROM CONVENTIONAL MEDIATION PRACTICE

If party self-determination extends to the relationship between the parties and is as articulated by Field and Crowe[25], it reflects a concept of mediation that diverges widely from conventional Australian mediation practice, for several reasons.

First, in requiring of the parties "connection, cooperation and collaboration" and behaviour that is "holistic and relational, encompassing the needs and interests of both parties", it goes well beyond the obligations imposed on the parties by conventional agreements to mediate[26] or by the statutory obligation to participate in a mediation in good faith[27], which "does not require any step to advance the interests of the other party"[28].

Second, in the writer's judgment, parties would not agree accept such obligations if requested to do so; and - if they declined to accept them - they could not be imposed on them[29].

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[25] Field and Crowe, "*Playing the Language Game of Family Mediation: Implications for Mediator Ethics*", n 2, 92.

[26] For example, the writer's pro forma agreement to mediate merely imposes on the parties an obligation to use best endeavours: "Each party and the mediator will use their best endeavours to resolve the Dispute by: 1.1 Systematically identifying the issues in dispute. 1.2 Developing alternatives and options for the resolution of the Dispute. 1.3Exploring the usefulness of each alternative. 1.4 Seeking to achieve a resolution which is acceptable to the parties and which meets their interests and needs."

[27] Section 27 of the *Civil Procedure Act 2005* (NSW) provides that "It is the duty of each party to proceedings that have been referred to mediation to participate, in good faith, in the mediation."

[28] The NSW Court of Appeal elucidated the content of an obligation "*to undertake genuine and good faith negotiations*" in *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177, 74 NSWLR 618. At [76], Allsop P, with whom Ipp and Macfarlan JJA agreed, said: "*...[T]he obligation to undertake genuine and good faith negotiations does not require any step to advance the interests of the other party. The process is the self-interested one of negotiation. Secondly, there is, however, a constraint on the negotiation, though this constraint is not one to advance the interest of the other party. Rather, it is a (voluntarily assumed) requirement to take self-interested steps in negotiation by reference to the genuine and honest conception of the pre-existing bargain, including the rights and obligations therefrom and of the facts said to comprise the controversy."*

[29] In *Hooper Bailie Associated Limited v Natcon Group Pty Ltd* (1992) 28 NSWLR 194, the NSW Supreme Court enforced an agreement to mediate for the first time. Until then, it was uncertain whether an Australian court would enforce such an agreement; see R. Angyal "*Enforceability of Alternative Dispute Resolution Clauses*" (1991) 2 ADJR No. 1 at 32; M. Shirley "*Breach of an ADR Clause - A Wrong Without Remedy?*" 2 ADJR No. 2 at 117; and R. Angyal "*The Enforceability of Agreements to Mediate*" (1994) 12 Australian Bar Review No. 1 at 1. In *Hooper Bailie,* Giles J, (as his Honour then was) rebutting suggestions that parties could be ordered to co-operate with and agree with each other, said at 206A-D: "*What is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come.*" While such agreements arguably are specifically enforceable (see R. Angyal, *The Enforceability of Agreements to Mediate: Seventeen Years After Hooper Bailie* (2009) 83 Australian Law Journal 299) what is enforced remains- as Giles J said - participation in a process from which cooperation and agreement might come.

Third, it may well be in a party's self-interest to co-operate with the other party in ascertaining both parties' interests and needs and in collaborating with the other party in attempts to determine whether both parties' interests and needs can be satisfied. But the reason that a party engages in these activities is self-interest: viz. to determine whether the other party can be satisfied without its satisfaction impinging too much on one's own outcome. If the attempts are unsuccessful, each party must be free to advocate its own interests at the expense of the other's.

Fourth, it ignores the reality that one party usually is more powerful than the other.[30] Indeed, only by sheer coincidence will the parties have exactly the same power. Party self-determination in effect requires the more powerful party to forego asserting its power advantage during the mediation. Again, it may be a good negotiating tactic for the more powerful party initially not to flex its muscles. But, ultimately, it will insist that it must be free to do so. Further, a party who has spent a large amount of time and money increasing its negotiating power by instructing lawyers and preparing carefully for the mediation will likely reject out of hand any suggestion that it is not entitled to take advantage of the resulting power advantage[31].

Fifth, it ignores the fact that each party, properly advised, realises that in order to settle the dispute it must compromise away from its best possible outcome. This process is described in Part 6 of this paper. Each party will attempt to compromise as little as possible and thus will seek the maximum possible compromise by the other party. Unless the pie can be expanded, or a lateral solution found, or a third party found to absorb some of the pain, the process inherently involves a competition between the parties for relative advantage.

Sixth, it ignores the power of the process itself to induce settlement via two mechanisms, described in Part 6 of this article. That power is neither holistic nor relational and it is blind to a party's interests and needs. Instead, its impact depends on a party's appetite for risk. That power may trump all the matters comprising party self-determination as described by Field and Crowe.

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[30] Boulle and Field, n 7.
[31] See Robert Angyal, "*The Power of Parties in Mediation: What is the Mediator's Role?*", n 17.

PARTY SELF-DETERMINATION AND CONTEMPORARY MEDIATION PRACTICE

This set of questions concerns whether party self-determination prescribes how mediation should be practised in Australia, or whether it describes how mediation is practised in Australia. This question concerns the nature of party self-determination.

Two subsidiary questions flow from this question. If party self-determination is prescriptive, who prescribed it and by what authority? The writer is unaware of any authority for such prescriptions.

If, on the other hand, party self-determination is descriptive, how accurately does it describe the contemporary practice of mediation in Australia and, given that mediations are conducted in confidence, how can we tell whether the description is accurate?

In a thoughtful recent post, "Rethinking Party Self-determination", Rachael Field and Laurence Boulle note [32]:

> *"We repeatedly refer to self-determination as the remaining legitimising value proposition underlying contemporary mediation, having noted the disappearance of voluntarism, the end of neutrality's reign and, to some extent, the compromisation of the promise of confidentiality in mediation - characteristics that have not stood the test of time. The self-determination principle has also been affected by some of the drivers and imperatives referred to in our previous blog post. We endorse the principle of self-determination as a defining feature and aspiration of all mediation - albeit with restrictions identified and discussed further in the book. We are now reflecting on whether even this principle is becoming contingent, given the rise of combined processes such as med-arb and arb-med, the displacement of facilitative mediation by evaluative and advisory systems and the prevalence of settlement conferencing under the guise of mediation."*

The post then asks the reader to consider the mandatory mediation of a workers' compensation common-law claim[33], where the negotiations proceeded as in the table below and resulted in settlement at $250,000. Two columns have been added by the writer to the original table, in order to show for each party the decrement or increment that each of its offers represented compared to the previous offer of that party, and to allocate a unique number to each of the offers. (Offer 11B is in parentheses, for reasons explained later.)

