

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 Macfarlane² 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.

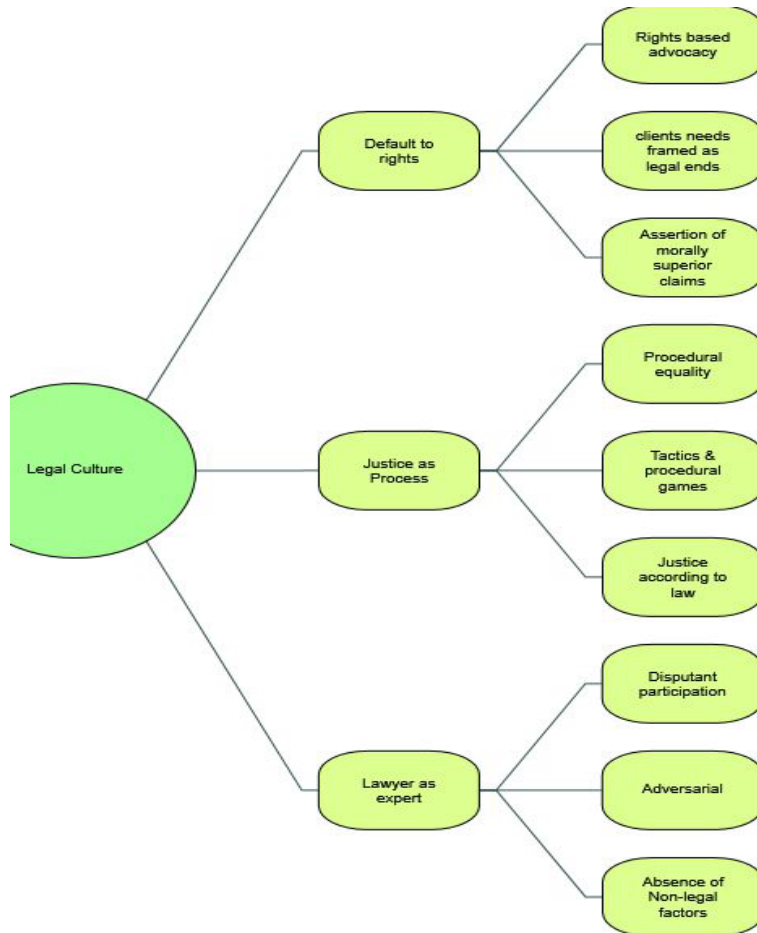


Fig 1. A diagrammatic representation of the three core elements of legal professional identity

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 Boule, *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

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 Boule, *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 Boule 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 note¹⁴ 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 'blurring 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 "blurring 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. Rosenthal¹⁶ 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

<i>Result</i>	<i>Active Client</i>	<i>Passive Client</i>	
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 Daubman²¹ and Isen, Johnson, Mertz and Robinson²² 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 Boule has pointed out²⁴ 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 Boule, *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

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 Alfani, “*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 way³:

“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 as⁴:

“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.”

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 contend⁷:

“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-determination¹⁰. 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 unsafe¹². Why should a settlement agreement or deed entered into at the end of a mediation be treated differently?¹³

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. If 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 is¹⁵. 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

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-determination¹⁶. 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 forms¹⁷, 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 why¹⁸. 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.

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 otherwise²¹. 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 plaintiffs²⁴, 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.

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 Crowe²⁵, 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 mediate²⁶ or by the statutory obligation to participate in a mediation in good faith²⁷, 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 them²⁹.

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. 1.3 Exploring 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 advantage³¹.

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.

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 Boule 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 compromise 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 claim³³, 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.)

³² Laurence Boule 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 money³⁵. 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 poutice 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 Boule 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 future³⁶. 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 Boule 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 mediation³⁷. 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 optimism³⁸, patience³⁹ 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 Boule to doubt whether this mediation involved "authentic self-determination" was "the difficult risk assessment involved" for the claimant. They explain⁴¹:

"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

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", <https://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 Boule 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 Boule 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 appropriate⁴².

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 doubt⁴³.

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 BATNA⁴⁵. 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 parties⁴⁶, 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 mediation⁴⁷.

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**Tanya Hall**

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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

GROUND 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

² *Ibid* [4].

³ *Ibid* [38].

⁴ *Ibid* [39].

⁵ *Ibid* [43].

⁶ *Ibid* [8].