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# Mediation and the Art of Power (Im)Balancing

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Some commentators on mediation purport to be tired of hearing about power imbalances and the inequities that can arise for women in mediated disputes as a result of them. I reject this attitude and aim in this article to continue the dialogue on power imbalances and mediation, particularly in the context of family disputes. Mediation theory as to the ability of mediators to redress power imbalances is questioned. Mediation is not completely rejected as a dispute resolution option for women on this basis, however. Rather a proviso is placed on its use, namely that women must always be given the opportunity to make a fully informed decision regarding the consequences of their participation and the disadvantages they may face as a result of power imbalances.

## Introduction

Awareness of the detrimental impact a power imbalance between the parties can have on the equitability of a mediated resolution to family disputes, whilst always present to some degree, is gradually increasing.<sup>1</sup> A male commentator recently wrote that “(p)ower imbalance between parties is a major problem where one party is highly assertive and the other non-assertive. In cases where power imbalance is gross and unlikely to be overcome, nonadjudicatory processes such as mediation are most likely to be inappropriate. Lack of power and assertiveness will totally undermine the process and the outcome will be distorted”.<sup>2</sup>

Proponents of mediation increasingly assert, however, that mediation can

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1 Much of the awareness in this area has arisen from paper prepared for the National Committee on Violence Against Women by Dr Hilary Astor, December 1991 entitled ‘Position Paper on Mediation’.

2 GV Kurien: ‘Critique of Myths of Mediation 6(1) *ADRJ* 1995 43 at 54.

empower a weaker party, and that mediators are able to redress power imbalances.<sup>3</sup> Professor Wade, for example, is convinced that mediators "... who openly discuss sources of power will be more successful in educating disputants and assisting with constructive decisionmaking."<sup>4</sup> His view is that the phrase "inequality of bargaining power" is repeated "ad nauseam" for showing the unsuitability of mediation<sup>5</sup>, and that the label "inequality of bargaining power" is "fashionably epidemic".<sup>6</sup> With respect, however, as Professor Wade is a male of considerable education and relative social standing I wonder whether, despite a theoretical grasp of the notion of power, he, and those who concur with him, have a real understanding of what it is to experience the consequences of a gender-based, relationship-oriented power imbalance.

My concern relates particularly to the mediation of custody and access matters. It is in this context, and at the risk of exacerbating the nausea experienced by Professor Wade and like-minded mediators, that this article aims unapologetically to continue the dialogue on issues arising for women in family mediation as a result of a power imbalance with their male partner.<sup>7</sup>

## Mediating in Cases Where There Has Been a History of Domestic Violence<sup>8</sup>

Much of the debate in this area focuses on whether it is appropriate to proceed with a family mediation where one party is a victim or survivor of violence. It is irrefutable that most victims of violence are women and the statistics regarding the prevalence of the perpetration of domestic violence make for real concerns about the appropriateness for women of the increasing popularity of the mediation process.<sup>9</sup>

The Chief Justice of the Family Court in a Direction concerning violence, stated that "... the existence of family violence may have an effect upon the conciliation

3 See, for example, A Love, L Moloney, and T Fisher: 'Federally-funded Family Mediation in Melbourne — Outcomes, Costs and Client Satisfaction' (National Centre for Socio-Legal Studies, La Trobe University 1995) and the Editor's Note in RM Field: 'The Use of Litigation and Mediation for the Resolution of Custody and Access Disputes: A Survey of Queensland Family Law Solicitors', (1996) 7 *ADRJ* 5 at 12.

4 JH Wade: 'Forms of Power in Family Mediation and Negotiation', 8 *AJFL* (1994) 40.

5 *Ibid.*

6 *Ibid.*

7 The scope of this article is limited to discussion in the context of heterosexual domestic relationships. The existence of violence-based and other imbalances of power in homosexual relationships is acknowledged, however.