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[32] Laurence Boulle and Rachael Field, "*Rethinking Party Self-Determination*", The Australian Dispute Resolution Research Network, posted on 1 August 2018, https://adrresearch.net/2018/08/01/rethinking-party-self-determination/.

[33] Workplace Injury Management and Workers Compensation Act 1998 (NSW) s. 318A (1). Court proceedings for recovery of work injury damages cannot be commenced while the claim is the subject of mediation: s. 318A (4).

Chart 1 Course of negotiations in the mediation of a Workers Compensation claim

Offer	Claimant	Decrement	Offer	Respondent	Increment
1A	$450,000	-	1B	$75,000	-
2A	$425,000	-$25,000	2B	$90,000	+$15,000
3A	$400,000	-$25,000	3B	$100,000	+$10,000
4A	$390,000	-$10,000	4B	$125,000	+$25,000
5A	$370,000	-$20,000	5B	$140,000	+$15,000
6A	$350,000	-$20,000	6B	$150,000	+$10,000
7A	$300,000	-$50,000	7B	$175,000	+$25,000
8A	$300,000	-$0	8B	$200,000	+$25,000
9A	$280,000	-$20,000	9B	$250,000	+$50,000
10A	$265,000	-$15,000	**10B**	**$250,000**	**+$0**
11A	**$250,000**	**-$15,000**	(11B)	($250,000)	(+$0)

Boulle and Field doubt that this negotiation can be classified as a mediation. They apparently regard it as an unprincipled haggle, conducted by lawyers rather than clients and with "*limited mediator involvement"*. They contend that [34]:

> *"In this situation, the legally-advised claimant, well informed by counsel, did provide informed consent to the insurer's final proposal when it became locked-in at the $250,000 figure. Our query relates to whether he was involved in an authentic self-determination exercise, given (i) his limited bargaining power, (ii) the difficult risk assessment involved; and (iii) the fact that he was negotiating against himself in the last three rounds. While a single anecdote does not itself challenge established theory, this example illustrates a current trend and exposes the forces impacting on party self-determination."*

Consider first the context in which this mediation took place. The claimant is an injured former employee of the respondent employer. The employee, because of his injuries, no longer works for the respondent. Under the workers' compensation

[34] Boulle and Field, n 31.

policy, the insurer is entitled to represent the employer at settlement negotiations, including mediations. This has the consequence that the party who in a formal sense is the respondent to the proceedings necessarily has zero self-determination, for the reason that its insurer is entitled to make the decisions about whether the proceedings are settled and, if so, on what terms.

Further, the parties to the mediation are an individual and an insurance company that had no relationship in the past and probably will have none in the future. By law, compensation for the injured worker is manifested by payment of money[35]. There is no opportunity for continuing the employment relationship or for some other contractual or employment relationship between the parties, let alone for some sort of transformative outcome. This mediation is only about, and can only be about, money.

Because of this and because there are many mediations of claims by injured workers, the precise amount of money that constitutes appropriate compensation for the worker's injuries is a matter of considerable expertise. Knowledge of its parameters necessarily resides in the respondent/insurance company and in the claimant's legal advisors, on whom the claimant has to rely for advice as to his BATNA and as to the conduct and endpoint of the negotiation.

It is true that there are mediations where the pie can be expanded to the benefit of both parties. There are mediations where a lateral solution is discovered that produces a win-win result for both parties. There are mediations where a new and better relationship between the parties can be forged that makes the dispute almost irrelevant.

There are mediations where the dispute is not about what the dispute is about and, once the real dispute is analysed and resolved, the apparent dispute the subject of the formal legal proceedings falls away. And there are mediations where the poultice of an apology has a magically healing effect when applied to the other party's wounds. But the mediation commented on by Professors Field and Boulle is not and cannot be any of these types of mediation. It is a zero-sum mediation about money, in which a dollar gained by the claimant is a dollar lost to the insurer, and vice-versa.

[35] Workplace Injury Management and Workers Compensation Act 1998 (NSW) s. 4(1) (definition of "work injury damages"). Also see *id.*, s. 70 (definitions of "claim" and "claimant").

Do these limitations have the consequence that party self-determination is lacking? Consider the factors commented on by Boulle and Field. *First*, why is the claimant described as having "*limited bargaining power*"? He had a valuable cause of action in negligence arising from having been injured at work. By statute, the measure of his damages was compensation for past loss of earnings and for deprivation or impairment of earning capacity in the future[36]. All going well, he had a legal right to compensation that his insured employer, no matter how large and powerful, could not resist.

The insurer is a professional risk-taker and an experienced litigant compared to the claimant, who is a one-time litigant. Does this impact on the claimant's bargaining power? What usually results from the insurer's experience is a strong desire to settle the dispute for a damages figure that is realistic- a Goldilocks figure that is neither too high, nor too low, but just right.

It is true that insurance companies have large war-chests from which to pay the cost of defending claims against them. But a dollar is a dollar and an insurance company, if acting rationally has no more desire to spend, or to risk losing, its dollars than does the claimant. While the claimant might have limited education, speak broken English and never before have been involved in a mediation, he is represented by counsel highly experienced in mediating workers' compensation and common law negligence claims; this also has the effect of tending to level up the parties' power.

Further, viewed more closely, the mediation perhaps was not an unprincipled haggle but, possibly, a principled negotiation. One does not know what was said as each offer was made, or whether schedules of damages were exchanged and discussed. Perhaps counsel for the claimant introduced offer 1A by saying to the insurer's lawyers:

> *"You'll think that this figure is high but here are comprehensive schedules of the claimant's past and future losses. There's simply no doubt about his past losses. As to his future losses, he was a good worker - never missed a day - in a business that was going nowhere but up.*
>
> *For the claimant's opening offer, we've taken the figures in the two schedules, added them together and then discounted the total by 40% to take account of the vicissitudes of litigation.*

[36] Workers Compensation Act 1987 (NSW) s. 151G(1).

