The Reconstructionist Model of Mediation: A Social Constructionist View of the Quest for Meaning to Make Sense of Loss

From Empowerment and Recognition to Relational Learning around Loss as an Access-to-justice Measure

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Abstract

HOW MEDIATION CAN DEAL WITH LOSS IN A RELATIONAL WORLD TO BE A MORE EFFECTIVE MEANS OF DISPUTE RESOLUTION

The thesis aims to develop a theoretical explanation for a social constructionist model of mediation. It does so by relying on the relevant interdisciplinary ideas in a number of disciplines including psychology and law. It addresses the need to re-conceptualize mediation as a genuine method of dispute resolution that can handle the impact of loss on the psychological well-being of the parties when engaging with the profession of law.

It makes the claim that effective mediation requires the parties to move forward psychologically from their dispute/loss by re-conceptualizing their own meaning of 'justice' around the loss so that the loss can be more effectively endured. It takes us from the transformative model to a social constructionist model of relational learning as a means of making sense of loss by placing the dispute in the wider social context to become in itself, an agent for grass-roots social change.

Declaration of Originality

I certify that this thesis does not incorporate, without acknowledgement, any material previously submitted for a degree or diploma in any university, and that, to the best of my knowledge and belief, it does not contain any material previously published or written by another person, except where due reference is made in the text.

Signed:  On: __15_/__11_/__2014

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Notable too is Andrew Wong whose invaluable assistance with the technical side and formatting of this thesis cannot be measured. In addition, I wish to acknowledge the love and support of my family, grandsons, close friends and colleagues, all of whom have contributed significantly and in true relational form to the evolution of ideas in the writing of this thesis. I now look forward to demonstrating my acknowledgement with each and every one of them as my life unfolds in our ongoing ‘game in the making’.

Contents

List of Abbreviations

ACT	Australian Capital Territory
ADR	alternative dispute resolution
AI	appreciate inquiry
FDRP	Family Dispute Resolution Practitioner
IS	Information Session
IST	intersubjective systems theory
MSB	Mediator Standards Board
NADRAC	National Alternative Dispute Resolution Advisory Committee
NIS	Normative Information Session
NSW	New South Wales
PCP	personal construct psychology
PT	psychology of type
RM	reconstructionist model
S-ART	self-awareness, self-regulation and self-transcendence
TA	transactional analysis
TJ	therapeutic jurisprudence

Prelude

The thesis is intended to explore how mediation conducted as the Re-Constructionist Model (RM) has the potential to reach the outcomes of relational learning for all involved.[1] The RM is not a "how to" manual for mediators to learn yet another model of mediation. Instead, I have attempted to offer the parties the chance to go as far as they are ready to go at any point in time throughout the mediation process as social constructionists and grounded theorists. The discussion does not purport to describe the reality of the participants but does purport to offer an opportunity to the participants to describe their own reality in relation to their loss.

I have endeavoured to explain how the writing style of any author can in itself be a factor that impinges on the level of communication that is extended between the author and the reader. Any suggestion of prescriptive accounts of reality in the thesis are therefore unintentional and are meant to be more descriptive in tone with the potential to achieve the promoted outcomes of the RM of mediation. In this regard I have been careful to explain that the reality as experienced by the parties during a Re-Constructionist process is intended to be qualitatively analysed from each of the parties' perspective. It is also noted that such a qualitative analysis did not intend to offer an empirical study that proposes particular outcomes that necessarily happen in reality.

For this reason, it is undesirable to remove the extensive referencing of my own mediation experience as a significant dimension of the thesis because there is no literature available that is of direct relevance to this inter-disciplinary approach to mediation. I have explained at the beginning of the thesis that I am drawing upon my own experience as a practising barrister, psychologist and mediator for more than twenty years and that this thesis is an attempt to theorise the insights I have gained from my lived experiences. I have produced a workable model of mediation by incorporating insights from psychology into Law in an interdisciplinary manner and offering a theoretical explanation for the relational learning around loss that occurs for all participants including the mediator, and includes a reconstruction of the system in which the outcomes from the mediation take form.

[1] Katherine Pavlidis Johnson, 'The Reconstructionist Model of Mediation' (Speech delivered at the Dispute Resolution and Psychology Inaugural Conference, Sydney, 14 September 2012). I acknowledge that this work has not been published and thus is not an authoritative source.

Any references to the suggested influence of the RM on the justice system, equality, democracy and other normative aspirations are intended to be modest in scope. Nonetheless, the thesis is responding to the trend in law towards mediation. That is, the analysis of mediation as the RM is designed to link it specifically with the fact that the success of mediation coming from the legal system can be conceptualised as an aspect of making law and the justice system more accessible to the public at large.

The RM initially developed from mediating Family Law (parenting) and workplace grievance matters where it was refined over time to its current form and usage, which incorporates the development of the Normative Information Session (NIS) as a normative framework against which the parties can assess their own level of readiness to move forward.[2] The RM has also been used effectively for other kinds of disputes and it remains for others to extend the ideas of this thesis to determine whether that effectiveness similarly transfers to other practitioners in resolving various other disputes.

The references to the relational learning aspirations and other contributions for parties in mediations brought into the NIS realm are reasonably feasible when the two interrelated issues of relational learning and dispute setting are kept in mind. Namely, the first issue stems from the theoretical argument that relational learning is desirable and can be facilitated through the use of the RM. The second issue is about what might be reasonably feasible for mediations in the dispute settings - especially of family and workplace disputes where relational change is a key factor to any resolution. It is noted that the practical limitations of available time and resources of describing how the RM works within family and workplace disputes does not detract from the theoretical reasons for aiming for relational change in resolving disputes in other legal areas through the RM.

The thesis is an attempt to bring forth a new way of seeing the mediation process not just as a resolution of disputes but also as a way of changing the personal constructs (worldviews) of the parties and by extension changing the very fabric of the system in which agreements take place.[3] For example, in matters where the parties must maintain

[2] See 3.3.

[3] See, eg, Beverly M Walker and David A Winter, 'The Elaboration of Personal Construct Psychology' (2007) 58 *Annual Review of Psychology* 453, 455; Henderikus J Stam, 'Personal-Construct Theory and Social Constructionism: Difference and Dialogue' (1998) 11 *Journal of Constructivist Psychology* 187,

on-going relationships such as parenting in family law or co-working in workplace grievances, I have presented the mediation process as one in which the parties can co-create a new foundation for relating that allows them to better live with their perceived losses and by so doing, to co- create a new system for living better with those losses as they continue to co-relate. In an attempt to give a theoretical basis to this analysis, I have noted that the RM process in the social sciences is actually the process of social constructionism in action where the very fluid interplay of constantly changing relations moving towards agreement or otherwise within the mediation process has been likened to the process of Chaos Theory[4] in the natural sciences.

I note that such claims are often the victim of language restrictions making them appear as overgeneralisations and over-reaching but which I state are not intended to be the case. I further note that statements such as: "the principal reason for conducting any mediation is to make sense of loss," is in fact intended to acknowledge that there are of course, many reasons for engaging in mediation but that a mediator is only engaged when the expectations of the parties have not been met, that is, there is a loss of the original expectations and a demand on the other to redress the loss. It is unlikely that a mediator would be approached to negotiate terms of a contract with two parties where there is no dispute. Such a third party if required at all, would more than likely be a facilitator and not require the skills of a mediator.

Likewise statements such as: "the normal process of facilitative mediation attempts to resolve the dispute as quickly as possible" fall victim to language restrictions where it is obvious from the very comprehensive description of the RM in the thesis that there is no such thing as a 'normal mediation' in practise, but that in theory, there is a fixed 'normal process' that is considered to be the 'facilitative model' which is constantly used by trainers, coaches and assessors of mediator trainees. The limited scope of the study necessarily restricts such explanations in detail at all times but the aspiration is that the insights from using the RM can similarly be tried by other practitioners in many dispute settings. Similarly the debate about mediator neutrality is thoroughly debated in

196; Albert Bandura, 'On the Functional Properties of Perceived Self-Efficacy Revisited' (2012) 38 *Journal of Management* 9-44.

[4] See, eg, See Stephen H Kellert, *In the Wake of Chaos: Unpredictable Order in Dynamical Systems* (University of Chicago Press, 1993) 32; Edward Thorndike, *The Principles of Teaching: Based on Psychology* (The Mason Press, 2013) 147; Peter Kinderman, John Read, Joanna Moncrieff and Richard P Bentall, 'Drop the Language of Disorder' (2013) 16 *Evidence Based Mental Health* 2-3.

the mediation community as stated often in the thesis, but the focus I wished to present was to highlight the interplay of personal constructs between the mediator and the parties which gives a different spin in relation to the whole concept of mediator neutrality.

I accept that not all proposals I have presented in the thesis will be accepted as substantiated but say that that is a matter of difference in interpretation between the author and the reader. Any suggestions of being too prescriptive and giving references to what 'mediators ought to do' or 'should do' need to be read in the context in which they were written where I have aimed at length to explain the use of such terms.

For example the proposal that law is a 'game with fixed rules' does not preclude the fact that many lawyers take a problem solving or holistic view of legal practice. In fact statutory Law is nothing but rules which are fixed and require interpretation before a holistic approach is possible. Case law similarly sets precedents which are preferably followed by lower courts such that rules are more recognised prior to mitigating circumstances being taken into consideration. Again, what might be reasonably feasible for mediation in settings of family law and workplace disputes may not equally apply in the same way in other settings and attempts have been made right throughout the thesis to acknowledge this very important consideration. It is also important to acknowledge the practical limitations of available time and resources in presenting the thesis but I further acknowledge that this will not detract from the theoretical reasons for aiming for relational change in resolving disputes throughout the mediation process which I have termed the social constructionist approach, and have relied heavily on the work of Kenneth Gergen who has broken new ground in psychology by highlighting that it is from relationships that all individual functioning arises.[5]

To explain how the social constructionist approach applies to mediation, I have drawn upon Dewey's pragmatism as the core foundation for the relational learning theory and presented the psychological concepts of Kelly's Personal Construct Theory to form a theoretical foundation for the worldviews of the parties that they bring with them to the mediation process. I added the theories of Neimeyer and Sands on Meaning reconstruction, as a theoretical basis to empower the parties to reconstruct their sense of

[5] Kenneth J Gergen, *Relational Being: Beyond Self and Community* (Oxford University Press, 2009).

Loss brought to the mediation.[6] Encouraging the parties to acknowledge their grief/disappointment arising from their perceived losses empowers them to change the meaning attached to those losses, and using grounded theory research, the parties' draw on their own experience to formulate a new narrative/ world view that is better suited to accommodate their on-going sense of loss into the future (grounded theory) where they relate as 'business partners' with very explicit expectations and no assumptions, if they relate at all.

I have incorporated the theory of Isolina Ricci form her Relationship Chart as a core component of the NIS to emphasise the significance of learning about the changing phases of relationship between the parties in a dispute;[7] and have included theories of Loss and Grief (Kubler-Ross etc)[8] to form a benchmark of accepted research from Psychology which can assist the parties in making informed decisions around the importance of paying due attention to the grief arising from the loss whether that grief is disenfranchised or not. The research indicates that when the grief is acknowledged appropriately by the parties they are better able to live with the loss whatever form it may take. The NIS offers the parties a normative framework from which they can learn the 'normal' responses to the experience of shock arising from a loss and how best to cope with the subsequent grief that follows. The NIS offers the parties an opportunity to compare their own level of readiness to that of the benchmark thus enabling them to move forward making an informed decision from any issue in dispute. The NIS further encourages each party to ***learn*** from what they see and hear during the mediation process so that they are willing to completely re-appraise their original version of the dispute based on what they see, hear and learn during the mediation process. The DISC model[9] has also been added to the NIS to assist the parties to better understand style differences in communication in order to avoid each party's possible assumption that the other is set to make life a misery.

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[6] See, eg, Neimeyer, Robert, 'Grief, Loss, and the Quest for Meaning: Narrative Contributions to Bereavement Care' (2005) 24 *Bereavement Care* 27; Neimeyer, Robert (ed), *Meaning Reconstruction and the Experience of Loss* (American Psychological Association, 2001); Neimeyer, Robert A, 'Fostering Posttraumatic Growth: A Narrative Contribution' (2004) *15 Psychological Inquiry* 53; Neimeyer, Robert, Darcy Harris and Howard Winokuer (eds), *Grief and Bereavement in Contemporary Society: Bridging Research and Practice* (Routledge, 2011).

[7] See 3.8.

[8] Elisabeth Kubler-Ross, *On Dying and Death* (Scribner, 1969).

[9] See, eg, Jan de Jonge and Christian Dormann, 'The DISC Model: Demand-Induced Strain Compensation Mechanisms in Job Stress' in Maureen Dollard, Helen R Vinefield and Anthony H Winefield (eds), *Occupational Stress in the Service Professions* (Taylor & Francis, 2003).

To assist the process of changing the parties' expectations around their perceived losses I have added Vago and Silbersweig's theory on Mindfulness to promote the parties' sense of vigilance and being present in the mediation process;[10] and Berne's theory on Transactional Analysis (TA)[11] to encourage the parties to engage from their respective Adults for best communication. I have added my own category of Observer Self to Berne's theory to incorporate the macro perspectives of the social contract in which the dispute occurs which also have to be considered if the parties' agreed outcome is to be endured long-term. The skills of Mindfulness and TA are essential to the parties' better understanding of their dispute from a holistic perspective with which a mediator and the parties can be better assisted when using the NIS and the DISC model to gain a normative response to each issue at hand. They are also useful skills to formulating the changes required to the social structures to better accommodate the on-going sense of loss that can be better endured.

I acknowledge that the very necessary narrow parameters imposed by academia to ensure validity – even on a qualitative basis - necessarily restricts the scope of such a fluid process as the RM such that the claims of the thesis may appear over-exaggerated and generalised. This however does not detract from the importance of the RM as a mediation process that offers a workable analysis of loss based on the readiness, willingness and ability of the parties to participate in such analysis. I further state that the thesis breaks new ground in presenting a theoretical perspective and as such, it is bound to break new boundaries that appear as overgeneralisations. Nonetheless I have been ever –mindful to present as close a description of the fluidity of the RM analysis process much like a prescription of what a holographic universe might look like where the micro skills of the mediation players reflect and affect the macro world in which they live and vice versa. The tendency to be wordy and technical should therefore be excused in the effort to explain the macro and micro interactions that comprise the RM concepts.

[10] Vago, David R, and David A Silbersweig, 'Self-Awareness, Self-Regulation, and Self-Transcendence (S-ART): A Framework for Understanding the Neurobiological Mechanisms of Mindfulness' (2012) 6 *Frontiers in Human Neuroscience* 1.
[11] Eric Berne, *Transactional Analysis in Psychotherapy: A Systematic Individual and Social Psychiatry* (Grove Press, 1961).

Introduction: Using Mediation to Manage Loss as a More Effective Means of Dispute Resolution

The relationship between law and dispute resolution[1] is by now an indisputable fact. The relationship between law and psychology is also well known, especially in family law. However, the relationship between psychology and dispute resolution (or 'alternative dispute resolution' [ADR]) is not as well known, especially in relation to the construct of loss and the emotion of grief. The starting point for this thesis is the notion that mediation is an acceptable form of dispute resolution, and the problem this thesis addresses is how mediation, as a form of dispute resolution (or ADR), can more effectively manage loss in a relational world, and thereby become a more effective means of enhancing access to justice.

There are many answers to this question because it can be addressed on multiple levels. I am particularly interested in addressing the formation and implementation of the reconstructionist model (RM) of mediation as a model that offers disputants the opportunity to better understand the generative process of relating that led to the dispute or loss, and that can lead them away from the dispute in order to better live with their loss.[2] The RM focuses on the relational flow between psychology and law in order to manage as much of the grief from the loss as the parties can handle at the time, thereby becoming a more effective means of dispute resolution through the process of relational learning.