8 This article proceeds on the assumption that the issue of domestic violence itself is not mediable.

9 The statistics of the former Department of Family Services and Aboriginal and Islander Affairs (now the Department of Families, Youth and Community Services) for the year ended 30 June 1994 contained in the Department's Annual Report state that in 1993–1994 there were 11,082 applications for protection orders under the Domestic Violence (Family Protection) Act 1989 in Queensland. This was up 23.2% from the previous year. These statistics would reflect only a small proportion of actual incidents of violence experienced by women, however.

and mediation processes.”<sup>10</sup> “For those who are in fear of family violence: ... mediation will normally be regarded as inappropriate.”<sup>11</sup>

Visible forms of domestic violence manifest as physical, emotional, sexual and verbal abuse. Less visible, and yet equally insidious forms of domestic violence include financial or social deprivation or the imbalance of control and decision-making.<sup>12</sup> Domestic violence is defined in s.11 of the *Domestic Violence (Family Protection) Act* 1989 (Qld) as “... any of the following acts that a person has committed against his or her spouse — (a) wilful injury; (b) wilful damage to the spouse’s property; (c) intimidation or harassment of the spouse; (d) indecent behaviour to the spouse without consent; (e) a threat to commit an act mentioned in paragraphs (a) to (d).”<sup>13</sup>

A number of compelling arguments exist against the use of mediation where there has been violence perpetrated by the male party to a family dispute against the female party. First, of course, violence creates an extreme imbalance of power between the parties.<sup>14</sup> Violence is essentially about control. Patterns of violent control become deeply entrenched, and yet their perpetrators are deceptively charming, reasonable and persuasive in the way they present to others.

The result is that a woman who has survived violence is disadvantaged by a process, such as mediation, which requires that she assert her own interests face-to-face with the perpetrator, in a context where strong intervention on the part of the third party facilitators would breach their neutrality. The perpetrator’s control does not end with the event of separation, he will inevitably bring it to the mediation table.<sup>15</sup>

Further, consensuality, the basis of mediation, is in direct opposition with the dispute resolution patterns exhibited by perpetrators of violence. Whilst a perpetrator may appear charming he does not have the capacity, at least in relation to his victim, to seek honestly to find mutually beneficial outcomes through compromise.<sup>16</sup>

Mediation might also place a survivor of violence in danger. In the process itself,

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10 Chief Justice’s Direction As To the Management of Cases Involving Family Violence, 15 January 1993, introduction.

11 *Id.* at point 4.

12 R Alexander: ‘Mediation’ Paper presented at ‘Challenging the Legal System’s Response to Domestic Violence Conference’, organised by the Southside Domestic Violence Action Group, Brisbane, 23-26 March 1994 at 2.

13 The following examples are included in the section: ‘1. Following the spouse when the spouse is out in public, either by car or on foot. 2. Positioning oneself outside the spouse’s residence or place of work. 3. Injuring or threatening to injure, the spouse’s pet. 4. Repeatedly telephoning the spouse at home or work without consent (whether during the day or night).’ Subsection (2) provides that ‘A spouse need not personally commit the act or threaten to commit it.’

14 H Astor *supra* n.1 at 22.

15 In Canada it has been recognised that, notwithstanding that the relationship had ended, the wife continued to be strongly influenced by what her husband told her because of her accustomed subservient role which had been imposed upon her by the husband during the marriage: *Heaton v. Heaton* (1992) 3 SCR 813 at 853-854.

16 H Astor *supra* n.1 at 23.

or in the carpark or street before or after the mediation session, not only is the woman at risk of a violent outburst, so too are the mediators. For a perpetrator of violence mediation is an excellent opportunity to continue contact with the victim, thereby extending his chosen form of control over her.<sup>17</sup>

Also, it must not be forgotten that violence against women is criminal and should be dealt with by the courts. Mediation is legitimately criticised for having the potential to privatise issues of violence.

## Other Sources of Power Imbalance

Violence is clearly not the only source of power imbalance which may work to a woman's disadvantage in the mediation of a family dispute. Power imbalances can take many and varied other forms.<sup>18</sup> Indeed, Renate Alexander, a Victorian family law practitioner asserts that "...virtually all marital and de facto relationships involve some sort of inequality of power and/or harm inflicted by one party upon the other — most commonly by the male partner upon the female partner."<sup>19</sup>

Power gives its owner the capacity to produce effects on the behaviour or feelings of another person. Power imbalances can result from discrepancies in tangible resources such as income, and education, and discrepancies in intangible resources such as personal characteristics. Power imbalance can arise from a male party's social status<sup>20</sup>, or from a female party's greater need for psychological closure of the conflict.