> *This obviously isn't the claimant's bottom line, but it's not your typical pie-in-the-sky plaintiff's opening offer either. We expect in return a realistic opening offer from the insurer and we don't want to hear any of the usual V for the D [translation: Verdict for the Defendant] nonsense."*

The insurer may have responded with offer 1B, saying,

> *"Look, I know you'll think that this is a typical insurer's miserly opening offer. But we're giving the claimant almost all the amount he claims for past lost wages. It's the future losses we're having problems with because of [insert reasons]. If you can satisfy us that these claimed losses are realistic, I can assure you there'll be more money forthcoming."*

From there, the mediation proceeded. The claimant obviously satisfied the insurer that there was at least some merit in his future losses claim. The parties slowly moved closer, until by making offer 7A the claimant made a dramatic move ($50,000) downwards. The respondent apparently rewarded him for that concession by making offer 7B, moving up by $25,000 for only the second time. But the claimant then repeated his offer of $300,000 (offer 8A), perhaps trying to signal that he was at or near his bottom line. The respondent's reaction was another increase by $25,000 (offer 8B), taking the respondent to $200,000.

This might have been a signal to the claimant that splitting the difference between $300,000 and $200,000 would produce a result acceptable to the respondent. But, if so, the signal was not received and the claimant came back at $280,000 (offer 9A)

The respondent then offered $250,000 (offer 9B). This represented an upward move of $50,000 - double the size of any other increment by the respondent that day. Perhaps the respondent said at this point that $250,000 was the respondent's best offer. When the claimant then came back at $265,000 (offer 10A), the respondent may have said, "*No, we really meant it when we said $250,000 was our best and final offer, so we're re-putting that offer.*" (offer 10B). And then the claimant accepted that offer (offer 11A). Offer 11B is in parentheses because it is redundant. Offer 11A, by accepting offer 10B, created a legally binding settlement agreement at $250,000.

It is noted that it is not correct to say that the claimant "*was negotiating against himself in the last three rounds*". Negotiating against oneself occurs when one party makes an offer and the other party says,

> *"That offer is ridiculously high [low]. We're not going to respond. You're going to have to retract your offer and make a more reasonable one that's much lower [higher]."*

The table makes it clear that this never happened. The respondent made offer 9B of $250,000; the claimant replied with $265,000 (10A) and the respondent then re-put

$250,000 (10B). Re-putting the offer was necessary because the effect in law of offer 10A by the claimant was to reject offer 9B and thereby render it incapable of acceptance.

If the respondent wanted its $250,000 offer (9B) to be capable of acceptance, it had to re-put the offer, and it did so (10B). It could have said, but did not:

> *"Well, we offered to settle for $250,000 but you rejected that offer by offering $265,000 in response. We're rejecting that offer. You may be expecting us to re-put our offer of $250,000 but we're under no obligation to do that. Looks like the mediation is over."*

Instead, the respondent re-put $250,000 and the claimant's choices then were (i) to put a figure between $265,000 and $250,000; (ii) to accept the respondent's offer at $250,000 (offer 10B); or (iii) to abandon the mediation. None of these involved the claimant's negotiating against himself. On the table, the bold type for offer 10B and acceptance 11A shows agreement being reached by the claimant accepting the respondent's offer of $250,000.

Another factor causing Field and Boulle to doubt whether the process they describe produces party self-determination is that there was "limited mediator involvement" in the process that resulted in settlement of the workers' compensation claim. It is perhaps ironic that party self-determination in the sense of maximum involvement of the parties in attempts to resolve their dispute is encouraged as the highest and best manifestation of mediation and, yet, when parties manage to resolve their dispute with limited involvement by the mediator, doubts are raised as to whether the mediation can validly be classified as such

In the writer's experience, many mediations require little involvement by the mediator for a considerable period following the usual joint session - subject to the mediator having been alerted to avoiding impasses at the front end and in the middle of the mediation[37]. Often but not always, it transpires that, at some point, parties who have been negotiating diligently and even enthusiastically with each other get stuck and cannot make any more progress towards agreement. At that point, an effective

[37] See Robert Angyal, "*So you want an effective mediator? What qualities should you demand? Post #5: Impasse Avoidance Skills*". https://www.linkedin.com/pulse/so-you-want-effective-mediator-what-qualities-should-demand-robert/.

mediator is vital. Such a mediator will display the essential qualities of optimism[38], patience[39] and persistence.[40]

Thus, the claimant did not lack bargaining power, did not have to bid against himself, and had as much control as the respondent over the outcome. The limited involvement of the mediator may well have been the result of smooth-running negotiations conducted by experienced lawyers.

The fact that the mediation involved multiple monetary offers as the parties moved towards each other in a process resembling a stately dance thus does not really tell us anything about the quality of the negotiation process by which they achieved a resolution by agreement. It may have been a principled negotiation. It may just have been an unprincipled haggle. Or, it might just have appeared to have been the latter because the lawyers involved knew the parameters of a likely monetary settlement sum appropriate to the claimant's particular injuries so well that they did not have to articulate to each other or to the mediator why each step was being taken.

The final factor that caused Field and Boulle to doubt whether this mediation involved "authentic self-determination" was "the difficult risk assessment involved" for the claimant. They explain[41]:

> *"The claimant's choices involved a complex risk analysis as he could continue on weekly benefits and medical payments until the age of 67 and was obliged to make a final 'certificate' offer if there was no settlement. If such a claimant succeeds at hearing but receives less than their certificate offer they may be denied recovery of their own costs. If they receive less in damages than the insurer's certificate offer they are potentially liable to pay the respondent's [employer's] costs, despite succeeding on the liability question. There was also some uncertainty over the claimant's future health condition despite his having reached maximum medical improvement."*

The author respectfully disagrees that difficulty in assessing the outcome of the proceedings in whose "*shadow*" the mediation is conducted detracts from the quality of a mediation. Uncertainty underlies almost every mediation conducted in the shadow of the Court. In the writer's experience based on 27 years of mediating and

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[38] See Robert Angyal, "*Want an Effective Mediator? What Qualities Should You Demand? #2 Optimism".* https://www.linkedin.com/pulse/want-effective-mediator-what-qualities-should-you-demand-angyal-sc-6012578890868862976/?trk=hp-feed-article-title.