The discussion of the thesis aims to develop a theoretical explanation for this model of mediation. It does so by relying on relevant interdisciplinary ideas in a number of disciplines, including psychology and law. It addresses the need to conceptualise

[1] There has always been a debate regarding the term 'alternative dispute resolution', with some people claiming that the term 'alternative' is a misnomer, and that the term should simply be 'dispute resolution', of which the law is a part and not an alternative. This will be further discussed in Chapter 1; however, in this thesis, the term 'dispute resolution' encompasses the familiar use of the term 'alternative dispute resolution', as used in the dispute resolution industry.

[2] The relationship between a 'dispute' and 'loss' will be further discussed in chapter 1 but for now the term 'loss' is used throughout this thesis to refer to expectations about the terms of a contract that are not met, even if the party decides not to make a claim on the other. The lost expectations are themselves a loss; and if a claim is made on the other then a dispute occurs.

mediation as a genuine method of dispute resolution that can handle the effect of loss on parties' psychological wellbeing when engaging with the profession of law. The arguments for each of the five proposals are developed sequentially in Chapters 1 to 5.

This introduction briefly outlines the arguments of this thesis to propose that mediation can be used as a genuine access-to-justice process to make sense of loss.[3] Part 1 presents the background context of this study, Part 2 provides a brief explanation of how mediation and social constructionism relate and Part 3 outlines the structure of this thesis.

Part 1: Background

This thesis is not an empirical study, but a qualitative analysis of the mediation process. It is an effort to theorise the insights that I have gained from the past 20 years of working as a mediator. The starting proposition is that parties who seek remedies in law, psychology or dispute resolution need to make sense of the losses they encounter, even if it is only the loss of expectations that requires a reconstruction of meaning. The second proposition arises from the recognition that using a social constructionist analysis of loss during the mediation process can better help parties develop the more effective long-term solutions required for ongoing relationships, such as in serious workplace disputes.

By combining these two insights, my aim is to develop a model of mediation as an example of how the mediation process can be analysed from a social constructionist perspective in order to assist disputants in ongoing relationships to better live with the losses they experience in their lives. I propose that a social constructionist interpretation of the relational world that comprises a dispute can help parties better deal with their losses during the mediation process, and that mediation can become a more effective means of dispute resolution and more effective means of enhancing access to justice.

[3] Once a claim is made on the other to redress the lost expectations in relation to the perceived terms of the contract, the way the dispute is handled as part of the daily functioning of the parties can be said to lead to a need for justice. 'Access to justice" therefore is an important factor for the parties in addressing their need to redress their lost expectations in order to resolve the disputes. This will also be further discussed in Chapter one.

The new model of mediation is termed the 'reconstructionist model' to describe the process of reconstructing meaning for parties experiencing serious ongoing disputes such as workplace or family disputes. By clarifying meaning around the perceived lost expectations from both sides, the form or nature of the dispute changes and affects the outcome of the dispute to become either a settlement of some issues or possible transformative experience for others. In addition, the extreme stress generated by the immediate need to fulfil legal obligations, while still dealing with the aftermath from the loss (which may be traumatic), may best be addressed as part of an ongoing new narrative. This new narrative may challenge each party's existing network of beliefs,[4] around which is organised a unified reality system that is otherwise highly resistant to change. This offers an effective model of ADR for use in all manner of disputes involving ongoing relationships—a model that takes seriously the task of resolving disputes.

The introduction of a discourse or narrative surrounding loss during the mediation process may empower parties to further recognise the degree to which the trauma of the loss affects their reality systems. The greater the degree of attack each party perceives on their central belief about the loss, the greater is the trauma felt to the entire reality system of that party. Conversely, the more peripheral the effect of the loss on the core belief of the party in dispute, the less trauma is felt.[5] Thus, relational learning is the learning that arises from the degree to which each party acknowledges the differences in meaning attached to the loss from their own and the other party's perspectives. It also

[4] Regarding the question about beliefs, an automatic response to something is referred to as an 'attitude', while a conscious formula, rule or idea that one can articulate is referred to as a 'belief'. For ease of discussion, the attitude is referred to as 'System 1' and the belief structure is referred to as 'System 2'. Both Systems 1 and 2 feed into and influence each other. Emily B Falk and Matthew D Lieberman, 'The Neural Bases of Attitudes, Evaluation, and Behaviour Change' in Frank Krueger and Jordan Grafman (eds), *The Neural Basis of Human Belief Systems* (Psychology Press, 2013) 83. See also Sylvia A Morelli and Matthew D Lieberman, 'The Role of Automaticity and Attention in Neural Processes: Underlying Empathy for Happiness, Sadness, and Anxiety' (2013) 7 *Frontiers In Human Neuroscience* 1; Salvatore J Torrisi, Matthew D Lieberman, Susan Y Bookheimer and Lori L Altshler, 'Advancing Understanding of Affect Labeling with Dynamic Causal Modeling' (2013) 82 *NeuroImage* 481. See generally Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011). The key point for mediation is that having certain System 2 beliefs can result in people forming fixed System 1 attitudes (being the automatic 'towards/away' response to something that they do not have to think about). These attitudes might be protective and useful in helping people attain what they want and need from their environment. However, many attitudes seek to control more than people actually need them to. After discussing issues using System 2, people may consciously change a belief or realise that an attitude is not consistent with their primary beliefs. This indicates that System 2 is reaching a new belief system that can immediately rewire the brain to change their attitude towards an issue.

[5] Milton Rokeach, *The Three Christs of Ypsilanti: A Psychological Study* (Columbia University Press, 1964) 20; Martin L Cheikin, 'Loss and Reality' (1981) 59 *Personnel and Guidance Journal* 335, 335.

arises from the degree of acknowledgement by the parties of their own part played in the ever-changing interactions that form the reality system of the relationships in their dispute.

The effect of legal obligations on the psychological wellbeing of parties also indicates similarities between the RM and the aims of therapeutic jurisprudence (TJ). Both TJ and the RM are holistic approaches that focus on the concept that law should have a neutral, not negative, effect on the psychological wellbeing of parties. Both TJ and the RM recognise the relational flow between law and psychology through a framework for asking questions; however, neither is a coherent body of knowledge that explains observed phenomena that can predict future behaviour and is verifiable.[6]

This thesis is not intended to be a comparison between the RM and TJ, but as an insight to the wider context of dispute resolution. I argue that the process of mediation, as social constructionism in action, can recognise the rich traditions of TJ as a relational flow between psychology and law, and shift that relationship from the public to private sphere. This may enable parties not only to deal with the effect of their own legal obligations on their psychological wellbeing, but also to further deal with the psychological effect of their loss on the outcome of their dispute through the process of relational learning. In this manner, a social constructionist approach aims to help parties consider what meaning is attached to their loss, and how that meaning can and does affect the outcome of their dispute during the mediation process. Adopting a social constructionist interpretation of the dispute enables parties to recognise that the original meaning attributed to their loss leads to a particular outcome, and that changing the meaning of deprivation attributed to the original meaning surrounding their loss can alter the outcome of the dispute.

The forms of relational learning inherent in the process of social constructionism empower parties to recognise the loss—whether it is in the form of family trouble, emotional disturbance, a bad business deal and so forth—as a construct that is brought into meaningful existence by being 'talked into being' in everyday life. Given that it is a construct that can be 'talked into existence', it can also be changed—it can be 'talked

[6] Cheikin, above n 5, 336.

out of existence'.[7] The practical functions of what is constructed and how the construction process unfolds play a critical role for parties in every dispute and thus in every mediation.

Addressing the effect of parties' respective losses—emotional or substantive—on the outcome of their dispute in the mediation process better enables parties to recognise each other's meanings attributed to their loss. In addition, seeing the meaning of the loss from each other's perspective better enables parties to more easily recognise the constraints these meanings impose on their individual and combined abilities to move forward from the dispute. The parties' theory of relational learning that develops from their social constructionist analysis of the loss is then confirmed using brief theory[8] from the psychology of type. Solution-focused brief therapy[9] arose as an approach to

[7] Jaber Gubrium and James Holstein (eds), *Handbook of Constructionist Research* (The Guilford Press, 2008) 1.

[8] The psychology of type essentially examines the behaviour of individuals in a specific situation. It is a 'wellness' model for normal behavioural styles and behavioural preferences that are objective and descriptive, rather than subjective and judgemental. It originated from the DISC model, which is the four-quadrant behavioural model based on the work of William Moulton Marston. He defined four categories of human behavioural styles: 'D' for dominance, drive and direct; 'I' for influence; 'S' for steadiness or stability; and 'C' for compliant, conscientious or cautious. For over 40 years, the DISC has continued to evolve from Marston's original development. I have included the DISC model in the RM as a standard of fairness with which parties can assess their own and others' negotiation styles during the mediation process. The DISC model is important because it identifies a clear and easily understood model of four distinctive behavioural types, and offers the ability to reliably measure the intensity of each style in order to explain 'normal' human behaviour. This model continues to be used by corporations, educational institutions, government agencies and religious institutions to develop and improve understandings of ourselves and others. For this reason, it was selected as an external standard of fairness for understanding productive interpersonal interactions. John C Goodman, *What is DISC? Who Created the DISC Model?*, Center for Internal Change <http://www.internalchange.com/what-is-disc.htm>. I want to emphasise that people tend to do things in predictable ways, which does not mean that anyone can know everything about another person merely by understanding their primary behavioural styles. However, understanding the model can form a strong basis for learning to communicate with and understanding other people in better and more effective ways. Marston's idea forms the basis of the DISC theory as it is commonly applied today. See, eg, Jan de Jonge and Christian Dormann, 'The DISC Model: Demand-Induced Strain Compensation Mechanisms in Job Stress' in Maureen Dollard, Helen R Vinefield and Anthony H Winefield (eds), *Occupational Stress in the Service Professions* (Taylor & Francis, 2003); Jukka Sappinen, *Extended DISC* (2013) <http://www.extendeddisc.com/>. Later, psychologists and behavioural specialists developed a variety of practical tools to apply Marston's theory. William M Marston, *Emotions of Normal People* (Kegan, Paul, Trench, Trubner and Co, 1928) 405; Carl Jung, *Psychological Types* (Princeton University Press, 1971); Myers Briggs and Peter Briggs, *Gifts Differing: Understanding Personality Type* (Davies-Black Publishing, 1980); David Keirsey and Marilyn Bates, *Please Understand Me: Character and Temperament Types* (Prometheus Nemesis, 1984); Hans Eysenck, *Dimensions of Personality* (Transaction Publishers, 1947); Peter Condliffe, 'Personality Types and Conflict: Finding Our Way Through the Maze' (2002) 5 *ADR Bulletin* 146, 148.

[9] Chris Iveson, 'Solution-focused Brief Therapy' (2002) 8 *Advances in Psychiatric Treatment* 149; Kidge Burns, *Focus on Solutions: A Health Professional's Guide* (Whurr Publishers, 2005); Alasdair J Macdonald, *Solution-Focused Therapy: Theory, Research & Practice* (Sage, 2nd ed, 2011); Anke Seidel and Darren Hedley, 'The Use of Solution-Focused Brief Therapy with Older Adults in Mexico: A Preliminary Study' (2008) 36 *The American Journal of Family Therapy* 242; Alistair Campbell, 'Single-

psychotherapy based on solution building, rather than problem solving. It has been adopted in the RM because it explores current resources and future hopes that contain the seeds of the parties' own solutions, rather than exploring present problems and past causes—the province of law. It is based on the theory that the clearer the party is regarding his or her goals, the more likely these goals will be achieved, particularly if the parties' efforts towards achieving their goals are acknowledged.

Although single-session brief therapy successes are considered 'flukes' in psychotherapy, this thesis contends that a single session is often the norm in mediations because of the nature of the mediation process, which focuses on the future. Parties entering the mediation process are usually stuck in the problem because they do not know the way out. The detailed description of a preferred future that normally characterises the brief session and is co-created through the option-generation and issue-exploration phases of the mediation process provides a sufficiently clear pathway for parties to move forward.

The process of parties reviewing their circumstances, measuring their hopes against their knowledge of reality, and taking stock of what they already have enables them to realise that their lives, while not perfect, are manageable. As with brief therapy, the process of describing their preferred future is sufficient for some parties to realise that enough of their goals are already being achieved for them to continue without further assistance or therapy. This offers an effective model of ADR for use in all manner of disputes involving ongoing relationships—a model that takes seriously the task of resolving disputes.

Part 2: Mediation as Social Constructionism in Action

The current understandings of the traditional facilitative, narrative and evaluative[10] models of mediation must be rethought and reconceptualised. I propose going beyond

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Session Approaches to Therapy: Time to Review' (2012) 33 *Australian and New Zealand Journal of Family Therapy* 15.

[10] The 'traditional facilitative' type is the general mediation process taught to prospective mediators. Nadja Alexander, 'The Mediation Metamodel: Understanding Practice' (2008) 26 *Conflict Resolution Quarterly* 97, 111–2.

the resolution, prevention or management of disputes[11] to allow a social constructionist interpretation that focuses on accepting and living with the enduring nature of loss and conflict.[12] In a social constructionist model, parties actively engage in ongoing support of their common ground with ongoing anticipation to avoid obstacles as they learn from each other (including the mediator) how best to move forward from their losses during the mediation process.

By offering parties an opportunity to go beyond the immediate issues, and by acknowledging the relational learning arising from empowering and recognising parties, a social constructionist interpretation differs from the traditional problem-solving models of mediation. It also differs from the transformative model because it uses the relational learning of the parties to focus directly on how best to make sense of their losses, both jointly and severally. What may otherwise occur incidentally as an 'aha!'[13] experience in transformative mediation through empowerment and recognition [14] techniques occurs mindfully in the RM through relational learning. This enables the parties to move forward with an enduring sense of a loss that can be tolerated, and a sense that grief can be left behind.

By recognising that the level of trauma from the loss influences the outcome of the dispute, this thesis proposes that the core of any dispute focuses on the need for parties to make sense of how their losses can fit into an acceptable reality system for both sides. The fundamental issue is to avoid violating the core beliefs of either party, while satisfactorily challenging the core beliefs of either or both sides to a level with which the parties can comfortably live. A further proposal is that the quality of the relationships that led to the dispute are dependent on each party's level of readiness, willingness and ability to move forward from their loss. The concepts of readiness,

[11] Non-adversarial justice explains the prevention, management and resolution of disputes.
[12] Bernard Mayer, 'Staying with Conflict: The Challenge of Engagement in the Face of Enduring Disputes' (Speech delivered at the CADRE's Fifth National Symposium on Dispute Resolution in Special Education, Eugene, Oregon, 26–28 October 2011).
[13] An 'aha!' moment is the point of relational learning when something makes sense—it is when a party applies a new understanding to a previously misunderstood event. John Kounios and Mark Beeman, 'The Aha! Moment' (2009) 18 *Current Directions in Psychological Science* 210, 210.
[14] Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass Publishers, 1994) 2. Empowerment is defined by Bush and Folger as increasing the decision-making skills of both parties and restoring their capacity to manage their own problems. Recognition involves considering the other party's perspective, views and experiences. It connotes acknowledging and empathising with the situation and problems of the other party.

willingness and ability are themselves psychological constructs and an inherent part of the greater construct of resilience. Thus, I argue that, since constructs can be formed that result in loss, they can be reformed or changed to incorporate that loss to make better sense of the world so the parties can progress in a resilient manner.