Other issues which may also give rise to a power imbalance in a mediation which will work to disadvantage a woman include depression, low self-esteem, low expectations, and a general relationship pattern of male dominance and entrenched sex role stereotypes.

## The Gender Role in Negotiations

Power imbalances may also arise out of a variance in attitude of women and men towards bargaining. An important study into the role of gender in negotiations focusing on differences in gender response to moral issues was carried out in 1982 by Carol Gilligan.<sup>21</sup> That study indicated that men and women do respond differently to

17 *Ibid.* at 23-24.

18 See JH Wade *supra* n.4 for a discussion of the various possible forms of power imbalance.

19 R Alexander *supra* n.12 at 2.

20 PE Bryan: 'Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation' 28 *Family Law Quarterly* 1994 177 at 196.

21 C Gilligan: *In a Different Voice: Psychological Theory and Women's Development* Harvard University Press Cambridge 1982. I support the notion that the way women reason is more than a product of the impact on a construction of consciousness by conditions of existence. However, I acknowledge that the conclusions of Gilligan's study have been criticized by many including Carol Smart who does not agree that there is an essential feminine way of reasoning. See also J Tronto (1993) 'Beyond Gender Deference to a Theory of Care' in *An Ethnic of Care* MJ Larrabee (Ed), London; Routledge at 240-57.

moral issues and that the basis for this is that women are more concerned with care issues whilst men are preoccupied by notions of justice. That is, the approach of men has been found to be right's based with the focus on the individual. That of women has been found to be relationships based, focusing on the resolution of dilemmas through communication.

The Gilligan studies have been taken by some as confirming that women have inferior negotiating skills to men. This, however, is a misinformed approach. Rather, the study identifies that women are motivated in their negotiations by different factors to men; factors which, as they result from their sensitivity to the relativity of rights, impact on their performance in negotiations. In family mediations, therefore, a woman may face the dilemma of balancing a concern for her child to have some contact with its father, and her own need to be protected and to protect the child(ren) from a violent or manipulative ex-partner.

The dilemma is compounded by the fact that women are generally more reluctant to impress their own views on others. Society tells women that it is unfeminine to be pushy, loud, forceful; although this is not only tolerated in men, but is an expected model of behaviour.

There is evidence therefore to support the assertion that "(w)omen's negotiating skills are informed by their role as nurturers and caretakers, and not as self-interested autonomous individuals".<sup>22</sup> And that these attitudes are brought by women to the custody and access bargaining table.<sup>23</sup> Consequently, women's interests are potentially jeopardised in the mediation process due to their tendency to value the (albeit now broken down) family relationship rather than their own personal rewards.<sup>24</sup>

Interestingly, this tendency in fact draws women to the mediation process, in that they perceive it as a means of dispute resolution which is more likely to produce a parity outcome. The result of their participation in the process, however, is potentially not in their own interests, is open to abuse and manipulation by a tactically astute male party, and may also not be in the best interests of the child(ren).

However, generalities about gender and performance in negotiations problematically attribute a homogeneity of behaviour to women as a group. It must be remembered that women of different ages, cultures, levels of education and social standing will approach mediated negotiations in many different ways.

Nevertheless, issues of power imbalance must continue to be acknowledged if mediation is not to result in travesties of equity and justice for women. Power imbalances potentially arise in various ways in almost every family mediation. The result is that even where a woman is not a victim of violence per se, the mediation process may well deny her a just outcome to the dispute.

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22 BC Bedont: 'Gender Differences in Negotiations and the Doctrine of Unconscionability in Domestic Contracts' 12 *Canadian Family Law Quarterly* 1994 21 at 34.

23 *Ibid* at 31.

24 This was confirmed in a study conducted for a PhD thesis by SL Borys entitled 'The Relation of Power, Goals, and Gender to Preferences for Various Conflict Resolution Settings (University of Waterloo 1987) cited in BC Bedont *ibid* at fn 46.