[39]See Robert Angyal, "*Want an Effective Mediator? What Qualities to Demand? #4: Patience",* *h*ttps://www.linkedin.com/pulse/want-effective-mediator-what-qualities demand-4-robert-angyal-sc-1c/.

[40]See Robert Angyal, "*Want an Effective Mediator? What Qualities to Demand? #3: Persistence",* https://www.linkedin.com/pulse/want-effective-mediator-what-qualities-demand-3-robert-angyal-sc/.

[41] Boulle and Field, n 22.

appearing as counsel at mediations, uncertainty is one of the two primary reasons that mediation works. The reason for this is explained in Part 6 of this article.

What do we draw from the mediation of a common-law workers compensation claim referenced by Boulle and Field? In the writer's view, that statutory mandatory mediation, apparently conducted as an undignified haggle, illustrates on close analysis that a wide range of mediation practices are consistent with the concept of party self-determination.

DOES PARTY SELF-DETERMINATION ADEQUATELY EXPLAIN HOW AND WHY MEDIATION WORKS?

The final question about the concept of party self-determination concerns the usefulness of the concept in a discourse about mediation. Its usefulness is limited because it does not describe two critical mechanisms at work within mediation which help account for its enormous power to resolve disputes.

Mechanism 1: Doubt Creates Risk, Risk Requires Mitigation, Mitigation Compels Compromise on the Parties' BATNAs

Let us return to the mediation of the workers compensation common law claim discussed in Part 5 of this paper. Like all claimants in negligence, that claimant bears the onus of proving duty of care, negligent breach of that duty, and loss flowing from that breach. Like all claimants, he runs the risk of failing to prove one or more of the elements of his cause of action and thus having his claim dismissed and being ordered to pay the respondent's costs as well as paying his own. Like all claimants, he also runs the risk of encountering a judge who assesses damages at a much lower figure than the claimant, on legal advice, regards as appropriate[42].

In short, at the commencement of the mediation, inevitably there is doubt that he will succeed fully in an adjudicative hearing. There are at least four reasons that this is

[42] The two principal measures of damages, contractual and tortious, both require the Court to reconstruct the past on a hypothetical basis. Contractual damages are assessed by pretending that the contract was performed by the defendant, rather than breached, and comparing the reconstructed past with the actual past. Tortious damages for negligence, for example, are assessed by pretending that the plaintiff was not injured by the defendant's negligence and, again, comparing the reconstructed past with the actual past: *e.g., City Mutual Life Assurance Society Ltd v Gates* [1986] HCA 3 at [10], 160 CLR 1 at 11-12 per Mason, Wilson and Dawson JJ. The potential for doubt as to the result of reconstructing the past on a hypothetical basis is obvious.

so. First, cases whose result is obvious by and large do not go to mediation. By and large, they settle without mediation or are discontinued, for the very reason that their outcome is obvious. If a party obviously is going to win, he/she/it has little incentive to compromise their claim. If a party obviously is going to lose, the other party has little incentive to offer them a settlement. Second, as a result, the cases that go to mediation are ones in which the result is not obvious and is in at least some doubt.

Third, because the result is in doubt, both parties run the risk of an adverse outcome if the case goes to trial. Fourth, because each party bears that risk, a mediated outcome is attractive because it completely mitigates the risk. A settlement at mediation removes any risk of a worse outcome in court - because the matter will not go to trial.

A competent mediator - alive to the fact that it is doubt that creates pressure on both parties to compromise their claims - will generate, enhance and maintain doubt[43]. While facilitative mediators cannot express views on the likely outcome of factual and legal issues in dispute, they certainly can say to the parties and their lawyers:

> *"You're asserting diametrically-opposed positions on the central issues of fact and law in this dispute. It's not part of my job to express views on who's right and who's wrong but I certainly can say to you that, because your positions are diametrically-opposed, you can't both be right. And the only way to find out definitively which of you is right is to go to trial - which guarantees that, when you eventually get judgment from the Court, one of you is going to be bitterly disappointed. This mediation gives you the opportunity to eliminate the risk of that happening."*

As a result of the risks created by doubt, our workers compensation common law claimant, like most claimants, is interested in mitigating the risks by settling his claim at the mediation. To achieve this, inevitably, he will have to agree to accept less than his Best Alternative To a Negotiated Agreement ("*BATNA*"), which is the maximum damages he might be awarded were he to have his case tried by the Court.

The reason that compromise is inevitable is that, were he to offer to "*settle*" for an amount that represented the maximum damages he could be awarded, his settlement offer would be met with this retort by counsel or solicitor for the workers compensation insurer:

> *"The amount of your offer represents the maximum you could be awarded if you ran your case in court and won on every point. We don't think you will succeed in doing this because of [insert problems that*

[43] What the mediation literature calls "*reality testing*" in fact is attempted doubt generation in private session by the mediator.

> *the respondent sees in the claimant's case]. Anyway, given the length of the Court's list and possible appeals against the trial judge's decision, it could be years before you get your money.*
>
> *That's why you'll have to compromise if this matter is going to be settled today. If you want your max damages, you'll have to run your case in Court and risk getting a much lower amount or perhaps even a V for the D and a costs order against you.*
>
> *The workers' compensation insurer for whom I appear recognises that it has the same problem in reverse and that's why we won't be offering to settle on the basis of a V for the D, even though this might be the result if the case went to trial."*

As much as the insurer would like to settle the claim for $0 or close to it, it realises that this is just as unrealistic as the applicant's offering to settle for his maximum damages. Thus, both parties are subject to a similar risk and both parties have a desire to mitigate that risk by agreeing at mediation on a compromise settlement figure. This tends to roughly equalise the parties' power.

The amount by which each party has to compromise its claim in order to settle at mediation is analogous to the premium payable for an insurance policy. While the premiums on, say, home insurance policies, look high to a homeowner, paying them has the effect that the homeowner is protected against the risk of their home burning down. If it does, the insurance company will pay the cost of rebuilding it.

Likewise, in a mediation, the amount by which a plaintiff reduces its claim in order to settle, and the amount that a defendant agrees to pay the plaintiff despite protesting that the claim has no merit, represent the cost to them of no longer bearing any risk of losing at trial and being in a much worse position than the settlement agreed at the mediation.