Through the process of relational learning, parties are given the opportunity to co-construct a meaningful new reality by changing the context for the original meaning of deprivation attached to the loss in order to create an enduring connection with the loss, while embarking on a new life.[15] The process of relational learning becomes the means for individual adaptation to move forward from the loss. A social constructionist mediation focuses on receiving support from all participants, including the mediator, in anticipation of a more workable future. The support arises from acknowledging the ever-changing relationships arising from the options available to the parties within the crucible of the mediation process to ultimately engage a new mutual reality that better enables them to live with their respective losses.

The proposed keywords for mediation as social constructionism in action move from 'empowerment' and 'recognition' to 'relational learning' and 'meaning reconstruction' around loss, as parties re-learn to trust each other sufficiently to move forward with anticipation, support and engagement[16] in order to better live with their losses. Where there is no possibility to re-learn trust, the matter cannot progress to a point at which both parties are satisfied, and will probably have to be determined in a court of law.

It is an accepted fact that people suffer grief due to loss, as connectedness is a basic human need. The experience of loss offers the parties an opportunity to learn better and different ways to understand their own capabilities and their own source of power that arises from the constant changes of everyday living in a relational world. More than any other experience, the experience of loss guarantees for parties an assault on any illusion of invulnerability and omnipotence[17] that may have developed from beliefs in concepts of the 'self' divorced from relationship. Thus, loss offers the possibility of growth

[15] See generally Geoff Glassock, *Australian Families of the Long Term Missing: Narrating their Lived Experiences* (PhD Thesis, University of New England, 2011); Kenneth J Doka (ed), *Disenfranchised Grief: Recognizing Hidden Sorrow* (Lexington, 1989). Both discuss the enduring bonds of loss.
[16] Mayer, above n 12.
[17] Cheikin, above n 5, 336.

through self-affirmation in a relational world.[18] By using relational learning to live with the loss, mediation becomes a process of social constructionism in action for the parties. In turn, mediation becomes an agent for social change, where the parties can co-create their own version of justice when deciding what is fair for both of them.

The findings from the use of the RM have relevance for other areas of law where ongoing relationships are crucial, such as in commercial matters in which the supply of goods is restricted to a few manufacturers, or in franchise disputes. The RM can also provide insight to the relational aspects of rights-based disputes, such as in workers compensation matters, in order to better explain the existing tensions between the medical model and social/legal model for causation of loss/impairment. By raising the consciousness of parties to incorporate the constraints of the legal system, a social constructionist approach to mediation enables parties to make the most sense of their loss, given their legal constraints[19]. Thus, it serves as an access-to-justice measure and more effective approach to dispute resolution that allows parties to balance their rights against their needs and interests, thereby enabling them to better maintain ongoing relationships, if required.

Part 3: Structure of the Thesis

The argument in this thesis is developed with the help of five interrelated proposals. The first proposal discussed in Chapter 1 is that disputes occur when expectations are not met, and one party makes a demand on the other to redress a sense of loss that cannot be endured. It introduces the claims of the thesis and the ideologies and issues that establish the parameters of the study, and discusses the dynamics behind loss. Further, it presents a brief outline of the reasons for adopting a social constructionist approach, based on Kenneth Gergen's work on 'relational being'.[20]

[18] Kenneth J Gergen, *Relational Being: Beyond Self and Community* (Oxford University Press, 2009) 291.
[19] The RM is not confined to legal disputes per se – ie to disputes in court. Instead, it can be argued that any dispute whether over money, relationship, status etc involves an element of legal rights which may be forgone in an informed decision. Thus whether or not the parties know their legal rights, it can be argued that a dispute still function in the shadow of the law, even in cases where one party decides not to make a claim on the other, but to simply walk away.
[20] Gergen, above n 18, 291.

By understanding how the substantive elements of an agreement can be misunderstood to form a dispute, Chapter 1 likens the social constructionist process to the concept of chaos theory in the natural sciences. It offers a framework of questions to develop a social constructionist model of mediation, and explains the relevance of relational learning to law, which functions as the beginning of a theoretical explanation for a social constructionist model of mediation.

The second proposal, discussed in Chapter 2, is that the principal reason for conducting any mediation is to make sense of loss. Although it can be argued that mediation can be conducted for many reasons[21] such as asserting a right, the response to such an argument is that asserting a right would only be required if there was some form of potential loss which required such an assertion. The right to free speech in Western Society for example, is to protect its potential loss; and if a mediator were involved to assert such a right, chances are that at least one party may feel that their right to free speech has been compromised perhaps to the point of total loss. Even if a person walks away from a potential dispute and makes no claim on the other, the fact remains that the reason for walking away is that the person realizes that his/her original expectations will probably not be met. The decision to walk away does not detract from the fact that disputes occur when expectations are not met.

Another possible argument for exclusion from the RM model may be on the grounds that mediation can be conducted where there is no dispute. Such a mediation is often termed a transactional mediation which aims to manage the negotiation process by ensuring that the deal is realized on terms to which all parties involved can agree. However the role of the mediator in such transactions is to prevent and, if necessary, resolve, disputes during the negotiation process and at a later stage during the implementation of the negotiated outcome.[22] As such the definition of transactional mediation does not exclude it from benefitting from the RM model in relation to any

[21] Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011).
[22] '*Moving Beyond 'Just' a Deal, a Bad deal or No Deal'* Manon A. Schonewille and Kenneth H. Fox. This chapter featured in the book ADR in Business: Practice and Issues across Countries and Cultures, Volume II, pp. 81–116. By Arnold Ingen-Housz (editor), published by Kluwer Law International in 2010. Reproduced with permission of Kluwer Law International and the authors" The goal of transactional mediation is to manage the negotiation with the objective to obtain a timely, substantive, efficient, sustainable and durable outcome. Nonetheless the fact remains that the mediator in transactional mediations is available to resolve disputes about the terms of the contract during the negotiation process thus not excluding it from the benefits of the RM model.

potential losses on the negotiation table that may or may not be realised and which may lead to disputes due to expectations that are not met.[23]

As stated previously, 'loss' is defined in a broader context to incorporate not only the individual's loss of expectation in relation to the terms of the contract (the micro view) but also to incorporate the impact such expectations may have on the outcome of the dispute given the socio-legal and economic constraints under which the dispute occurs (the macro view).[24]

If the applicant's personal loss is felt very strongly, the possibility of understanding the dispute from a macro perspective could be affected, to the point of no agreement. This is an example of how the private personal construct of the parties around their perceived losses has an impact on the outcome of the dispute, thus distinguishing the difference between 'loss' and 'dispute' yet simultaneously highlighting the intricate link between them.

King et al.[25] distinguish between dispute resolution and problem solving. They claim that a dispute develops through a number of stages, and that there is a high rate of attrition of matters at each stage. In order to be defined a dispute, the first stage requires

[23] Given the potential misunderstandings between any two parties in relation to their expectations of how the terms of the contract may be drafted, a dispute may be inevitable and may require a reconstruction of the terms to be used as common ground through the reframing capacities of a facilitator/mediator. So to say that there is no dispute when negotiating the terms of a contract, or to minimize the impact of misunderstandings as being less than disputes may be very optimistic. Although a mediator can act as a facilitator in transactional or other mediations, it does not follow that a facilitator necessarily has the skills required for a mediator.

[24] For example in a worker's compensation dispute, it may be argued that the losses of the worker are one-sided; and that it is reasonable for the worker to be compensated for his losses commensurate with his level of injury. But the fact remains that the insurer also suffers a loss in the form of compensation payments made to the applicant. To understand the broader context of the dispute, the applicant is informed about the limitations of the *Workplace Injury Management and Workers' Compensation Act 1998* and the obligations of the insurer under the Act as well as the constraints on any judge should the matter go to Court. The applicant is thus given the opportunity to make an informed personal decision (micro level) about how best to move forward given the constraints of the legislation to present sufficient evidence to prove negligence and accountability for compensation payments made (macro level).
By understanding the dispute from the macro and micro perspective from both sides, the applicant and the insurer can both make an informed realistic decision within their respective rights and entitlements under the Act so that although the amount of compensation to be paid for the specific losses/injuries incurred by the applicant may be specified under the Act, both parties are given the opportunity to achieve the best outcome under those particular constraints. It is this opportunity to achieve the best possible outcome under all the socio-legal and economic constraints imposed on the parties under the Act that offers both of them access to co-create some justice however poor, for both sides.

[25] Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, Non-Adversarial Justice (Federation Press, 2009) 14.

the experience to be recognised as injurious, the second stage attributes the cause of injury to the fault of another person or body (the blaming stage), and the last stage requires the injured person to make a claim against the other and ask for a remedy. Thus, disputes form the basis of rights-based resolutions governed by the macro system of law that focuses on the dysfunction and prescribes how relations should unfold.

Chapter 2 discusses the inherent assumptions about the traditional mediation processes that must be addressed when using a social constructionist approach to handle parties' emotions regarding their loss. A social constructionist approach places the micro-elements of the loss or dispute in the macro-elements of the context in which the loss or dispute occurs, in order to make better sense of the loss.

Chapter 2 presents an overview of the most recent definitions of mediation and the difficulty of mediator neutrality in order to argue for a new definition of mediation that incorporates a social constructionist approach, and a new role for mediators and parties as relational learners. The psychological theories regarding loss are then introduced to extend the relevance of relational learning to mediation, followed by an argument for using grounded theory as a social constructionist approach to mediation, thereby extending the theoretical explanation for a social constructionist model of mediation.

The third proposal, discussed in Chapter 3, argues that the first step towards making sense of loss is to analyse the meaning of loss in the worldviews of the parties. It introduces the concept of parties as social 'constructionists' as they deal with their losses as relational learners. It proposes that parties become relational learners in the process of mediation when they use their own theories from their own experiences to research the constructs that form their worldviews. It discusses how the readiness, ability and willingness of the parties to move forward from their loss or dispute directly affects the meaning they attribute to their loss, which subsequently influences the outcome of their dispute and directly affects the ongoing relationship between them.

Chapter 3 introduces the Information Session (IS) of the Family Court in the 1990s as a precursor to the development of the Normative IS (NIS) of the RM, and demonstrates how the procedural elements of any traditional mediation process can be reorganised to include the NIS, which subsequently enhances the relational learning between the

parties. That is, this chapter introduces an in-depth analysis of the methodology of the RM as a template for use with all mediations.

The fourth proposal, discussed in Chapter 4, argues that the process of moving forward from a dispute occurs when both parties accept responsibility to change their belief systems regarding the loss so that the loss can be endured. The focus for change is through an interdisciplinary process that requires a reconstruction of meaning attributed to the loss from several disciplines to form a 'philosophy on life' that can more effectively endure the loss. It offers a theoretical analysis of the antecedent philosophies and ideologies that comprise the RM by introducing personal construct theory, mindfulness and transactional analysis (TA) as core elements of the process of relational learning.

Chapter 4 presents the ideologies and philosophies of pragmatism, positivism and postmodernism as the antecedent theories against which the RM is developed, and discusses how relational learning combines with the theory of meaning reconstruction to form social constructionism in action. That is, Chapter 4 elaborates a possible interdisciplinary theoretical explanation to develop an argument for a social constructionist model of mediation.

The fifth and final proposal, discussed in Chapter 5, states that using relational learning in any mediation can raise the consciousness of parties to actively engage in their 'game in the making'[26] to analyse the effect of their loss (micro-elements) on the outcome of

[26] I use the term 'social constructionism' as a philosophy to explain that I am not assessing the theory, but wish to demonstrate how social constructionism in action can be a means of dispute resolution and social change. For example, Gergen gives a historical overview of relational theory and attempts to remove the reality of a distinctly inner or mental world that is significant in its own right, to replace it with a view of relationally embodied action—not distinct entities coming into contact. This aligns with his proposal that the cause and effect understanding of relationships—that people, as fundamentally separate entities, affect each other—should now be reconsidered in terms of relational confluence. He states that the hallmark of Western philosophy is its presumption of dualism—mind and world, subject and object, self and other—which derives from the early writings of Descartes, Locke and Kant. He begins with an account of relational process to derive a conception of individual consciousness, so that terms such as 'thinking', 'remembering', 'experiencing' and 'feeling' do not refer to events inside the head, but to coordinated actions in relationships. He states that language such as 'influencing', 'determining the actions of' and 'the individual' sustain the presumption of independent beings and define relationships as their derivative. He proposes that, as an outcome of immersion in multiple relationships, humans emerge as rich in the potential for relationships. However, the realisation of that potential can be radically diminished in any given relationship. Gergen explores dialogic practices for restoring relationships between antagonistic parties through the process of what he terms 'social bonding' and 'coordinating action'. See Anthony Kenny, *Descartes: A Study of His Philosophy* (Random House, 1968) 10; Douglas Odegard, 'Locke and

their dispute (macro-elements). The focus is on living better with the loss. Chapter 5 discusses how the micro-elements of individual disputes affect the macro-elements of social change. It develops the argument that, through mediation as social constructionism in action, parties form new groups that incrementally form a new social structure. It focuses on the proposition that mediation conceptualised as the RM can be a more effective access-to-justice measure, when parties can make sense of how the micro-elements of their dispute align with the macro-elements in which their dispute occurs. In this sense, the micro- and macro-elements of dispute resolution come together as social constructionism in action.[27]

These five proposals have been informed by my work as a consultant mediator, barrister/arbitrator and practising psychologist for the past 20 years. A qualitative grounded theory[28] approach is used, based on my experience, to construct a theoretical understanding of the RM. The RM extends the traditional facilitative, narrative and transformative models of mediation to offer the possibility of a fundamental paradigm shift in the field of everyday dispute resolution. It does so by dealing more effectively with parties' losses through the social constructionist process of relational learning.

Mind-Body Dualism' (1970) 45 *Philosophy* 87; Karl Ameriks, *Kant's Theory of Mind: An Analysis of the Paralogisms of Pure Reason* (Oxford, 2nd ed, 2000). See Kenneth J Gergen, *Play and New Openings* (September 2010) Brief Encounters from the Taos Institute <http://www.taosinstitute.net/Websites/taos/Images/ResourcesNewsletters/9-2010%20Ken%20on%20Play.pdf>; see also Ch 1, 18.

[27] For example see the previous worker's compensation example in 21 above where it was argued that understanding the dispute from the macro and micro perspective from both sides, affords the applicant and the insurer the opportunity to make an informed realistic decision within their respective rights and entitlements under the Act. The fact that both parties are given the opportunity to achieve the best possible outcome under the particular constraints of the Act further affords them access to co-create their own sense of justice for both sides, however poor. When parties make sense of how the micro-elements of their dispute ie their own personal understanding of the terms of the contract, align with the macro-elements in which their dispute occurs, ie the socio-economic or legal setting which is affected by their dispute, they are said to engage in a process that can be termed social constructionism in action.

[28] The phrase 'grounded theory' refers to theory that is developed inductively from a corpus of data, rather than derived deductively from grand theory, without the help of data. Using a grounded theory approach, researchers take different cases to be whole, in which the variables interact as a unit to produce certain outcomes. Cases similar in many variables, but with different outcomes, are compared to determine where the key causal differences may lie. This is based on John Stuart Mills's method of differences, which is essentially the use of (natural) experimental design. Similarly, cases that have the same outcome are examined to determine which conditions they have in common, thereby revealing necessary causes. John Stuart Mills, *A System of Logic: Ratiocinative and Inductive* (Harper and Co, 1843) 455.

Chapter 1: Understanding the Loss—Introducing the Ideologies that Set the Aims and Parameters of the Study

Grieving allows us to heal, to remember with love rather than pain.
It is a sorting process.
One by one you let go of things that are gone
and you mourn for them.
One by one you take hold of the things that have become a part of
who you are and build again.