## The Possibility of Redressing Power Imbalances

Many mediators genuinely believe that they can redress power imbalances: "...we contend that the essential values and characteristics of mediation make it a particularly effective means of dispute resolution in situations where power imbalances play a role".<sup>25</sup> And it is of considerable concern that it is usually only in "extreme cases", so-called, that mediators will be prepared to admit that their personal powers are inadequate to protect the disadvantaged party's interests and that the process is therefore inappropriate: "... in extreme cases the mediator should consider terminating negotiations rather than permitting an uninformed or intimidated party to agree to a settlement that may be unrealistic or unfair".<sup>26</sup>

Relying on a mediator's ability to assess when a circumstance of power imbalance is extreme enough to justify termination, or to decide that a party is feeling intimidated, or that a settlement is unfair, places a woman's physical and emotional safety squarely in the hands of the mediator. This is too risky. Mediators too can fall prey to the charms of perpetrators of violence, and the tactical manipulations of those with the balance of power in their favour.

Before an imbalance can be redressed by mediators, if indeed that is possible and I doubt that it is, the mediators must be aware of its existence. If this information does not arise through questioning at intake (as well it might not if a woman chooses not to discuss it, it is hardly likely to be raised by the perpetrator), it places the burden of a belated embarrassing (and unlikely) 'admission' on the part of the woman, or reliance on the mediators' skills in power imbalance identification.

There is considerable concern as to whether a woman who is subject to a power imbalance or who is a victim or survivor of domestic violence will be prepared to raise those circumstances with the mediators. Women may well be silenced through the cultural and legal privatisation of issues of male control over women and the position of that control within the realm of normalcy.<sup>27</sup>

Not only might the woman herself be reluctant to advise mediators of power imbalance issues, but mediators may also, through their loyalty to the process, in effect discourage this. Mediators tend to be preoccupied with diffusing hostility. They achieve this by avoiding accusations of fault and by looking to focus on the solving of future-oriented issues. The result might be said to be a rigid rejection of past misconduct which also acts to silence the complaints and fears of women.<sup>28</sup> As one writer has said "(a)lthough mediators have responded to feminist critics by expressing concern for domestic violence, their insistence on prospectivity and on

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25 AM Davis and RA Salem 'Dealing with Power Imbalances in the Mediation of Interpersonal Disputes' 6 *Mediation Quarterly* (1984) 17 at 18.

26 *Ibid.*

27 S Tarrant 'Something Is Pushing Them To the Side of Thier Own Lives: A Feminist Critique of Law and Laws' 20 *Western Australian Law Review* 1990 573 at 581.

28 MJ Bailey 'Unpacking the "Rational Alternative": A Critical Review of Family Mediation Movement Claims' 8 *Canadian Journal of Family Law* 1989 61 at 69.

avoiding accusations of guilt may have the effect of preventing the issue of violence from surfacing".<sup>29</sup>

Even more seriously, the desire mediators may have to create a level playing field can result in discussions of the issue of violence being overridden by the concept of complementarity; a concept which, through assigning responsibility for violence to the family system, can be used to implicate the victim.<sup>30</sup>

Whilst mediators assert that they are theoretically able to redress power imbalances, it is very difficult to find the practicalities of this assertion precisely articulated anywhere.<sup>31</sup> Often reliance appears to be placed on the fact that mediators simply have excellent training, or communication and interpersonal skills. However, I am not alone in believing that "... erroneous assumptions appear to have been made in mediation practice (and certainly in mediation theory) that a balance of power can be ensured in the mediation process".<sup>32</sup>

## A Survey of Family Law Practitioners and Mediators

To test my views regarding the appropriateness of mediation for women involved in family disputes (and in particular disputes as to custody and access), I conducted a survey of family law solicitors and mediators with the Community Justice Program in Queensland in 1995.<sup>33</sup>

Amongst other things I asked for their responses to the statement that mediation is appropriate where there has been a history of domestic violence. The results are reflected in Tables 1 and 2 below.

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<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> See, however, S Gribben 'Violence and Family Mediation: Practice' 8 *AJFL* (1994) 22 and the entirely inadequate eleven point plan proposed by Davis and Salem *supra* n.25 at 18 — 23.

<sup>32</sup> GV Kurien *supra* n.2 at 54.

<sup>33</sup> The survey was conducted as a part of a Master of Laws thesis at the Queensland University of Technology under the supervision of Assoc. Prof P Tahmindjis. A response rate of approximately 27% was received from practitioners and of approximately 40% from mediators. 477 practitioners were sent surveys. 147 mediators were sent surveys. Note that the percentages shown in the tables are of those who answered each question. Due to rounding errors, totals may sometimes not add to 100%. The results of the practitioners survey are discussed in more detail in RM Field *supra* n.4. In particular, the results found in Tables 1 and 3 and the discussion relating to them first appeared in that article at 12-13.