Mediation thus has at its core the negotiation by the parties - spurred by doubt about the outcome of the court or arbitration proceedings - with the assistance of the mediator, of a "*risk premium*" which the claimant will forfeit, and which the respondent will pay to the claimant. The effect of their compromises will be complete mitigation of the risk of doing worse at trial than the agreed settlement.

That does not mean that either party will be particularly happy with the outcome. The late Sir Laurence Street, a former Chief Justice of NSW and a pioneer mediator in the State, described a good outcome of mediation as a settlement about which the parties were "*equally unhappy*" - by which he meant that both parties had to compromise by about the same extent in order to settle their dispute; hence they

were "*equally unhappy*" with the agreed settlement.[44]

Doubt, risk and the resulting desire to mitigate risk is a critical mechanism in mediation because it creates and maintains pressure on both parties to compromise their claims by accepting less than their respective BATNA[45]. Party self-determination makes no reference to the role of doubt and its importance.

Mechanism 2: The terrible choice required by the end-game of mediation: Choosing between an unattractive certainty and an attractive uncertainty

Doubt about the outcome of the court proceedings or arbitration in whose shadow the mediation is conducted gets and keeps the ball rolling in mediation. It does so by giving both parties a strong incentive to negotiate a settlement of the dispute by compromising their claims.

While doubt gets the process of negotiation and compromise going and sustains it, there needs to be a second mechanism that brings the negotiations to an end by inducing the parties to enter into a settlement agreement. There is such a mechanism, which forces parties in dispute to confront their options and to make hard choices between them. It works because it can impose almost unbearable pressure on parties to settle. It is the process itself, not the mediator, that imposes the pressure.

The point of maximum pressure typically comes in the late afternoon when, after an exhausting day of negotiation, the defendant puts an offer, says that this is the final offer, and it probably is or is close to their final offer. (The roles are reversed for a defendant.) The mediator has diligently dug deep into her or his metaphorical bag of techniques for bridging the last gap between the parties[46], but despite those efforts,

[44] Address to NSW Bar Association's Bar Readers' Course in 2005.

[45] Ibid. Geoff Sharp, a prominent New Zealand and international mediator, describes doubt as "the jet fuel of mediation": LinkedIn comment at https://bit.ly/2pimYco. Some retired judges who act as mediators do not understand the importance of doubt, no doubt because for many years their role as judges was to eliminate doubt by deciding the factual and legal issues in cases tried before them. Their performance as judges was assessed by how quickly and decisively they eliminated doubt, by delivering judgments determining the issues. But, as mediators, they face a paradigm shift into a universe in which doubt is a necessity. Many of them, however, instinctively discharge doubt by voicing opinions on factual and legal issues. But, once the doubt is gone, neither party has a motive to settle: See Robert Angyal, "*Doubt Drives Mediation ... Treasure It!*", LinkedIn post 16 September 2019 https://bit.ly/32SVpF8.

[46] See John Wade, "*The Last Gap in Negotiations - Why is it Important? How can it be Crossed*" [1995] ALRS 1.

a large gap remains between their positions.

At this point, the plaintiff has a choice between an unattractive certainty and an attractive uncertainty:

(1) The unattractive certainty is the amount being offered by the defendant. It almost most literally is on the table. It is there for the taking. It is payable within 14 days. It is a certainty. But it is a very unattractive certainty. It is far less than the plaintiff hoped to receive and perhaps not even enough to pay their legal costs, or to repay the mortgage, or to repay the loan from Aunt Maude to fund the litigation.

(2) The attractive uncertainty is the eventual outcome of the adjudicative proceedings. This, the BATNA, is the plaintiff's other alternative. It almost certainly is much better than the offer on the table. But it is some time, perhaps far, in the future. It is uncertain. It is hedged about with the inevitable lawyers' qualifications ("*I've told you many times that, although your prospects are good, no case is unloseable.*"). Achieving the BATNA not only will take a lot of time and impose financial and emotional burdens, it also will incur the distinct, but difficult to quantify, risk of losing the case, getting nothing and having to pay both parties' costs. This may lead to bankruptcy/insolvency. Realistically, the plaintiff may not be able to fund the proceedings to this point anyway.

Mediation imposes enormous pressure to settle because this point usually is reached after an exhaustive consideration of the merits of the parties' positions and of the options for resolving the dispute, and after exhausting negotiation has narrowed the differences between the parties to the maximum extent apparently possible. In blunt terms, for both parties, as far as settlement is concerned, the reality is that this is about as good as it is going to get.

At this point, the plaintiff must make a terribly difficult choice between an unattractive certainty that is much less than was hoped for and, on the other hand, a mass of uncertainties as to time, expense (financial, emotional and distraction from personal and income-generating activity) and as to outcome, which eventually may produce a much more attractive result but which also carries with it the risk of a much worse result.

The choice is extraordinarily difficult because one is not comparing like with like. To modify a colloquial expression, it is not so much like comparing apples with oranges as it is like comparing apples with elephants. And yet a choice between the

available alternatives must be made. There is no escaping making the choice: Accepting the other side's offer is one alternative. Rejecting the offer and terminating the mediation is another. Extending the mediation for another day or adjourning it till next month is merely postponing making the choice.

The lawyers no doubt will give their respective clients the best legal advice possible in the circumstances and remind the clients of their BATNAs, but only the clients can make the ultimate choice. While both parties are free to reject the other party's final offer, in practice both parties will be subject to intense pressure to settle.

Parties facing this terrible choice sometimes become angry at being put in such an impossibly difficult situation. They vent their anger at their lawyers, at the other party, at the mediator, at the process of mediation itself. They had hoped that, as a result of mediation, the parties would happily together get to yes. Instead, they find themselves with only two alternatives, to both of which they want to say "*No"*. Parties in this position should hold their lawyers responsible for not adequately preparing them for the rigours of the "end game" of mediation[47].

The writer, both as mediator and as counsel for parties at mediation, often has seen parties struggling to resist the pressure generated by the terrible choice facing them. In the writer's experience, many parties find the pressure to settle unbearable and accept the offer on the table. This behaviour is consistent with that predicted by studies of decision-making.[48] Again, party self-determination makes no reference to the importance of the end game of mediation.