Rachael Naomi Remen[29]

1.1 Thesis Aim

The aim of this thesis is to develop the argument that a social constructionist interpretation of loss during a traditional[30] mediation process can convert that process into an exploratory qualitative mechanism to more effectively progress from (and not necessarily resolve) the parties' dispute by dealing constructively with their loss. Through a social constructionist approach, parties are encouraged to reconstruct the meanings associated with their loss in order to co-create another reality in which they can better live with their loss to the best of their ability, readiness and willingness at that point in time. Using grounded theory and social constructionist principles that result in relational learning, the traditional mediation process—whether facilitative, narrative, evaluative or transformative—can become an action process that offers parties the opportunity to go beyond traditional problem-solving techniques to resolve their issues. Using a social constructionist approach, parties are encouraged to deal constructively with the interpersonal, intersubjective[31] and relational contexts of everyday reality that comprise their dispute.

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[29] J William Worden, *Grief Counseling and Grief Therapy: A Handbook for the Mental Health Practitioner* (Springer Publishing Co, 4th ed, 2009) vii.

[30] 'Traditional' incorporates the four basic methods of settlement, facilitative, evaluative and transformative models of mediation. David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, 2nd ed, 2009) 156.

[31] Intersubjectivity is central to the social life of humans. Thus, unsurprisingly, research pertaining either directly or indirectly to intersubjectivity spans many research areas of psychology. In developmental psychology, it lies just below the surface of widely used research, such as decentration, theory of mind and perspective taking. Readings from Gillespie and Cornish confirm that, in neuroscience, intersubjectivity has recently become a popular topic due to the discovery of 'mirror neurons', which are

In the field of counselling, much therapeutic effort is directed at resolving misunderstandings and feelings of being misunderstood, both of which indicate dysfunctional intersubjective relations.[32] In this thesis, these ideas of intersubjectivity have been used in the RM to enhance the reliability and flexibility of group functioning between parties in the mediation process. Intersubjectivity has been introduced to analyse the relational contexts of the everyday disputes involving loss in terms of mutual understanding, so that parties are better able to change the core foundation of the relationships that led to that loss of mutual understanding in order to form new methods and group structures that enable a better capacity to live with that loss. Chapters 2 and 3 of this thesis demonstrate how this is done. The current chapter outlines the claims made by this thesis to establish the parameters for the study.

This chapter has two parts. Part 1 discusses the claims of the thesis and offers a brief outline of social constructionist research of the dynamics behind the construct of loss, likening it to chaos theory. It includes the reason for adopting a social constructionist approach, and introduces the concept of TJ as an example in the public domain of the relational flow between psychology and law. The inference is that the RM similarly has a relational flow between psychology and law, which means it can function in the private domain the way TJ functions in the public domain. The claim is that a social constructionist approach can help parties accept the dual effect of their loss not only on their worldviews, which affects their psychological wellbeing, but also on the legal outcome of their dispute.[33] Part 2 introduces the ideologies and issues that establish the parameters of the study, and focuses on the interdisciplinarity of the RM. It explains the

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thought to provide a neurological basis for imitation, theory of mind, language and social emotions. In the field of comparative psychology, there has been a surge of interest in intersubjectivity in the form of investigations of possible perspective-taking among, for example, monkeys and scrub jays. Intersubjectivity (going by various names) is also central to research on communication. Phenomena such as addressivity, double-voiced discourse and dialogue are deeply intersubjective. Intersubjectivity has also been identified as important in small group research because it has been found that mutual understanding in small groups creates increased efficiency, reliability and flexibility. Research on the self and identity has long emphasised the importance of the self's perceptions of the other's perceptions of the self. In the field of counselling, much therapeutic effort is directed at resolving misunderstandings and feelings of being misunderstood, both of which indicate dysfunctional intersubjective relations. Alex Gillespie and Flora Cornish, 'Intersubjectivity: Towards a Dialogical Analysis' (2010) 40 *Journal for the Theory of Social Behaviour* 20.

[32] Ibid.

[33] Having recognised that the RM developed from these realisations, there was nothing in the background literature review addressing the pragmatic ideas that I developed over the last 20 years involving the significance of dealing with loss in the mediation process. My ideas are now listed as the five proposals of this thesis.

relevance of relational learning to law, which is the beginning of a theoretical explanation for a social constructionist model of mediation.

1.2 Claims of the Thesis

In keeping with other research in the area of ADR, this thesis cannot make final or conclusive claims. A great deal of the empirical research undertaken examining the effectiveness of ADR has failed to yield definitive results,[34] partly because the number and complexity of variables make it difficult to draw reliable general conclusions when the mass of often-conflicting research results is reviewed.[35] It is not possible to identify and isolate all possible variables when discussing the results of any research project, and this alone makes comparisons impossible. Research conclusions necessarily concentrate on a few factors, variables or qualities and may not specifically isolate certain other variables.[36] Of necessity, the argument developed here is limited to addressing the main issue of how parties in a dispute can acknowledge and deal with their respective loss of expectations arising from their assumptions that turned out to be inaccurate. This thesis is not intended to be an empirical study.

Another limitation in attempting any significant empirical work on private mediation is the rapid rate of change in the field. The recent standardisation of mediator protocols for accreditation in Australia through the formation of the Mediator Standards Board (MSB) (September/October 2010) and overseas through the Institute of Mediators International are just two examples of the rapid institutionalisation of the mediation process, which has changed social access-to-justice measures, such as dispute resolution.[37] In turn, the public process of institutionalisation directly affects the flexibility on which the success of the private process of mediation is founded. In this

[34] Dale Bagshaw, 'Language, Power and Gendered Identities: The Reflexive Social Worker' (2006) 8 *Women in Welfare Education* 1 <http://www.freepatentsonline.com/article/Women-in-Welfare-Education/165971625.html>.
[35] Ibid.
[36] Ibid.
[37] The recent 'absorption' of the National Alternative Dispute Resolution Advisory Council (NADRAC) into the Federal Attorney-General's Department in late November 2013 is another example of fast movement in the dispute resolution industry. This absorption has left the dispute resolution industry without a voice to the government about the needs of the industry, causing a great deal of consternation. At the time of writing this thesis, a dispute resolution industry forum day was held on 14 May 2014 and a second day is proposed for the 20 February 2015. These forum days are an attempt to find a single voice with which to lobby the government on the needs of the dispute resolution industry as an economic force in the community.

thesis, no attempt is made to describe or otherwise discuss the constant changes occurring in the practices in the field.

1.3 Overcoming Limitations: Using a Qualitative Approach

To avoid the empirical pitfalls and rapid rate of change confronting research of mediation, I have used a holistic qualitative approach and social constructionist interpretation for the scholarship, which includes published books, articles and other literature regarding the mediation process. As such, this is not a conventional review of mediation. Instead, this thesis presents an argument about the content and aims of mediation that goes beyond understanding dispute resolution as a technical process. It is with this wider goal that the RM is presented as a model of mediation that can help parties deal with their loss using a social constructionist approach.[38]

In pursuit of this goal, I have relied on Gergen[39] for his interpretation of social constructionism. Gergen presents relationships, rather than the self, as being at the forefront of psychological enquiry. He consequently challenges the basis of understanding in psychology, especially in relation to the construct of accepting personal responsibility within relationships. I also rely on the core theorists of intersubjective systems theory[40] (IST), who, like Gergen, propose that the mind is a relational construction in which subjective personal experiences are inextricably embedded into intersubjective systems.[41]

When viewed from a systems or contextual perspective, worlds of personal experience encompass more than just the two parties involved in a relationship. In a 2010 interview, Sassenfeld stated:

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[38] I have used the RM over the last 20 years as a practical support for participants to deal with their loss within the dispute.
[39] Gergen, above n 17.
[40] Unfortunately, intersubjective theory falls into an area of overlap between psychology and sociology, and the insularity of each has precluded any serious cooperation in terms of research. Most of the research has been done in the realm of psychology and philosophy, especially by Stolorow and Orange. George E Atwood, Robert D Stolorow and Donna M Orange are the core theorists of intersubjective systems theory—a form of psychoanalytic practice that focuses on the relational origins of mental distress through the interpersonal and intersubjective relationship of the analyst and analysed. See, eg, Robert D Stolorow and George E Atwood, *Contexts of Being: The Intersubjective Foundations of Psychological Life* (Analytic Press, 2002); Robert D Stolorow, George E Atwood and Donna M Orange, *Worlds of Experience: Interweaving Philosophical and Clinical Dimensions in Psychoanalysis* (Basic Books, 2002).
[41] Stolorow and Atwood, above n 40, 7.

> One's philosophical presuppositions, and one's awareness or unawareness of them, can have a monumental clinical impact. For example, the Cartesian objectivist analyst who sees himself/herself as treating deranged isolated minds and correcting 'distortions' of what he/she 'knows' to be true can unwittingly retraumatize his/her patients by repeating devastating early experiences of massive invalidation. On the other hand, the phenomenological-contextualist analyst, in seeking to understand and make sense out his/her patients' experiences in terms of the contexts of meaning in which they occur, no matter how bizarre these experiences may seem to be, helps to create a therapeutic bond in which genuine psychological transformation can gradually take place.[42]

In other words, worlds of personal experience exist in interpersonal and intersubjective relational contexts that do not conform to a uniform body of techniques or to a standardised or manual series of interventions. IST theorists also confirm that every relationship (such as between a therapist and client) is unique and must be created anew by its participants.[43] This thesis extends Gergen's notion of accepting personal responsibility in relationships by including the need for parties to accept personal responsibility for the psychological effect of their loss in relation to the outcome of their dispute. That is, if the psychological effect of loss for a party going through a divorce is still at the stage of shock, chances are that that party will not reach agreement at that stage – hence affecting the outcome of their dispute. Conversely, if both parties have accepted the inevitable fact of divorce they will both be better able to live with the loss, no matter how reluctantly or whether they reach full agreement on all issues in dispute or not – thereby again affecting the outcome of the dispute.[44]

Transposing Gergen's ideas and IST theorists' ideas to mediation enables a social constructionist approach to be developed so that parties can accept personal responsibility for their own interpretation of their loss. In turn, the meaning attributed to these losses forms the core reasons for the dispute. For example if an ex-husband believes that his ex-wife was the cause for not reaching his own financial security, and further believes that his ex-wife spent all his money indiscriminately without working to contribute to joint finances, chances are that he will avoid paying child support to prevent her from squandering any more of his money.

[42] Robert Stolorow and Andre Sassenfeld, 'A Phenomenological-Contextual Psychoanalyst: Intersubjective-Systems Theory and Clinical Practice' (2010) 30 *Psychologist-Psychoanalyst*, 6–7.
[43] Stolorow and Atwood, above n 40, 15–6.
[44] Note Guidelines 6 and 7 of the NIS on pp 286 and 287

In other words, the meaning he attributes to his financial loss, namely, that his wife can't handle money, forms the core reason for the on-going dispute over his paying child support. If he were to accept responsibility for his part in the dispute—no matter how innocuous that part is believed to be— it would better enable him to acknowledge his own assumptions and expectations that were not met in his intersubjective, relational context with his ex-wife. It would also better enable him to realise that his own assumptions and expectations contributed at least in part to his financial losses. By adopting a social constructionist approach both parties can acknowledge and hopefully accept that their financial loss was the product not only of the clash between their respective worldviews, hence affecting their psychological wellbeing, but also affected the legal outcome of their dispute in relation to child support.

1.4 Five Proposals

As explained in the introduction, there are five proposals in this thesis, but only the first is discussed in detail in this chapter—that disputes occur when expectations are not met. The arguments of the other four proposals contribute to the first proposal using a qualitative holistic approach as they mesh and intertwine with each other. For that reason, they are briefly addressed below.

The second proposal states that the only reason to conduct any mediation is to make sense of the loss caused by the breakdown of expectations. The third proposal states that the only way to make sense of loss is to analyse the meaning attributed to the loss, and determine how that meaning aligns with the worldview of the parties—that is, to deconstruct the meaning of the loss. The fourth proposal states that, to move forward from the loss, parties must assign new meaning to the loss—they must reconstruct the future in order to live with and endure the loss in the present and overcome the disappointment and possible grief of the past through the process of relational learning. The fourth proposal develops a theoretical explanation for a social constructionist model of mediation. It discusses how relational learning combines with the theory of meaning reconstruction to become the process of social constructionism in action. The final fifth proposal states that using relational learning in any mediation can raise the

consciousness of parties to actively engage in their own 'game in the making'.[45] For example, Gergen wrote:

> At the edge one is not playing by fixed rules, but borrowing, melding, and re-shaping. In a word, one is playing … [A]t the edge of consciousness, the nagging question: are we turning the 'game in the making' to a game with fixed rules? Are we generating a new box, without the means to recognize that it is a box? … [S]ocial constructionist ideas do not carry a banner proclaiming their own truth. It is just such banners that invite the erecting of boundaries. Either you believe, or you fall outside. Nor, from a constructionist standpoint, does one look to the work of others with an eye to a transcendent truth. Most important is what follows in practice. 'If we take this idea on, what happens next?' we ask.

Similarly, in mediation we ask: if we take this option/idea on, what happens next? What future do we create? By actively engaging in their own 'game in the making', the micro-elements of the parties' dispute come together with the macro-elements in which the dispute occurs to change the social fabric in which the parties co-exist at a grass-roots level.

By reconstructing a new basis to move forward from the loss, parties can transform the mediation process into an agent for social change, and can do so to the best of their readiness, willingness and ability at any given time. This is the outcome of the interplay of all five proposals from a social constructionist and holistic perspective. The

[45] Gergen cites the work of the Russian developmentalist, Lev Vygotsky, in which Vygotsky proposes that everything in the mind—in terms of higher mental processes—is first in the social world. Individual psychological functioning is a cultural derivative. The works of ethnomethodological scholars, such as Harold Garfinkel, shifted the focus from the psychological world to the interactive processes responsible for mental attributions, while Goffman's work shifted the focus from the individual actor to the plane of relationship, where the self is a by-product of the theatrical conditions of the moment. Gergen cites feminist literature to be the major watershed in deliberations on relational being, stating that, from the feminist perspective, there is a natural yearning for relationships that can only be fulfilled in growth-fostering relationships, in which mutual empathy and empowerment are central. He further cites writings from the therapeutic tradition of socially oriented psychiatrists, such as Eric Fromm and Karen Horney, who both saw culture and mind as fundamentally interdependent, saw mental conditions as reflections of social institutions, and saw institutions as by-products of personal needs and desires. Feminists similarly saw the development of individual wellbeing as fully dependent on relationships. From all this, I have gleaned that social constructionism—as relational being in action—is actually the process of dispute resolution and social change. Gergen, above n 17, xvi–viii; Lev Vygotsky, 'Interaction Between Learning and Development' in Mary Gauvain and Michael Cole (eds), *Readings on the Development of Children* (W H Freeman and Company, 2nd ed, 1997) 29; Harold Garfinkel, 'Conditions of Successful Degradation Ceremonies' (1956) 61 *American Journal Sociology* 420; Erving Goffman, *The Presentation of Self in Everyday Life* (Doubleday Anchor, 1959); see also Jonathon D Raskin, 'Constructivism in Psychology: Personal Construct Psychology, Radical Constructivism, and Social Constructionism' in Jonathon D Raskin and Sara K Bridges, *Studies in Meaning: Exploring Constructivist Psychology* (Pace University Press, 2002) 1; Kenneth J Gergen, *Play and New Openings* (September 2010) Brief Encounters from the Taos Institute <http://www.taosinstitute.net/Websites/taos/Images/ResourcesNewsletters/9-2010%20Ken%20on%20Play.pdf>.

following section provides a brief explanation of the reasons that I chose a social constructionist approach, which will create the context for the rest of this thesis.