**Table 1: Practitioners’ responses to the statement: Mediation is appropriate where there has been a history of domestic violence.**

	Strongly disagree	Disagree	Undecided	Agree	Strongly agree	Total disagree	Total agree
Male	11%	38%	36%	15%	0%	49%	15%
Female	34%	36%	21%	9%	0%	70%	9%
Total	20%	36%	30%	13%	1%	56%	14%

These results indicate an encouraging level of awareness amongst practitioners that mediation is not appropriate where there has been a history of domestic violence. Interestingly, but not surprisingly, more female practitioners have a greater awareness of this issue. The considerable number of male practitioners who remain undecided on the issue, reflects a possible need for their further education in this area. It would appear that the “ad nauseam” discussion of power imbalance concerns in relation to mediation (so distasteful to Professor Wade) has not yet impacted on the views of the practitioners surveyed. Their views tend to support the assertions I have made above.

**Table 2: Mediators’ responses to the statement: Mediation is appropriate where there has been a history of domestic violence.**

	Strongly disagree	Disagree	Undecided	Agree	Strongly agree	Total disagree	Total agree
Male	24%	32%	16%	28%	0%	56%	28%
Female	36%	30%	18%	15%	0%	66%	15%
Total	31%	31%	17%	21%	0%	62%	21%

Note: female figures do not add up to 100%

Mediators too indicated an awareness that mediation may not be appropriate where there has been a history of violence, again supporting the assertions I have made above.

The survey then put to both practitioners and mediators the statement that mediation is appropriate if a victim of domestic violence makes an informed decision to participate. The results are found in Tables 3 and 4 below.



**Table 3: Practitioners' responses to the statement: Mediation is appropriate if a victim of violence makes an informed decision to participate.**

	Strongly disagree	Disagree	Undecided	Agree	Strongly agree	Total disagree	Total agree
Male	1%	7%	21%	67%	4%	8%	71%
Female	7%	13%	15%	61%	4%	20%	65%
Total	3%	10%	18%	64%	5%	13%	69%

These results indicate considerable support for the participation of survivors of violence in mediation where their decision to take part has been an informed one. It must be understood, however, that perceptions of what constitutes an "informed" decision will differ. If solicitors are to subscribe to this view there must be a greater focus on their education so that they can ensure the decision of a survivor of violence to participate is made on accurate information as to the disadvantages a woman might face as a result of power imbalance issues.<sup>34</sup>

**Table 4: Mediators' responses to the statement: Mediation is appropriate if a victim of violence makes an informed decision to participate.**<sup>35</sup>

	Strongly disagree	Disagree	Undecided	Agree	Strongly agree	Total disagree	Total agree
Male	4%	8%	20%	52%	16%	12%	68%
Female	6%	12%	21%	48%	9%	18%	57%
Total	5%	10%	21%	50%	12%	15%	62%

Again, there is considerable support amongst mediators, both male and female, for providing women, who make an informed choice to participate, with the mediation option.

<sup>34</sup> RM Field *supra* n.3 at 13.

<sup>35</sup> Note female and total figures do not add up to 100%. 3% of female respondents (= 2% of total respondents) chose not to answer this question.

## Conclusion

Although power imbalances and their impact on mediated outcomes make the appropriateness of mediation for women in family disputes highly questionable, I do not believe that "...mediation is inappropriate in all family law matters and should be abandoned as an appropriate and viable socio-legal response to family law litigation".<sup>36</sup>

To abandon mediation in this way is to deny women the opportunity of a process which they may prefer, which may be more affordable and which may result in a faster, more flexible outcome. It is not in the interests of women unilaterally to deny them access to mediation where they make a free and informed choice to participate.<sup>37</sup> The views of Queensland family law practitioners and mediators support this.

A woman's decision to participate in a family mediation must be based on extensive information about the potential disadvantages she may face and the possible impact the disadvantages may have on the equitability of any mediated outcome. The decision must not be smothered with hopeful, theoretical assertions that power imbalances can be redressed or nullified by mediators.

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36 R Alexander *supra* n.12 at 1-2.

37 H Astor *supra* n.1 at 26-27.