CONCLUSIONS

If the concept of party self-determination is limited to drawing the distinction between disputes resolved by the parties collectively and those in which a resolution is imposed on the parties by an external body such as a court, the concept does not add anything to that distinction except potential confusion stemming from its

[47] See Robert Angyal, "*Advocacy at Mediation: An Oxymoron or an Essential Skill for the Modern Lawyer?*", Ch. 13 in M. Legg (ed) *Resolving Civil Disputes* (LexisNexis Butterworths 2016) at p 192, which warns that "Perhaps the most important part of advocacy at mediation is preparing the client for the difficult and critical end stage of mediation. ... A lawyer should warn their client about this. Pressure is easier to resist if it does not come as a surprise. Forewarned is forearmed. Other things being equal, a party better able to resist the pressure to settle will do better than one who is less able."

[48] *E.g.*, Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Straus and Giroux, 2011) at 297, 300.

awkward name. If, on the other hand, the concept of party self-determination also extends to describing how the parties acted towards each other in resolving their dispute by mediation, it lacks content. The loss of content of the concept stems from misplaced concerns about the substantive unfairness of agreements reached at mediation caused by power imbalances. These concerns create logical, empirical, legal and practical problems that do not appear to be soluble. The concerns also divert attention from the important questions of how and why mediation works to resolve disputes. If party self-determination extends to the relationship between the parties in dispute, it reflects a concept of mediation that diverges widely from conventional mediation practice. A wide range of mediation practices is consistent with the more limited concept of party self-determination.

The concept of party self-determination does not explain how and why mediation works. In particular, it does not describe two little-understood mechanisms that largely explain the power of mediation to resolve disputes. The first mechanism stems from the presence of doubt. Doubt creates risk and risk requires mitigation. However, mitigation compels compromise away from the parties' BATNA. The second mechanism not accounted for by party self- determination is the terrible choice that a party must make at the end of a mediation. The choice is between two things that are almost impossible to compare: an unattractive certainty (the other party's best offer) and an attractive uncertainty (going to trial). Neuroscience reveals that most people will choose the alternative that minimises loss (the unattractive certainty) rather than the one that may maximise gain and this brings the mediation to an end by resolving the dispute. Given these conclusions, it is argued that the concept of party self-determination should be abandoned as lacking utility.

CASE NOTE - Lyons v The Queen [2020] VSCA 127

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PARTIES

First Appellant: Christine Lyons **Respondent:** The Queen

Second Appellant: Ronald Lyons

FACTS

The First Appellant, Christine Lyons sought leave to appeal against both her conviction for attempted murder and conviction of murder. The Second Appellant, Ronald Lyons sought leave to appeal against his conviction of attempted murder.

The circumstances surrounding the appeal involved an allegation that Christine, Ronald and a man named Peter Arthur (who was Christine's partner and carer) planned to kill a woman named Samantha Kelly. Ms Kelly lived with Christine, Ronald and Peter and her four children in Kangaroo Flat. Having suffered from cancer and undergone a hysterectomy, Christine was unable to bear children. Sometime in mid-January 2016 it was alleged by Peter that all three offenders had formed a plan to kill Ms Kelly by overdose of sedatives, so that Christine could take over the care of Ms Kelly's children. Peter was then allegedly directed to kill Ms Kelly by other means as the process of poisoning her was taking too long. On 23 January 2016 Ms Kelly was bludgeoned to death in a bungalow on the Kangaroo Flat property. She was struck approximately seven times to the head with a hammer. The blows were administered by Peter who later confessed to the murder. He then led police to a dry creek bed near Maryborough, where he had taken her body and partially buried it. [1]

Peter plead guilty to the murder and agreed to give evidence against Christine and Ronald in exchange for a discounted sentence. Both Appellants denied any

[1] *Lyons v The Queen* [2020] VSCA 127 ('*Lyons*') at [1] per McLeish, Emerton and Weinberg JJA.

involvement in either the attempts to poison Ms Kelly or the actions which resulted in her death. They claim that Peter had killed Ms Kelly of his own volition and that they had no previous knowledge of what he was going to do.[2]

JURISDICTION

The Appellants sought leave to appeal the judgment set down by Kaye JA in the Trial Division of the Supreme Court of Victoria. This case was determined by McLeish, Emerton and Weinberg JJA in the Victorian Supreme Court of Appeal. The date of the hearing was on 24 March 2020 and judgment was handed down on 20 May 2020.

PROCEDURAL HISTORY

In November 2016, Peter pleaded guilty to the murder of Ms Kelly before giving an undertaking that he would give evidence against the Christine and Ronald at their trial. As a result, Peter received a discounted sentence of 22 years imprisonment with a non-parole period of 18 years following an appeal from the Crown.[3]

Before giving evidence, Peter was examined by psychiatrists from both sides who agreed that there was no evidence that Peter's memory was affected by a recognised psychiatric disorder.[4] The Crown case against the Appellants at trial was based to a largely on Peter's evidence, however independent evidence was also adduced. Both Appellants relied upon what they allege to be underlying inadequacies in the credibility and reliability of Peter's evidence at trial.[5]

GROUNDS OF APPEAL

Christine's grounds of appeal:

(1) That the verdicts of guilty on Charges 1 and 2 were unsafe and unsatisfactory

(2) That the verdict of guilty on Charge 2 was inconsistent with the acquittal of Ronald Lyons of that charge.[6]

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[2] Ibid [4].
[3] Ibid [38].
[4] Ibid [39].
[5] Ibid [43].
[6] Ibid [8].