1.4.1 Background to a Social Constructionist Interpretation of the Five Proposals

The Handbook of Constructionist Research[46] represents the empirical forefront of the constructionist movement in the social sciences, and the authors have been at the centre of constructionist debates for decades. For this reason, I use their work to assess the criticisms and current popularity of social constructionism.[47] Holstein and Gubrium[48] provide a comprehensive review of the primary debates and controversies as they appear in historical and research contexts. However, this thesis does not aim to give a full and comprehensive account of the background to the debates about social constructionism. Instead, it is important to note that there are very few writings, if any, that refer specifically to social constructionism in relation to dispute resolution, or to mediation in particular. The lack of literature on this topic emphasises the need to

[46] Gubrium and Holstein, above n 5.

[47] Gergen explores dialogic practices for restoring relationships between antagonistic parties through the process of what he terms 'social bonding' and 'coordinating action'. I have extrapolated from these ideas that Gergen's version of social constructionism—and particularly his notion of 'social bonding' and 'coordinating action'—is actually what occurs through the process of mediation. Gergen defines knowledge as a relational achievement where educators shift their attention from the individual student to the nexus of relationships in which education occurs. From this, I have derived that the disputing parties and mediator become relational learners in the process of mediation, so that the parties, as individual units, become a derivative of a relational process. Gergen affirms that the traditional views of self, causality and agency (free will/determinism) are not mistakes, but are human constructions around which people organise their lives, and that new constructs of human connection now exist, which can become as real as the traditional sense of individual separation. Gergen states that human traditions should be treated as optional, rather than as defining the limits of people's world, for as much as they are worth sustaining. He questions the significance of the brain in determining human behaviour, the presumption of truth, the importance of educating individual minds, the ultimate value of community, democracy and individual responsibility—not to judge the truth or falsity of such traditions, but to consider their implications for daily life. For example, by presuming that the brain determines human actions, Gergen claims that people fail to see that the brain is a servant in the quest for meaningful lives, and that, by embracing truth, people can eliminate the voices of those who do not view the world in the same way. By stressing the importance of educating individual minds, people obscure the dependence of knowledge on the social world. Similarly, I have realised that, in dispute resolution, parties seek their own truth in the attempt to make meaningful sense of their losses as they reconstruct the foundations for their relationship into the future. This is the very process Gergen describes as social constructionism in action. Gergen, above n 17, xvi–viii; Lev Vygotsky, 'Interaction Between Learning and Development' in Mary Gauvain and Michael Cole (eds), *Readings on the Development of Children* (W H Freeman and Company, 2nd ed, 1997) 29; Harold Garfinkel, 'Conditions of Successful Degradation Ceremonies' (1956) 61 *American Journal Sociology* 420; Erving Goffman, *The Presentation of Self in Everyday Life* (Doubleday Anchor, 1959); see also Jonathon D Raskin, 'Constructivism in Psychology: Personal Construct Psychology, Radical Constructivism, and Social Constructionism' in Jonathon D Raskin and Sara K Bridges, *Studies in Meaning: Exploring Constructivist Psychology* (Pace University Press, 2002) 1.

[48] Ibid; Gubrium and Holstein, above n 5.

continue research in the area of mediation as social constructionism in action, as this thesis seeks to do.

Gergen's work is relevant because I am extending his ideas of constructionism to the mediation process. His latest work on *Relational Being: Beyond Self and Community*[49] replaces the traditional concept of the individual and community with the concept of relationships as the forefront of concern. Gergen challenges the view that individual minds come together to form relationships; rather, he states that it is out of relationship that individual functioning emerges.[50] Gergen's focus on 'relational being' is a seminal breakthrough in social constructionist theory, and was selected to study for that reason.[51] By proposing that all meaning grows from coordinated action—or 'co-action', as Gergen calls it—Gergen challenges the traditional view of psychology that the individual mind is separate and apart from others. Instead, he states that what we call 'knowledge' or 'meaning' derives not from individual minds, but from communities that share common perspectives.[52] Thus, 'meaning' is generated cooperatively. Gergen offers an entirely new concept of psychology that is particularly relevant to this thesis because it can be applied to the process of mediation.

By considering the 'common ground' in mediation and extending that perspective to issues in dispute between the parties it is claimed that all 'meaning' similarly grows from the coordinated action of the parties (including the mediator) to redress the perceived losses in the terms of their contract. This presents a new definition—that mediation is the process of new meaning making around the loss through relational learning, or through reconstructing the meaning of loss.

During the mediation process, a social constructionist analysis of the vocabulary used by parties to describe their loss indicates the quality of the relationships that exist between them. These relationships can be changed by the quality of relational learning

[49] See generally Gergen, above n 17.
[50] Ibid xvi–xvii.
[51] Andy Lock and Tom Strong, *Social Constructionism: Sources and Stirrings in Theory and Practice* (Cambridge University Press, 2010). The later work of Lock and Strong confirms the effect of Gergen's work and places it in the broader social constructionist framework. The findings of Gergen's work in connection to 'relational being' have been adopted as the basis of social constructionist interpretation in this thesis, as these findings can be adopted more readily to explain the relational interactions in the process of mediation than can the broader framework proposed by Lock and Strong.
[52] Gergen, above n 17, xvi–xvii.

that arises when parties become constructionists—that is, they become aware that they are constructing a new reality—and, by so doing, are better able to describe the complex contours of meaning associated with the social forms produced through their interactions and discourse during the mediation process. By using a social constructionist analysis as a broad framework to appreciate, rather than critique, the practices that construct everyday reality, parties to a dispute can participate as constructionists in their joint 'game in the making'.[53]

For example, the social constructionist vocabulary demands answers to particular questions dealing with the practical workings of what is constructed and how the construction process unfolds. Social constructionist vocabulary does not lend itself easily to dealing with 'why' questions; instead, it focuses on how the constructionist perspective is put into practice in theoretically viable and productive ways. Questions such as 'what is mediation as a social construction?' outline the historical and contextual development of mediation as a social form that arose in the 1980s due to the need for better access to justice. This led to what are now termed 'third-wave reforms' to access.[54] By recognising how mediation emerged as a distinct phenomenon in the

[53] Gergen, above n 35. I will elaborate this shortly in a subsequent discussion.

[54] Mauro Cappelletti and Bryant Garth (eds), *Access to Justice: A World Survey* (Sitjoff and Noordhoff, 1978) vol 1, cited in Albert Currie, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework* (2003) Department of Justice Canada, 3–4 <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_5/rr03_5.pdf>. Cappelletti and Garth provide the classic statement of the evolution of the access-to-justice movement. Although there are many antecedents, the access-to-justice movement emerged in a major organised way in most Western countries during the immediate post–World War II era, especially when these authors described the evolution of access to justice in terms of three 'waves' of change. The first wave was the emergence of legal aid, which focused on providing access to legal representation in court for the economically disadvantaged. The second wave of change progressed from an emphasis on assuring the right to legal representation in the first wave, to an emphasis on group and collective rights, where test cases and public interest litigation began to address systemic problems of inequality. This changed the law, court procedures and legal practice to make access to justice more meaningful, including changing court procedure to make it less traumatic for victims, improving court processes to resolve disputes (streamlining the civil litigation system), and 'demystifying' the law (such as through plain language drafting and community legal education). The third wave saw the development of a range of alternatives to litigation in court to resolve disputes and justice problems, as well as reforms that simplified the justice system and thus facilitated greater accessibility. This included greater use of non-adversarial alternatives to legal justice, such as ADR. Cappelletti and Garth refer to the third wave as the emergence of a fully developed access-to-justice approach. In New South Wales (NSW), Australia, courts are seen as the central 'suppliers' of justice because they are ultimately the arbiters of legal issues, can declare what the law and the rights and obligations of parties are, and can enforce these declarations. The academic literature describes the 'waves' of justice reform in NSW in terms of four waves. Waves one to three are outlined above, while, according to Parker, wave four includes improving access to justice by focusing on competition policy. This involves implementing competition policy in order to allocate access-to-justice resources (whether formal or informal) as efficiently as possible through market institutions, such as by reforming legal profession rules to lower the cost of legal services. Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 31.

early 1980s, constructionists can specify the processes and practices that gave mediation a meaningful existence. Understanding how family trouble, emotional disturbance and so forth are 'talked into being' in everyday life can generally offer a more empirically robust response when considering how these issues can be 'talked out of being'—provided that all variables are accounted for.[55]

1.4.2 Reasons for Adopting a Social Constructionist Approach

A social constructionist interpretation of disputes is about the way humans relate.[56] It does not purport to be a comprehensive theory in its own right, but is a way of dealing with the reality of the moment. It proposes that the ways in which people commonly understand the world, including the categories, concepts and language used, are historically and culturally specific.[57] In social constructionist terms, knowledge cannot be taken as 'truth' or understanding, but as being time and culture bound. The practical workings of what is constructed and how the construction process unfolds are the key questions asked by a social constructionist approach.[58]

Similarly, the practical workings of what is constructed and how the construction process unfolds are the key questions that play a critical role in every relationship, every dispute and thus every mediation. Thus, using such a holistic approach offers a better explanation of the shifting relationships in the mediation process. Defining a social constructionist approach as being the 'game in the making'[59] enables the process of mediation to be defined as a process in which parties actively engage in re-making their game/relationship for their future—otherwise termed their 'game in the making'. A social constructionist approach better explains the theoretical underpinnings that form the foundations of the RM process.

It can be argued that the process of any mediation can become a social constructionist process if it concerns itself primarily with 'what' questions (such as 'what issues led to

[55] However, as previously noted, empirical responses give only a 'snapshot' of what is occurring at any time. In the mediation process, this snapshot approach does not offer sufficient insight to the ever-changing processes that form the relational learning that arises from the constantly shifting relationships between parties.
[56] Gubrium and Holstein, above n 7, 37.
[57] Ibid.
[58] Ibid.
[59] Gergen, above n 35.

the dispute/loss?') and 'how' questions. However, I propose that the RM is a social constructionist approach to mediation because it focuses on 'what issues can lead the parties away from the dispute/loss?' (that is, 'what outcomes are sought by the parties?'). The RM engages the 'how' questions by focusing on how parties reach their preferred outcomes pragmatically.[60] In social constructionist theory, 'how' questions particularly target the relationships that form the everyday methods, rules and strategies by which reality is constructed to form new groups that lead to new social structures or to a 'new game'. In the RM, such 'how' questions can accommodate the parties' perceived losses, and hopefully anticipate any enduring conflict. If it is accepted that any mediation process is a process of co-creation, then it is a process of social constructionism, which is about the 'game in the making'.[61]

Similarly, it can be argued that Law and its application has many grey areas/facets. Nonetheless the aim of law is to set rules by which a society can adequately function. As such it can be argued that the purpose of the Common Law is to allow the Courts to make new legal principles which function as precedents that have to be interpreted by the Courts; and that a main aim of Parliament is to similarly set statutory rules and regulations by which a society can adequately function. In either case Law can described in social constructionist terms as the 'game with fixed rules' despite all its shades of grey for the very reason that the aim of the law is to determine the specific rule(s) that apply to any particular situation. That is Law is a deductive process whereas mediation is an inductive process.

Offering the RM as a social constructionist analysis of mediation subsequently places the practice of mediation within an ideological framework. It produces a greater understanding of the process of dispute resolution as an ongoing, active, societal-change process that stems from the need to better live with loss as a means of access to justice.[62] To that effect, the remainder of this chapter considers the first of the five proposals in detail.

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[60] As if engaging in brief therapy—see Introduction, Part 3: Structure of Thesis, 11.

[61] The term 'game in the making' comes from Gergen in his article listed in the Taos institute, dated 2010. The term 'game with fixed rules' is my own adaptation of Gergen's phrase to describe law in the same terms.

[62] Katherine Pavlidis Johnson, 'The Reconstructionist Model of Mediation' (Speech delivered at the Dispute Resolution and Psychology Inaugural Conference, Sydney, 14 September 2012). I acknowledge that this work has not been published and thus is not an authoritative source.

1.5 Proposal 1: Disputes Occur When Expectations Are Not Met

The interdisciplinary approach provides greater insight to the context of a wider dispute-resolution continuum, expanded to accommodate the concepts of loss and grief. To gain greater insight to the wider context of dispute resolution on an institutional basis and to how disputes occur on a personal basis, I argue that the process of mediation, as social constructionism in action, can recognise the rich traditions of TJ[63] as a relational flow between psychology and law. I also argue that the relational flow between psychology and law that already exists in the public sphere of TJ can be shifted into the private sphere of a social constructionist mediation. This can enable parties not only to deal with the effect of their legal obligations on their psychological wellbeing (as does TJ in the public sphere), but also to further deal with the psychological effect of their loss on the outcome of their dispute through the process of relational learning.

Thus, to gain greater insight to the relational flow between loss and the context of dispute resolution, I examine the ideologies behind the concept of loss and grief, as well as TJ and various other third-wave, access-to-justice measures. Further, I analyse the ideologies or ideas behind the concepts of relational learning, meaning reconstruction and social constructionism. The argument here is that the interplay of all these ideologies leads to the formation of the RM by providing an interdisciplinary basis to better understand the context of the shifting relationships between parties during the mediation process. Therefore, I argue that discussing a social constructionist interpretation of disputes sets the parameters for the first proposal—that disputes occur when expectations are not met.

For example, a social constructionist interpretation of disputes explores the fact that attributing meaning to every event of one's life occurs either consciously or unconsciously, whether that event is as trivial as assuming the unmarked price of an item in a supermarket, or as life-changing as a serious workplace injury or divorce.[64] It

[63] David B Wexler and Bruce J Winick, 'Therapeutic Jurisprudence' in Richard K Ries, Shannon C Miller, David A Fiellin and Richard Saitz (eds), *Principles of Addiction Medicine* (Lippincott Williams and Wilkins, 4th ed, 2009) 1519.
[64] Katherine Pavlidis Johnson, 'Advanced Mediation Workshop: Different Emotional Stages in Family Conflict and Mediation' (Speech delivered at the Accord Group, Sydney, 9 June 2011).

further accepts that the attribution of meaning comes from one's value base[65] and, in social constructionist terms, that values arise from shared beliefs about how things relate. Thus, the process of relating is itself a social contract based on agreements about what people believe or assume to be shared meanings or 'terms of the contract' between them.[66]

When parties do not share the same terms of reference or 'terms of the contract' to move forward, a dispute arises and the assumptions from which the shattered expectations arose must be reconceptualised and given new meaning for the parties to move forward from the dispute. In settlement mediation the general aim is to resolve the dispute as quickly as possible. In so doing, very little attention, if any, is given to the emotional influence of the loss, and the effect this has on the meaning the parties attribute, jointly and severally, to the outcome of the dispute. Encouraging parties to accept a social constructionist interpretation of disputes enables them to pay attention to the emotional effect of the loss, not only on their psychological wellbeing in the present, but also on the proposed outcome of their dispute for the future.

To explore the disputants' quest for meaning to make sense of their respective perceived losses from their social contract, I have adopted the social constructionist premise established by Gergen[67]—that people cannot step outside the nexus of relationship. This view of relationship as a process of coordinated actions follows the theory that humanity exists in a world of co-constitution, where people co-create their own reality.[68] Once this is accepted, it is possible to propose that the RM is a model of mediation in which parties are offered an opportunity to consider their quest for meaning in relation to the overall impact of their loss. That is, the co-creation of new meaning by the parties manifests pragmatically as their legal outcomes in various areas of law.