Ronald's ground of appeal:

(1) That the verdict of the jury on Charge 1 (attempted murder) was unreasonable or could not be supported having regard to the evidence. [7]

OUTCOME

All three judges unanimously refused both Appellant's applications for leave.[8]

EXAMINATION OF JUDGMENT

General Submissions

Both Appellants argued that no rational jury could have been satisfied beyond reasonable doubt based on Peter's evidence. They submitted that Peter had numerous accounts of how he had murdered Ms Kelly and that he had been blatantly untruthful to the police, as well as under oath.[9] Both Appellants submitted that the charges against them were based solely on what Peter had said and, at least in terms of the murder, there was no independent support for his account of events.[10] Furthermore, both contended that it was not until well into Peter's plea that he gave evidence inculpating Christine and Ronald directly in the actual killing, which they argued was only because Peter realised things were not going well for him.[11]

First Appellant

Counsel for Christine noted the three versions that Peter had put forth as to how Ms Kelly died.[12] Counsel then had reference to *M v The Queen*[13] which was recently affirmed by the High Court as an authoritative statement of principle in *Pell v The*

[7] Ibid [9].
[8] Ibid [216].
[9] Ibid [108].
[10] Ibid [109].
[11] Ibid [110].
[12] Version One was on 11 February 2016 where he admitted to killing Ms Kelly in self-defence without the involvement of Christine or Ronald. Version Two took place in September 2016 where Peter claimed that there was a plan to murder Ms Kelly through the overdose of sedatives and that he was directed that Ms Kelly's death should be expedited. In Version Three Peter claimed to have been directed by Christine and Ronald to kill Ms Kelly because the poisoning was taking too long. Ronald was said to have walked with Peter to the bungalow and shown the murder weapon to be used on Ms Kelly.
[13] (1994) 181 CLR 487 ('*M*').

Queen[14]. Counsel had further reference to *M*[15] for the contention that Peter's evidence included many 'discrepancies' and 'inadequacies' and should be regarded as 'tainted' or otherwise lacking in probative value.[16] Counsel relied upon the fact that Peter had admitted that he was uncertain as to whether his third version of events were genuine 'flashbacks' as opposed to fantasies.[17]

Counsel submitted that without the additional gloss in Version Three which implicated Christine, her conviction for murder could not stand.[18] Counsel further submitted that Version Three was obviously illogical and that no jury acting reasonably could be satisfied to the requisite standard that Christine was involved in the decision to kill Ms Kelly in those circumstances.[19] Utilising the language in *Pell*, it was argued that Peter's evidence must have led a reasonably acting jury to entertain a doubt about Christine's guilt, notwithstanding the advantages they experienced in having seen Peter's evidence. Counsel conceded that this argument was significantly weaker for Charge 1[20], due to both the body of evidence indicating Christine's overwhelming desire to be a mother to Ms Kelly's children[21] as well as the connection between the drugs prescribed to Christine and those identified in Ms Kelly's toxicology report.

Counsel submitted that on the matter of 'participation' in the murder, the prosecution relied wholly on unsatisfactory evidence given by Peter as to the words allegedly spoken by Christine at or about the time of Ms Kelly's murder.[22] Counsel submitted that Peter had a very strong motive to adhere to his third version of events as he knew that failure to do so would result in an increased sentence.[23] Given the unreliability of Peter's evidence, Counsel argued that the inconsistent verdicts,

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[14] [2020] HCA 12 ('*Pell*'). This threshold requires the appellate court to consider "… whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty" (*M* at 493).
[15] *M* (1994) 181 LR 487, 494 (emphasis added).
[16] *Lyons* [2020] VSCA 127 at [120].
[17] Ibid [131].
[18] Ibid [112].
[19] Ibid [113].
[20] Ibid [120]-[122].
[21] Evidence was led that Christine had effectively taken over the role of mother to Ms Kelly's four children and had become particularly attached to the youngest daughter, 'Dorothy' (a pseudonym) who she would call 'Shaneeka'. She also allegedly began calling 'Sarah' (a pseudonym), the second youngest child by the name 'Neisha'. It was claimed that if Christine had daughters of her own, they would be called by those names.
[22] Ibid [127].
[23] Ibid [132].

whereby the jury had acquitted Ronald of murder but convicted Christine, in circumstances where both cases were 'substantially identical' was inexplicable.[24]

Second Appellant

Counsel submitted that Ronald had always denied participating in any plot to murder Ms Kelly and that there was little evidence to support a motive that he would be willing assist in the murder of Ms Kelly. There was also reliance on the fact that Ronald had three sons of his own, all of whom were living with him.[25] Similar to the First Appellant, Counsel noted that the inconsistencies in Peter's version of events as well as the evidence concerning Peter's 'flashbacks' and 'nightmares' demonstrated a willingness to change his evidence capriciously if there was a perceived benefit in doing so.[26]

The Crown's arguments

First Appellant

The Crown challenged the premise that in order to have convicted Christine of murder it was necessary for the jury to have accepted Version Three to the requisite standard.[27] Although recognising the obvious difficulties with Peter's credibility, the Crown maintained that his evidence as a whole was sufficient to establish Christine's participation in a joint criminal enterprise (JCE) that had as its purpose the murder of Ms Kelly.[28]

Counsel argued that Version Two was also entirely sufficient to amount to 'participation' on Christine's part, relying on *Arafan v The Queen*[29] for the contention that relevant acts of 'participation' in a JCE can comprise of acts carried out in furtherance of that JCE. The Crown submitted that the jury was entitled to accept that Christine had directed Peter to kill Ms Kelly, given that Peter was deeply in love with Christine and had no real motive other than to support her bizarre fantasy[30]. Once it was accepted that the jury was qualified to find that Christine had directed

[24] Ibid [137].
[25] Ibid [144]-[145].
[26] Ibid [151].
[27] Ibid [152].
[28] Ibid [161].
[29] (2010) 31 VR 82.
[30] *Lyons* [2012] VSCA 127 at [165].

Peter to have Ms Kelly killed, the Crown argued that it was open for them to be satisfied of the other elements required of a JCE.[31]

The Crown further argued that the basis of Christine's charge for murder rested on several pieces of circumstantial evidence which went toward proving her guilt alone and as such, enabled the jury to find Christine guilty but not Ronald. Having regard to the entirety of the evidence, the Crown submitted that there was nothing far-fetched about Christine having played the central role as 'architect' in the scheme to murder Ms Kelly.[32]

Second Appellant

The Crown submitted that Peter provided a detailed statement of Ronald's role in Ms Kelly's attempted murder, namely, that he had crushed numerous types of sedatives and brought the powder into the kitchen it in order to spike Ms Kelly's drink.[33] There were numerous pieces of evidence indicating that Ronald was in love with Christine and wanted her to have children,[34]which the Crown contended went toward establishing motive. Evidence was also adduced to indicate that he had a murderous intent, due to his involvement in a conversation where he proposed that a syringe full of air be put into Ms Kelly's arm to cause a heart attack.[35] The Crown further submitted that Peter's account of the drugging of Ms Kelly was broadly consistent throughout and that Version Two had a powerful ring of truth to it, particularly so when all three offenders and Ms Kelly were essentially living together.[36] Accordingly, the Crown submitted that the jury's decision to convict Ronald was not based on 'unsafe or unsatisfactory' evidence.

DECISION

First Appellant

[31] Ibid [169].
[32] Ibid [165].
[33] Ibid [178].
[34] Ibid [179]. There was evidence from a neighbour, Rebecca Stow that Ronald very much wanted Christine to have children. Ronald took part in discussions regarding Christine's desire to have Ms Kelly's children call her 'Mum' and Ronald 'Pa'. Christine said she loved Ronald and regarded him as her 'second husband'. Ronald was also a party to a request made to the Department of Health and Human Services that he and Christine become the legal guardians of Ms Kelly's children.
[35] Ibid [180].
[36] Ibid [214].

Their Honours were of the opinion that the case against Christine on the charge of murder was powerful regardless of whether or not the jury chose to accept the varying accounts of Peter's evidence.[37] Kaye JA in the original trial accepted that the Crown case against Christine was largely dependent on Peter's evidence, however the jury was given a direction to treat the evidence as potentially unreliable and Kaye JA considered it was open to them to act upon it.[38] Their Honours made note of Christine's conduct leading up the commission of the offences, which involved Christine proposing a surrogacy arrangement with a neighbour, and her actions in assuming the role as Mother to not only two teenage girls who were subject to care orders, but also Ronald and Ms Kelly's children.[39] Christine had also obtained drugs of the kind found in Ms Kelly's body within the day or two of her having been beaten to death.[40]

Once it was established that there was a considerable case against Christine on the charge of attempted murder, their Honours held that her conduct in that regard extended to support of her guilt of the murder. As such, their Honours determined that the jury must have found that, based on the evidence as a whole, Christine had given a direction to Peter to kill Ms Kelly by other means, rather than waiting for the sedatives to have the desired effect of an overdose.

In terms of the second ground, it was also clear to their Honours that the suggestion that Peter had spontaneously killed Ms Kelly was rejected by the jury, and that they must have rejected the evidence which equally implicated Ronald, as demonstrated by his acquittal on the murder charge.[41] This was due to the bulk of evidence adduced by the prosecution that was admissible against Christine, and not against Ronald, including post-offence conduct.[42] Consequently, their Honours concluded by

[37] Ibid [211].
[38] Ibid [199].
[39] Ibid [194].
[40] Ibid [200].
[41] Ibid [184].
[42] Ibid [164], [204] and [206]. Recently after Ms Kelly's death, Christine told approximately sixteen people that she no longer lived at the Kangaroo Flat property. She also fabricated a story to the effect that in the early hours of 23 January 2016, Ms Kelly allegedly 'walked out' on her children, saying she no longer wished to care for them. Christine asserted that Ms Kelly physically abused her children and that she was obsessed with her former partner who had threatened to kill her. Christine also claimed that Ms Kelly was involved in illicit drugs and that she may have been a drug dealer.

stating that it could not be said that it was not open to the jury to be satisfied beyond reasonable doubt of her guilt on both charges.[43]

Second Appellant

Their Honours were brief in their assessment regarding Ronald and essentially agreed with the Crown's submissions as outlined above. As such, they ruled that there was clearly evidence of a cogency that enabled the jury to form a decision beyond reasonable doubt that Ronald was involved in Ms Kelly's attempted murder. Their Honours were firm on the fact that it could not be credibly said that it was not open to the jury to draw that inference.

SIGNIFICANCE

The question of whether it was 'open' for a jury acting rationally to make a finding of guilt based on all the available evidence alludes to a tension present in the law as to whether appellate courts should have the ability to overrule the decision of a jury. The hallmark of community standards emphasises the strength of the jury system, as juries ensure community representation informs the weight of evidence, and further, permit laymen perspectives to be incorporated in the Court process. As such, it has long been practice to uphold the utility of a jury as inherent in validating the effectiveness and reliability of the criminal justice system.

Most recently, the controversial High Court decision in *Pell* which overturned the jury's decision reignited this tension, with many criticising the ability of an appellate court to subvert the opinion of twelve jurors, given that they had heard the evidence firsthand and had deliberated on their verdict for a considerable period of time. In the present case their Honours had regard for the observation held in *Pell* that an appellate court "should not seek to duplicate the function of the jury in its assessment of the credibility of witnesses where that assessment is dependent upon the evaluation of the witness in the witness box".[44]As such, their Honours did not divulge into debates as to whether Peter's evidence was reliable or whether he was

[43] Ibid [212].
[44] *Pell* [2020] HCA 12 at [37].

a credible witness, rather they evaluated the cogency of the Crown case, which was not only comprised heavily of Peter's evidence but was also bolstered by other independent pieces which created compelling circumstantial case against both Appellants.

This case is instructive in applying the threshold question elucidated in *M* to the context of JCEs. Whilst *Lyons* can be distinguished factually from *M, Pell* and *Libke v The Queen*[45] on the basis that those proceedings were concerned with crimes of a sexual nature, *Lyons* further extends the concept of whether it was open to the jury to make a finding of guilt in circumstances where a JCE is alleged to have occurred. Determining whether, on the whole of the evidence it was 'open' for a jury acting reasonably to convict as propounded in *M* is notably hard to cross, however in *Pell* there was a highly contentious body of evidence consisting of witnesses who were unable to adequately support the Crown's theory that the accused had the opportunity to commit the crimes that were alleged. Arguably *Pell* can be distinguished from *Lyons* on the basis that there was powerful witness evidence, which went toward establishing motive and to formulating a persuasive circumstantial case against Christine and Ronald.

On the question of 'participation' in the JCE, their Honours correctly accepted the Crown's argument which relied on the precedence of *Arafan*, that if it was open for the jury to accept that Christine directed that Ms Kelly ought to be killed 'by other means' in the early hours of the 23 January 2016, then this constituted a furtherance of the JCE. Their Honours also correctly rejected the Appellant's submissions that their convictions were based entirely on the incredible and unreliable evidence of Peter, as it was clear that the Crown had adduced a substantial body of independent evidence which supported a number of important aspects of Peter's evidence.

In conclusion, *Lyons* demonstrates a fairly uncontroversial and good application of the law and is unlikely to be successfully overturned by a subsequent decision.

[45] (2007) 230 CLR 559.