[65] Daniel Toohey, 'New Thinking about Determinism—Reasons for the Success of Mediation' (Speech delivered at the National Mediation Conference, Sydney, 11 September 2012).
[66] Johnson, above n 62.
[67] See generally Gergen, above n 17.
[68] Johnson, above n 62.

Gergen's theory is supported by the research of Daniel Toohey[69] on the brain's function when dealing with assumptions, expectations and beliefs. Further support for on the brain's function when dealing with assumptions and expectations, comes from the research led by Matthew Lieberman which has written extensively on this topic.[70] Toohey explains in his seminar *My Neurons Made Me Do It*[71] that there are two systems of the brain—the automatic thinking (System 1) and conscious thinking (System 2)—which feed into and influence each other at all times. Toohey suggests that 'attitudes' generally refer to System 1 automatic thinking, while 'beliefs' (something that can be articulated, such as a rule) generally refer to System 2 conscious thinking.

Toohey states that the key point for mediation is that maintaining certain System 2 conscious thinking beliefs can result in forming fairly fixed System 1 attitudes because System 1 is the automatic 'towards/away' response of the brain to something that the individual does not have to think about.[72] He states that System 1 attitudes are generally very protective and useful in assisting people to attain what they want and need from their environment. However, he stresses that unthinking attitudes seek to control more than people actually need them to control. Toohey claims that System 2 thinking can be engaged to enable disputants to discuss things in order to consciously change a belief or realise that an attitude is not consistent with a primary belief.[73]

Toohey's findings that System 2 thinking can be engaged to consciously change beliefs and assumptions during mediation aligns with Gergen's findings that people create their own reality in a world of co-constitution, and cannot step outside relationships. Toohey confirms that the 'aha!'[74] moments that are the key feature of the transformative model of mediation create a new belief system that can immediately rewire the brain to change one's attitudes.[75] Such 'aha!' moments—otherwise termed 'relational learning' moments—may incidentally occur during the traditional mediation processes. However,

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[69] Daniel Toohey, 'Thinking about Determinism and How Our Brains Form Our Frames—What We See and Hear During Mediation' (Speech delivered at the National Mediation Conference, Sydney, 11 September 2012).
[70] Matthew Lieberman has some useful papers in this general topic area. See, eg, Morelli and Lieberman, above n 4; Torrisi, Lieberman, Bookheimer and Altshler, above n 4.
[71] Daniel Toohey, 'My Neurons Made Me Do It' (Speech delivered at the National Mediation Conference, Sydney, 11 September 2012). See footnote 4.
[72] Toohey, above n 71; see also n 4.
[73] Ibid.
[74] Bush and Folger, above n 14.
[75] Toohey, above n 71; see also n 4.

in a social constructionist approach, they are mindfully explored to better understand what led to the dispute in the first place, from the perspective of both parties, and what can lead away from the dispute. A social constructionist approach to mediation can help parties better live with their loss, which is related to how the loss is interpreted.

Thus, Toohey's explanation of the workings of beliefs aligns with a social constructionist interpretation of how assumptions, expectations and beliefs around loss can be changed by parties through the process of relational learning. It contributes to this study's first proposal—that disputes occur when expectations are not met. To further contribute to this first proposal, it is important to consider what is meant by a 'social constructionist interpretation' of loss.

1.5.1 What is a Social Constructionist Interpretation of Loss?

A social constructionist perspective of loss focuses on how loss is interpreted by each party, and what concept of loss is constructed by each party. It then focuses on how that construction of loss unfolds for each party. An unconventional, but useful, analogy to describe such an interpretation of loss is to consider the mathematical equation from the natural sciences that has been devised to explain the nature of all relationships, including ones of loss—an equation that arises from chaos theory.[76] For chaos theory, the mathematical rule explaining the behaviour of relationships is $Z = Z^2 + C$.[77] This equation is used to predict the nature of all relationships, one of which is that of a flickering flame observed on a screen in a camera feedback loop system. Despite knowing everything about how the rule works, it is impossible to predict the movement of the flame due to microscopic variations in the movement of the flame that are magnified in the feedback system so that the image in the screen (the feedback mechanism) no longer resembles that of a flickering flame. That is, the image on the screen appears to be chaotic and the real image is lost. However, if the camera zooms in

[76] Hal Gregersen and Lee Saller, 'Chaos Theory and its Implications for Social Science Research' (1993) 46 *Human Relations* 777, 780; see generally Margaret J Wheatley, *Leadership and the New Science: Discovering Order in a Chaotic World* (Berrett-Koehler, 3rd ed, 2006).

[77] Ibid. The Mandelbrot set is a set of values of 'c', where the orbit of zero under iteration of the complex quadratic polynomial remains bounded, rather than infinite. The Mandelbrot set has become popular outside mathematics both for its aesthetic appeal and as an example of a complex structure arising from the application of simple rules—much like simple individual decisions lead to the development of complex social structures.

to focus more closely on a portion of the chaotic image on the screen, the image appears as constantly changing ordered pattern formations.

Relating this mathematical rule of relationships from chaos theory to mediation in constructionist terms, it can be said that, despite knowing everything about the 'rules of the game' (such as the 'terms of the contract'), the microscopic variations in interpretation of the terms by each party can be magnified. This magnification can be to the extent that each party's understanding of the terms varies so significantly that it leads to behaviour that resembles a breach of the original terms of the contract. A social constructionist interpretation of loss, asks: what loss is created by the parties? In accordance with chaos theory, the answer would be that the ensuing chaos/loss arises from the two de-similar sets of expectations of how the parties should behave, with each party expecting the other to behave in terms of their own expectations. If the resulting interpretations of the terms of the contract are too different between parties, litigation may be required to determine the original expectations of the parties in their intent to create the original contract, and whether there was a breach of the subsequent terms of that contract, according to the original intent of the parties.[78]

Similarly, the interpretation of how things relate in chaos theory through the mathematical rule of relationships can be extrapolated for use with all 'rules of the relationship' matters to incorporate a social constructionist interpretation. Such an interpretation asks: how does the concept of loss between parties unfold? In accordance with chaos theory, the answer is to explore the distortions in understandings of the rules/terms formed consciously or unconsciously between the parties. These distortions of engagement in understanding the terms of the contract can be large enough to lead to a permanent separation or 'divorce'—a real period of chaos and loss. In social constructionist terms, which view mediation as the 'game in the making', loss can be defined as the period of chaos following the shattering of expectations that were previously held.

To more fully understand how the effect of loss on parties, jointly and severally, can affect the fluid, evolving nature of outcomes in any mediation process, it is important to

[78] Ibid.

note the rule of relationship from chaos theory. This rule can be applied as an explanation of distortions to understand the losses incurred.[79] Following this theory, a greater focus on the loss—whether the loss of the image of a flickering candle on a screen in a feedback loop, or the loss involved in disputes between parties—allows the apparent chaos to become a constantly changing, ordered set of pattern formations that are otherwise never seen, either in the natural world or social sciences. For example, Elliott and Kiel wrote:

> The social sciences have long emulated the intellectual and methodological paradigms of the natural sciences, from the behavioural revolution to applications such as in cybernetics. Chaos Theory raises questions about the apparent certainty, linearity and predictability that were previously seen as essential elements of a Newtonian universe. Chaos Theory therefore represents the most recent effort by social scientists to incorporate theory and method from the natural sciences as a means for understanding and examining the uncertainties, nonlinearities and unpredictable aspects of social systems behaviour.[80]

Thus, the significance of employing a social constructionist interpretation of loss using terms from chaos theory is that parties are offered an opportunity by the mediator (the camera) to go beyond what appears to be the chaotic phase of the dispute to focus more closely on each other's interpretations of the terms (of the contract). This occurs until the parties enter the 'ordered pattern phase', where they are able to accommodate each other's perspectives in order to co-construct a new reality, to the extent that they are ready, willing and able to do so.

To support the notion that mediation can be likened to processes in the natural world, Fisher and Brandon describe the process of mediation in terms that suggest it is a complex, living organism with a DNA of its own. In describing the mediator's role in 'preparing, anticipating, reacting, responding, strategizing and in adapting'[81] to the process of the 'game in the making', Fisher and Brandon's comments and description of the role of the mediator support a social constructionist interpretation for mediation.

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[79] L Douglas Kiel and Euel Elliot, 'Exploring Nonlinear Dynamics with a Spreadsheet: A Graphical View of Chaos for Beginners' in L Douglas Kiel and Euel Elliot (eds), *Chaos Theory in the Social Sciences: Foundations and Applications* (University of Michigan Press, 2004) 28–9.

[80] Kiel and Elliott demonstrate that there is no single technique to diagnose and describe all chaotic processes. Rather, they indicate the universal importance of being able to observe the same kind of chaotic processes at radically different levels of analysis. This thesis contends that traditional mediation process can become such a process, where parties can observe the same issues (chaotic processes) at radically different levels of analysis. Ibid 1.

[81] Mieke Brandon and Linda Fisher, *Mediating with Families* (Thomson Reuters, 2nd ed, 2009) vii.

Ken Doka [82] also confirms that transitions inevitably entail loss, and presents Worden's[83] formulation that change = loss = grief. Doka defines disenfranchised grief as a loss that cannot be socially sanctioned, openly acknowledged or publicly mourned. Thus, it can be argued that, in every dispute, change occurs. In accordance with Worden's formula, loss and grief inevitably follow, even if the grief is disenfranchised, as may occur in many legal matters where the loss may not be publicly mourned.

Thus, in a social constructionist mediation process, parties are better able to co-create their own reality when they have a better understanding of the effect the loss has on each other. By better understanding the effect of the loss on the psychological wellbeing of the parties, jointly and severally, during the mediation process, and by understanding the effect of the loss on the outcome of the dispute, a social constructionist analysis of loss can further contribute to the premise that disputes occur when expectations are not met. However, the definition of the mediation process is not clear in every event. Thus, what does it mean under a social constructionist interpretation? In the following discussion, I explain why a social constructionist form of interpretation should be employed.

1.5.2 Choice of Social Constructionism as a Model of Mediation

Underlying the first proposal—that disputes occur when expectations are not met—is the search for meaning to make sense of the losses incurred between parties. This proposition is forwarded as the foundational reason for conducting any mediation. This proposition requires the adoption of a social constructionist interpretation of both mediation and disputes. A social constructionist interpretation of mediation means that the mediation process becomes a process for relational learning—or social constructionism in action. Parties continue to learn from each other which assumptions and expectations initially comprised the dispute. Later, they learn how their continued assumptions and expectations influence the possible resolution of their dispute by affecting which options are reduced to possible resolutions, then to probable resolutions, and then to resolutions with which both parties can agree.

[82] Kenneth J Doka, 'Disenfranchised Grief in Historical and Cultural Perspective' in Margaret S Stroebe, Robert O Hansson, Henk Schut and Wolfgang Stroebe (eds), *Handbook of Bereavement Research and Practice: Advances in Theory and Intervention* (American Psychological Association, 2008) 223, 234.
[83] Worden, above n 29, 53.

In this conception of mediation, the assumption is that, in any dispute, everyone has their own unique perception or social construction of the dispute, and there is no single 'right' or 'wrong' answer, question or situation. Instead, what is 'right' and 'wrong' is different for each party, which leads to the notion that there is no transcendent truth. That is, in the original social contract between the parties, both sides hold expectations about what should have happened that did not happen as expected.[84] A social constructionist perspective of relationships acknowledges the existence of the other party's construction of 'truth' or 'reality' without necessarily accepting it. By so doing, a greater willingness to settle is created as the principles of right and wrong give way to pragmatism and practicality. Acknowledging the other party's truth removes the need for each party to persist rigidly holding onto their own social construct of 'the truth' as if there was no other, and allows the co-creation of new meaning to overcome the emotional and substantial effect of the losses.[85]

The effect of the perceived losses—emotional, financial and otherwise—varies for each party and affects the readiness of parties to move forward from the losses of the dispute. Under a social constructionist interpretation of the mediation process, the conscious and open acknowledgement of the perceived losses of one party by the other—on a substantive and emotional level—creates an opening for a shift of meaning to occur for each party.[86] The argument continues that the relational learning that can result from the interplay of behaviours during the social constructionist mediation process can raise the consciousness of the parties to actively engage in their 'game in the making'.

For example, the psychological effect of the loss on the emotional wellbeing of the parties arises from the meaning attached to the original expectations that were not met (or that were lost). This effect on the psychological wellbeing of the parties affects their ability to let go of the previous meanings attributed to the original social contract. When the parties are ready to attribute new meaning to their perceived losses from both

[84] Note the difference here between a social constructionist interpretation of 'truth'—namely, that there is no transcendent truth—and the aim of non-adversarial justice, which is to use a holistic approach to 'find the truth'. A social constructionist approach recognises that the 'truth' can change for parties, depending on the facts of the moment, and that all that can be expected is to move as close to the 'truth' as possible at that time.
[85] See Johnson, above n 62.
[86] Ibid.

sides they can then make better sense of why their expectations were not met. A social constructionist approach recognises that the search for 'truth' by the parties arises from their need to better understand their experience of loss. Thus, it can be argued that loss is a catalyst in the search for meaning to find the 'truth'.

The level of inability to let go of previous meanings attached to the loss (the 'readiness' of the parties to move forward from the dispute) is directly linked to the level of impact formed by those meanings on the core beliefs of the parties' reality or worldview. A social constructionist interpretation of the mediation process, such as the RM, offers parties a normative framework with which to analyse the practical workings of what is constructed by them during the mediation process. Alkire and Deneulin state:

> All normative recommendations for development wrestle with common core issues: of uncertainty, of difficulties in prediction, of evaluating trade-offs, and of identifying interconnections among variables and causal links … The point is, normative approaches are central to the shaping of development policy, but are not sufficient to create it. There are many ways in which normative frameworks affect policy decisions and outcomes. To name a few: they shape the data that we collect; they influence our analysis; they give certain topics greater or less political salience; they feed or stymie social movements; they may motivate professionals for moral or ethical reasons and they can be more or less philosophically credible.[87]

As parties aim for agreement about how to effectively handle their respective losses, they jointly and severally move to a future that holds an enduring sense of the loss that can be tolerated, and a sense of grief that can be left behind.[88]

Understanding the first proposal that disputes occur when expectations are not met enables parties to see more clearly the several different 'realities' or social constructions of each party's truth. The parties can see that the dispute can shift to become easier to understand and subsequently easier to handle or settle.[89] The degree to which the parties can accept the first proposal enables them to reconsider the meaning attached to their

[87] Normative means a 'prescriptive model which evaluates alternative solutions to answer the question, "what is going on here?", and suggests what ought to be done according to a standard or assumption'. Business Dictionary, *Normative Model* <http://www.businessdictionary.com/definition/normative-model.html>; Sabina Alkire and Séverine Deneulin, 'A Normative Framework for Development' in Séverine Deneulin and Lila Shahani (eds), *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (Earthscan and International Development Research Centre, 2009) 4.
[88] See Johnson, above n 62.
[89] This aligns with the second proposal—that the only reason for mediation is to deal with loss.

losses, jointly and severally.[90] This forms the basis for their relational learning from engaging in their 'game in the making' as 'constructionists'.[91] A social constructionist interpretation of the mediation process proposes that the only way to move forward from loss is to assign new meaning to the loss—to reconstruct the future in order to live with the loss.[92] By analysing how the reconstruction of meaning around the loss unfolds between parties, a systemic constructionist perspective can be applied to any dispute and mediation.[93] This forms the basis for the final proposal—that reconstructing a new basis for moving forward from loss enables parties to transform the mediation process into a means of actually resolving their dispute.[94] In this manner, it becomes another (and I believe, more effective) access-to-justice measure that functions as an agent for social change.

There is clearly a need for a practical and effective way of dealing with loss during the mediation process when conducting disputes to explain how the expectations and assumptions of the parties that are not met lead to serious consequences. A social constructionist interpretation of dispute resolution, and of mediation in particular, offers an ideological basis to effectively explain the relationship between loss and how disputes arise.

1.5.3 Introducing the Ideologies that Establish the Parameters of the Study: Interdisciplinarity

The preceding sections have shown how social constructionism established the parameters for the first proposal—that disputes occur when expectations are not met. The argument now is that a social constructionist view of mediation also extends the current dispute resolution continuum to include the disciplines of psychology and law.

[90] This aligns with the third proposal—that the way to move forward from a dispute is by reconstructing the meaning around the effect of the loss on the outcome of the dispute.
[91] This aligns with the fourth proposal—that relational learning combines with meaning reconstruction to become social constructionism in action. Chapter 3 focuses on how the normative framework is used by parties to confirm the second proposal—that the only reason to conduct mediation is to move forward from the loss caused by the breakdown of the relationship.
[92] This forms the third proposal, which is discussed in Chapter 3.
[93] This forms the basis for the fifth and final proposal—that reconstructing a new basis for moving forward from the loss enables parties to transform the mediation process into another access-to-justice measure as an agent for social change.
[94] This is done by focusing on living with the psychological effect of the loss on forming the outcome of the dispute.

As ‘helping’ professions, both law and psychology assist parties to address their losses from opposite ends of the dispute resolution continuum. This is well known for law, but not as well known for psychology outside of family law and TJ. Accommodating loss requires parties to understand the meaning attached to the losses from both sides in a manner that does not violate the core beliefs of either party. If the core beliefs are violated, there will be no resolution at that time. Instead, it is more likely that this will confirm the perceived unfairness of the circumstances, which will usually transform to an enmity for the other side. If a reconstruction of meaning attached to the loss does occur, the outcome of the dispute will depend on the degree to which the parties are ready to change the original feelings of deprivation attached to the loss in order to better live with the loss.

The argument here is that, for an effective dispute resolution system that can also act as a more effective means of access to justice, there is a need to extend the concept along a continuum of disciplines. Therefore, an interdisciplinary approach to dispute resolution is necessary and requires a normative framework in which to better understand the loss. To better understand the loss, it is necessary to articulate benchmarks to assess the process from the perspective of the parties. To do so, the following issues must be addressed:

- Where does mediation sit on an expanded dispute resolution continuum that includes the disciplines of psychology and law (as does TJ), given that both are helping professions that help parties deal with loss, and subsequently both act as access-to-justice measures?
- How is the need for a normative framework addressed to handle the effect of loss on the psychological wellbeing of the parties?
- Does providing external benchmarks enhance understanding between the parties about their losses in relation to their differences in negotiation styles?

The first issue addresses the argument that psychology and law are both helping professions that aim to manage losses, but that each discipline lies at the opposite end of the dispute resolution continuum. That is, the findings from psychology can help disputants during the mediation process resolve their issues associated with loss in order to fulfil their legal obligations. Expanding the dispute resolution continuum to include the disciplines of psychology and law creates a new role for mediation as a ‘marriage’ between the two disciplines. However, mediation remains at the private end of third-

party interventions[95] in the dispute resolution continuum, while law is at the extreme public end, and psychology is at the extreme private end.

The second issue addresses the need for a normative framework that could be used with any dispute involving ongoing relationships. The success of the Family Court's Information Session prompted a similar use for workplace grievance matters and in response, a template was developed. The purpose of the introductory template was to provide a normative framework to specify all relevant aspects of the role of the mediator and parties when addressing losses. The template forms part of the mediator's opening statement at the mediation, and focuses on understanding how perceived losses affect the relationship of the parties and can lead to misunderstandings about cultural differences or differences in negotiation style between the parties.

Although it may be considered that the flexibility of mediation makes it resistant to a 'common approach' or 'template' the commonality is to establish a normative framework from which the parties can determine their own level of readiness to proceed in line with their ability and willingness to do so.[96] Establishing a normative framework enables a common approach to understanding the losses felt by the parties in all disputes by using the Normative Information Session (NIS) as a template. The NIS allows the mediator to offer the parties an opportunity to better handle their losses so they can fulfil their legal obligations and hopefully resolve most if not all aspects of their dispute.[97]

The third issue addresses the need to provide external resources as benchmarks to better equip parties to understand their differences in negotiation style. By providing information from psychological research in the form of external independent standards of fairness, [98] parties can more easily develop mutual understanding about their

[95] 'Third-party intervention' is where a person or group of people become involved in a conflict to help the disputing parties manage or resolve it. This also applies to court-annexed mediation in that the confidentiality provisions keep the process in the private realm as anything said in the mediation cannot be used as evidence in Court.

[96] In workers' compensation matters this 'normative framework' takes the form of the explanation about the macro constraints placed on the parties by the *Workplace Injury Management and Workers Compensation Act, 1998*. See footnote 21

[97] The resulting template was modified from the Family Court's IS in the 1990s to use primarily in workplace grievance disputes.

[98] Roger Fisher, William Ury and Bruce Patton, *Getting to YES: Negotiating Agreement Without Giving In* (Penguin, 10th ed, 1991). This reference shows negotiators how to separate relationship issues from

negotiation styles, which improves their internal resources of confidence and so forth, with which they can better accommodate their loss in order to handle and hopefully resolve the dispute. In the following section, these three issues are discussed—extending the continuum of dispute resolution, normative framework for dealing with loss, and measures to assess the process as fair. To better understand how these three issues contribute to the ideologies behind the mediation process, it is important to give an example of how the dispute resolution continuum can be expanded to incorporate the disciplines of psychology and law as part of the ideology behind the formation of the RM.

1.6 Expanding the Dispute Resolution Continuum

Exploring the ideological foundations of the dispute resolution continuum as an access-to-justice measure that attempts to make sense of loss presents the argument that the only reason that the professions of law, psychology or dispute resolution are engaged by clients is to deal with change. This change always includes an element of loss, including the loss of the way things were. If this is accepted, it can be considered that, as helping professions, law and psychology actually constitute the opposite ends of a dispute resolution continuum, ranging from a public resolution process that affects everyone (law) to a private resolution process designed to change individuals and their immediate environment (psychology).[99] Mediation as social constructionism in action can be seen as a process that heads the private end of the third-party intervention process for dispute resolution within the public intervention framework of the law.[100]

It is common to view mediation and litigation as theoretical constructs that occupy opposing ends of the same 'procedural continuum' of dispute resolution.[101] While agreeing with this view in relation to the traditional[102] models of mediation, I argue here that a social constructionist perspective of dispute resolution enables a re-examination

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substance, and how to deal with the substantive matters by focusing on: (i) interests, as opposed to positions; (ii) developing options for mutual gain; and (iii) using independent standards of fairness to avoid a contest of will between parties. The inclusion of independent standards of fairness forms the basis of what is generally referred to as 'principled negotiation'. See footnote 6.

[99] Johnson, above n 62.

[100] Johnson, above n 62.

[101] Spencer and Hardy, above n 30, 25.

[102] See footnote 8 for an explanation of 'traditional' mediation.

of certain underlying assumptions regarding the nature of law and psychology. It is possible to rethink the clear dichotomy in which law heads the public end of the dispute resolution continuum in establishing rules to handle loss, and psychology heads the private end of dispute resolution as it attempts to make sense of the effect of loss on the psychological wellbeing of individuals. And as stated above, mediation as social constructionism in action can be seen as a process that heads the private end of the third-party intervention process for dispute resolution within the public intervention framework of the law.[103]

Law is characterised by procedural fairness, openness and the transparency of proceedings for the sake of natural justice. Within this framework, mediation is characterised by flexibility of procedure, confidentiality and closed proceedings for the sake of privacy, which does not necessarily include natural justice, especially when confidential private meetings are held. Law contributes to the principles of justice that comprise the rule of law by which nation states are publicly governed.[104]

Mediation contributes to the private arrangements between individual parties that allow pragmatic and practical solutions to unfold as concepts of daily justice that emerge as the 'way business is done here'.[105] Concepts of daily justice similarly call for a re-examination of the broader practical principles of access to justice within the legal system. Access-to-justice principles are commonly referred to as 'third-wave reforms'—otherwise termed 'ADR'—of which mediation, in its various forms, is one of many access-to-justice measures. Models of TJ, individual case management (such as pre-hearing conferences) and court-connected ADR are other access-to-justice measures adopted as part of the 'third-wave reforms' of the legal system—all of which have varying degrees of public/private features, and all of which, like mediation, are examples of non-adversarial justice.[106]

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[103] Johnson, above n 62.
[104] Johnson, above n 62.
[105] Ibid.
[106] Briefly described, non-adversarial justice is an approach to justice (both civil and criminal) that focuses on prevention, rather than post-conflict solutions. As a dispute resolution measure that aims to stay out of the courtroom, the basic premise of non-adversarial justice is cooperation and problem solving to find the 'truth'. It includes using tribunals and ombudsmen (public and private) and exercising more control over the processes of pre- or post-determination of guilt or sentence in criminal matters. Case management processes in civil matters are generally termed 'managerial justice', with an enhanced responsibility of the judge to manage the assembly of proofs and arguments, while restorative justice

A social constructionist interpretation of the functions of law and psychology presents both disciplines as helping professions that deal with loss as access-to-justice measures at opposite ends of the dispute resolution continuum. Law and psychology each have a distinct set of protocols and criteria with which to assist the general public to resolve or settle their disputes. At one end of the continuum, the function of law is to set rules and principles with which to regulate behaviour in order to determine when people conflict with those rules and principles. The function of law is to state exactly what is 'lawful' and what is not. Whether law fulfils this function does not concern us here as we are considering its aims. In contrast, the function of psychology is to explain the human psyche.[107]

In the conventional understanding of law, it can be argued that any breach of the rules of law is considered 'wrong'. Yet a social constructionist interpretation would recognise that rules are agreements by social convention that can be changed to fit the needs of a changing world. Alternatively, it is possible to say that rules allow for the selection of a version of the 'truth' that has the greatest amount of evidence in its favour, noting that it is just that—a version of the truth with the greatest amount of evidence.[108] Psychological research demands a degree of empirical correspondence between ideas and data to be definitive about the nature of the human psyche. In its pursuit to explain the human psyche, psychological research is separated from the messy reality in which humans live.[109] A social constructionist interpretation of psychological research notes that, in practice, the psychologist faced with the idiosyncratic circumstances and unique demands of a client's situation—on a case-by-case basis—would not always find it desirable to be bound by a level of definitiveness about what constitutes the human

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programmes and ADR processes aim for compromise and harmony. Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (Federation Press, 2009) 5.

[107] See generally Arie Friedberg, 'Psychiatry, Psychology and Non-Adversarial Justice: From Integration to Transformation' (Paper presented at RG Myers Memorial Lecture, Melbourne, 25 October 2010). Although this is an unpublished work, it is the most current available information specifically on this topic that is relevant to this thesis.

[108] For a discussion, see generally Andrei Marmor, *The Language of Law* (Oxford University Press, 2014); Bernard S Jackson, 'Envisaging Law' (1994) 7 *International Journal for the Semiotics of Law* 311, 312;
Hanneke van Schooten, 'Visualization Between Fictitious Law and Factual Behaviour: A Pragmatic-Institutional Analysis' in Anne Wagner and Richard K Sherwin (eds), *Law, Culture and Visual Studies* (Springer, 2014) 152.

[109] Friedberg, above n 107.

psyche. Thus, psychologists cannot always rely on a broad set of principles that states definitively what to do or say with a client.[110]

Therefore, the aim of psychological research is to assist psychologists in their daily practice and to ask difficult questions when completing their work so that they can remain sceptical of oversimplified explanations of the human psyche and of reductive answers to complex questions. By so doing, psychological research serves as a corrective to assumptions and expectations, warning clinicians to guard against the pervasive human temptation to construct a narrative that matches their preconceptions and unexamined biases in an attempt to 'cure' the client.[111]

Psychology deals with the idiosyncratic and unique interpretations of individuals when attempting to fulfil their needs by making sense of their losses in life, while law definitively deals with individual rights following loss in order to establish a fair society.[112] It would appear that psychology and law are at opposite ends of the extended dispute resolution continuum in their attempts to assist parties to make sense of loss—on an individual and societal level, respectively. Mediation can bridge this continuum, as explained below.

1.7 Mediation as an Interdisciplinary Method on the Expanded Dispute Resolution Continuum

A social constructionist interpretation of mediation in this extended dispute resolution continuum places mediation uniquely between the two professions—something akin to a 'marriage' between law and psychology, where mediation uses intrinsic elements from both. The uniqueness of mediation as social constructionism in action is that it considers individuals' needs (including psychological needs) in the context of their legal rights in order to serve their best long-term interests.[113] The process of mediation as social constructionism in action offers parties an opportunity to correct their own preconceptions and unexamined biases with assistance from a mediator (or therapist, in

[110] Ibid.
[111] See, eg, Stolorow and Atwood, above n 40; Stolorow, Atwood and Orange, above n 40.
[112] Stolorow, Atwood and Orange, above n 40.
[113] Ibid.

psychology) who is invited, whether voluntarily or otherwise, into the parties' messy worlds. Within a framework of legal rights, parties in mediation can choose to forgo their rights to pursue their best long-term interests within the parameters of the law. This combines the aspects of psychology and law that work best for the parties in their specific and unique circumstances.[114]

Unlike psychology, which aims to explain the human psyche, or law, which aims to set standards for behaviour, the aim of mediation is to assist parties, jointly and severally, to deal with their most pressing immediate needs, within a legal framework, to form new functional groups. These losses can be the loss of a marriage, a contractual arrangement, or a reputation through a grievance process. The foundational need for the traditional facilitative mediation process arises from the urgency for the parties to move away as quickly as possible from their losses, prompting the formation of new relational groups. Even in cases where the new group may be reduced to one individual for a point in time, a social constructionist perspective would say that the group of one only has meaning within a relational context.

By using a social constructionist interpretation for resolving disputes, the mediation process can identify the ways of relating that led to the losses, and create an opportunity to form new ways of relating in order to avoid any further loss and to live with the existing loss. A social constructionist mediation is a process where the parties are not only mindful of the effect of law on their own psychological wellbeing, but are also mindful that, as 'constructionists', their decisions become an instrument for their own social change. In other words, as 'constructionists', the parties are mindful that their individual needs (psychology) are balanced with their individual rights (law) to determine what is in their best practical interests when making sense of their losses. By pursuing their 'game in the making', individual parties making sense of their losses can contribute to the evolution of a more fair society.[115]

A social constructionist mediation, such as the RM, can be seen as an interdisciplinary process, with the purpose of balancing the rights and needs for the parties' best interests. This is and should be the central aim of most models of mediation including

[114] Ibid.
[115] Ibid.

social constructionism. But as social constructionism in action, mediation becomes the ongoing and evolving interaction of the way individuals relate with their society, so that a social constructionist interpretation of disputes expands the dispute resolution continuum to incorporate the helping professions of law and psychology, and places mediation uniquely somewhere between the two. This does not assume that legal practise is only about advising on the law and that lawyers are only concerned with legal rights which is not the case. There are many lawyers who do take a holistic approach to dispute resolution but for those that do not have the skills for dispute resolution their obligation is to advise their clients about their legal rights and a breach of that duty is considered sufficient for professional negligence.

The point to be made here is that the RM can be seen as another access-to-justice measure that moves towards a broader concept of justice—a way of moving forward from the first four waves of reform to include a fifth wave that entails taking personal responsibility within the institutionalisation of ADR.[116] To improve the quality of dispute resolution, the report by the Access to Justice Taskforce from the Attorney-General's Department[117] claims that justice must be maintained in individuals' daily activities, and dispute resolution mechanisms situated within a community and economic context. The taskforce states that reform should focus on everyday justice, not simply the mechanics of legal institutions, which people may not understand or be able to afford. This study argues that the RM provides such an example of everyday justice.

The idea of providing everyday justice has long been discussed by scholars. For instance, Marc Galanter notes in his article 'Justice in Many Rooms' that:

[116] The four waves are as follows: (1) equal access to legal services; (2) changing structural inequalities within the legal system; (3) promoting ADR systems, such as mediation; and (4) reforming legal professional rules. Now, the fifth wave involves taking personal responsibility within the institutionalisation of ADR. Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Attorney-General's Department, 2009) 3. It is noteworthy that the fourth wave is recognised as a wave aimed at improving access to justice by focusing on competition policy, such as lowering the cost of legal services. According to Parker, the fourth wave includes improving access to justice by focusing on competition policy: implementing competition policy in order to allocate access to justice resources (whether formal or informal), as efficiently as possible through market institutions, such as by reforming legal profession rules to lower the cost of legal services. It has long been established that courts never have been and are still not the primary means by which people resolve their disputes, and very few civil disputes ever reach the formal justice mechanisms of the courts, while fewer still reach final determination. Instead, most disputes are resolved without recourse to formal legal institutions. Ibid 3–4; Parker, above n 44, 31.
[117] Access to Justice Taskforce, above n 116.

> Just as health is not found primarily in hospitals or knowledge in schools so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.[118]

The RM aims to move towards a broader concept of justice that allows parties to improve their 'everyday justice', such as the quality of their social, civic and economic relations, by having an opportunity not only to see the dispute from their opponent's perspective, but also to co-create a new reality that incorporates the loss of the old network. As a social constructionist process, the RM provides an appropriate forum for parties to exercise choice in each dispute, to the extent of their level of readiness, willingness and ability to better live with their loss in the future.

The RM also facilitates a culture in which fewer disputes will need to be resolved in the future by encouraging mutual understanding of the issues in dispute and of the differences in communication style between the parties. In addition to enhancing the parties' capacity to understand their own and their opponent's positions, the RM encourages parties to resolve matters by providing a range of psychological constructs[119] with which to resolve disputes, thereby increasing access to justice. As a social constructionist process, the RM recognises that a focus on formal justice, while important, is not enough for disputants to easily access justice.[120] A focus on living with loss better enables parties to inadvertently and simultaneously create a sense of moral justice with which they can live. Thus, it is important to consider how the RM, as a further access-to-justice measure, compares with the current models of mediation in the

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[118] Marc Galanter, 'Justice in many Rooms' in Mauro Cappelletti (ed), *Access to Justice and the Welfare State* (Springer, 1981) 147, 161–2.

[119] For example, the DISC model of psychological type, relational chart of Isolina Ricci, system of grief and loss from Kubler-Ross, attachment theory from Bowlby, and meaning reconstruction theory from Neimeyer and Sands—to name a few.

[120] Access to Justice Taskforce, above n 116, 4–5:

> To address family disputes which cannot be resolved between the parties, government intervention is directed towards a number of avenues ranging from targeted and accessible information, through to informal services such as mediation and/or, the formal justice mechanism of court-based dispute resolution. Each institution has its advantages and disadvantages. Courts tend to be more expensive for parties and government, but are well placed to resolve complex and/or violent family disputes. Family relationship services are potentially useful in minimising adversarial mind frames and helping parties that need to maintain ongoing family relationships. For minor disputes, useful and accessible information may be sufficient to guide them in their dispute. For example, Government intervention in a non-violent family dispute focuses initially on improved access to information, to filter some disputes and assist all, then mandate the use of informal mechanisms to reserve the most entrenched disputes (and those involving violence) for the court.

dispute resolution spectrum. This requires a brief discussion of the traditional mediation processes, which will be presented in detail in Chapter 2, where a comparison is made between the traditional models of mediation and the RM. This comparison leads to a discussion of how the persistent issue of mediator neutrality can be better handled in the RM.

Here, it is important to note again the argument that the concept of mediation should be broadened to allow for a social constructionist interpretation that fits somewhere in the middle of an expanded dispute resolution continuum that incorporates both psychology and law as opposite ends of the continuum. The second issue is now considered.

1.8 Adapting the Ideology Behind TJ and the Family Court's IS for Use in the RM, As a Normative Framework

The second issue is how to address the need for a normative framework to handle the effect of loss on the psychological wellbeing of parties. Briefly, this argument is developed in the context that the RM requires parties to take responsibility for their responses. To that extent, there are some parallels between the developments described as TJ and those of the RM, which will now be expanded. TJ is a framework for asking questions about the effect of law on the psychological wellbeing of the offender. TJ was first established by Professor David Wexler,[121] whose aim was to emphasise the contextual nature of the law and the importance of the social sciences as a means to better appreciate the content, interpretation and procedures of the law. In this manner, TJ explores the potential for the law to be both pro-therapeutic and counter-therapeutic (such as in instances of the counterproductive consequences of coercion and deprivation of autonomy).

The effect of TJ as a framework for asking questions has been significant in driving the proliferation of specialist courts—such as mental health, drug, domestic violence and indigenous courts—and influential in enabling the health repercussions of law to be mainstreamed into the development of policy in many contexts. The main aim of TJ was to build constructive bridges of discourse between the social sciences and law in order

[121] Wexler and Winick, above n 63, 1519.

to facilitate a more holistic and sensitive system for resolving legal disputation and preserving the dignity of those affected by the legal process. The main idea was that no one should be worse off due to the effect of the law on their psychological wellbeing. Wexler[122] believes that, at worst, the effect of the law should be neutral, and, at best, it should be therapeutic—hence leading to the establishment of the problem-solving courts. It is possible to view TJ as an ADR measure at the public end of the continuum, complete with natural justice, and mediation as an ADR measure at the private end of the dispute resolution continuum, involving third-party interventions.

A social constructionist model of mediation such as the RM shares a common vision with TJ and engages a holistic approach to dealing with the effect of law on the psychological wellbeing of clients. Although a comparative analysis between TJ and the RM is not intended, it is nonetheless important to note that both processes incorporate theories from psychology, are non-adversarial and aim to implement a broad framework to appreciate, rather than critique, everyday reality-constructing practices. However, the TJ process contains a more comprehensive programme of motivational interviewing that is used in particular ways during the five stages of engagement, when the offender takes responsibility for his or her own rehabilitation.[123] The RM similarly relies on parties to take responsibility for the outcome of the relationships between them, especially for those in ongoing relationships, but relies more on the concept of meaning reconstruction following loss as an inherent part of every dispute resolution procedure, whether in a public (such as governmental) or private setting. TJ provides a normative framework to ask questions through its comprehensive programme of motivational interviewing. This is not discussed in this thesis, but it was the inspiration for acknowledging the similarity between the TJ's framework and the framework employed by family law in Australia in the 1990s, as discussed below.

Family law has long led systemic reform in dispute resolution by acknowledging the effect of psychological theories on legislation to create a system of resolving disputes capable of dealing with individuals' grief arising from the systemic and personal losses

[122] Ibid.
[123] Astrid Birgden and Luke Grant, 'Establishing a Compulsory Drug Treatment Prison: Therapeutic Policy, Principles, and Practices in Addressing Offender Rights and Rehabilitation' (2010) 33 *International Journal of Law and Psychiatry* 341, 348.

of divorce proceedings.[124] The application of psychological theories to the process of divorce completely reformed the law from the culture of blame entrenched in the *Matrimonial Causes Act, 1959* (Cth) to one of a 'no-fault' jurisdiction, which led to the Family Court through the *Family Law Act 1975* (Cth).[125] To effect the 'no-fault' legislation, the Family Court included a counselling unit[126] from its inception to assist parties through the grief resulting from the losses of the divorce. It also helped parties move away from their entrenched viewpoints that hindered their capacity to co-parent their children, as they moved forward from their dispute and on with their lives.[127]

By the 1990s, the continued application of psychological theories around relationships to deal with the losses from divorce proceedings led to the Family Court's Mediation Unit, with Di Gibson at its helm, in the Sydney Registry. In matters where children were involved, it was fundamental that the Mediation Unit developed effective long-term relationships between parties to enable the co-parenting of children after divorce. To do so, the IS of the Mediation Unit were created (see Appendix 1).[128] The ideas contained in the Family Court's IS of the 1990s were adopted as a benchmark of information considered essential for parties to assist their decision making throughout the mediation process. At the time, the IS was a proven method to work with family law disputants that enabled a very high success rate of settlement to occur between parties who were constantly engaged in changing circumstances, despite being divorced, because children were involved.[129]

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[124] Dale Bagshaw, 'Mediation of Disputes in the Australian Family Law System' in Phillip Swain and Simon Rice (eds), *In the Shadow of the Law: The Legal Context of Social Work Practice* (Federation Press, 3rd ed, 2009) 330; The Family Law Courts, *No Fault Divorce* <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Family+Law+Principles/No+fault+divorce/>. The 'no fault' divorce means that a court does not consider which partner was at fault in the marriage breakdown. The only ground for divorce is the irretrievable breakdown of the relationship, demonstrated by 12 months of separation. See *Family Law Act* s 48(1).

[125] Noah Eidelson, *What is the Family Law Act?* (1 July 2010) Family Law Handbook 1 <http://www.lawhandbook.org.au/handbook/ch05s01s01.php#>.

[126] This is from the Family Court in the 1990s. Ray Watson, 'History of the Family Law Act and the Family Court of Australia' (2011) 2 *Family Law Review* 6; Janet R Johnston and Nancy Ver Steegh, 'Historical Trends in Family Court Response to Intimate Partner Violence: Perspectives of Critics and Proponents of Current Practices' (2013) 51 *Family Court Review* 1.

[127] Eidelson, above n 115.

[128] In short, I adapted the Family Court's IS and used the adapted version to conduct mediations in all manner of workplace grievance disputes, on the basis that the workplace participants similarly needed to make sense of their loss and could do so within a normative framework.

[129] The Mediation Unit in the Sydney Registry of the Family Court in the 1990s was highly successful for parties who were ready, willing and able to resolve their dispute, but not as successful for those who were not. This led to the need to change, as described in the report for recommendations by Di Gibson. See Di

The IS provided a template for understanding loss that could be used numerous times after the initial dispute was resolved. For this reason, the template is adapted for the RM to form a normative framework imparting information about relational learning. Such relational learning is considered equally essential for decision making about how best to accommodate the losses of the parties in different types of workplace grievance disputes, and this insight led to the formation of the NIS.[130] The NIS offers a better understanding of the theoretical integration and practical interdisciplinarity of the relationships that unfold during the mediation process through the concept of meaning making. The argument is that interdisciplinary knowledge can enable both the mediator and parties to creatively deal with their dispute. The following discussion elaborates how meaning making occurs in a social constructionist mediation.

1.8.1 Interdisciplinarity, Meaning Making and Mediation

To address the concept of meaning making, this section examines the work of Omri Gillath, Glenn Adams and Adrianne Kunkel in their book, *Relationship Science: Integrating Evolutionary, Neuroscience and Sociocultural Approaches.*[131] This will help demonstrate how relationship science can facilitate the generation of new questions—both theoretical and practical—as part of 'the game in the making'. Gillath, Adams and Kunkel's work showcases research that integrates psychological science with sociocultural science, neuroscience and evolutionary science, and demonstrates the cutting-edge approaches outside the current comfort zones of traditional disciplinary domain expertise within the respective disciplines. This discussion does not seek to provide an exhaustive review or definitive statement about relationship research from each theoretical perspective, but to demonstrate how little research has occurred on the sociocultural context of relationship experience. There is a particular paucity of research on how relationship patterns reflect sociocultural processes.[132]

Gibson, *Submission to the Family Law Council, Attorney-General's Department—A New Approach to the Family Law System: Implementation of Reforms, Discussion Paper* (10 November 2004).
[130] Johnson, above n 62.
[131] Omri Gillath, Glenn Adams and Adrianne Kunkel, *Relationship Science: Integrating Evolutionary, Neuroscience, and Sociocultural Approaches* (American Psychological Association, 2012) 3.
[132] Ibid 7.

For example Gillath, Adams and Kunkel emphasise that research on relationships in Western, educated, industrialised, rich and democratic ('WEIRD') settings [133] disproportionately informs the scientific community with results about emotional support[134] and attraction (such as dating and mating), but does not offer much data about instrumental support and obligation (family and kinship).[135] They outline the definition and scope of relationship science and note that researchers who conduct sensitive, qualitative analyses in fieldwork often regard experimental research as intellectually trivial and politically hegemonic, while researchers who conduct laboratory experiments frequently regard qualitative fieldwork as unscientific reportage. Nonetheless, the most obvious benefit for interdisciplinary work is evident in instances where many phenomena (such as caring, close relationships) do not lend themselves to neat, distinct disciplinary boundaries, but refer instead to the integration of knowledge and practice from different disciplinary perspectives.[136]

Gillath, Adams and Kunkel note[137] that the latest advances in relationship science increasingly require an integrative approach to apply frameworks, models and methodologies that transcend disciplinary and theoretical boundaries in order to bridge the gap between researchers and practitioners who disseminate scientific knowledge to society. I propose that the RM is an integrative model that transcends the disciplinary boundaries of psychology and law to inform disputants about theory about relationships, both close and casual. The RM can assist them achieve to a practical solution through a framework for asking questions,[138] as opposed to a study of multidisciplinary areas that includes a juxtaposition of two or more disciplines with no real integration.

The most formidable barrier to interdisciplinary work is that the academic disciplines have different practices for presenting work (such as legal case citations versus

[133] Joseph Henrich, Steven J Heine and Ara Norenzayan, 'The Weirdest People in the World?' (2010) 33 *Behavioral and Brain Sciences* 61, 80; Jeffrey Arnett, 'The Neglected 95%: Why American Psychology Needs to Become Less American' (2008) 63 *American Psychologist* 602.
[134] Note Mayer's use of 'support' as a new dimension that is used to assist beleaguered peace workers to keep doing their jobs. Mayor, above n 10.
[135] Gillath, Adams and Kunkel, above n 131, 7.
[136] Ibid 5.
[137] See generally, Ellen S Berscheid and Harris T Reis, 'Attraction and Close Relationships' in D T Gilbert, S T Fiske and G Lindzey (eds), *The Handbook of Social Psychology* (McGraw-Hill, 4th ed, 1998); Ellen Berscheid, 'The Greening of Relationship Science' (1999) 54 *American Psychologist* 260; Ellen Berscheid, 'Searching for the Meaning of 'Love' in Robert J Sternberg and Karin Weis (eds), *The New Psychology of Love* (Yale University Press, 2006).
[138] Johnson, above n 62.

psychological counselling reports), standards of evidence (qualitative versus quantitative)[139] and terminology for discussing similar concepts (such as the use of the term 'settlement' in law and 'resolution' in mediation). In addition, they can use the same word in very different ways, reflecting histories of debate about the precise meanings of terms, which can appear trivial and obscure to anyone outside the discipline (such as the use of the term 'causation' as a medical or social/legal term to explain loss/injury).

Block and Staats[140] describe the 'jingle-jangle-jumble' across subfields of psychology, where the 'jingle fallacy' refers to using the same label for two things that are different, so that the unwary may consider them interchangeable,[141] and the 'jangle fallacy' refers to different labels being used to explain the same or similar things. The dispute resolution world is similarly crippled with such severe terminological problems.[142] For example, the word 'mediation' has come to refer to the process of dispute resolution in certain legal settings, instead of referring to a particular model of dispute resolution. In the Workers Compensation Commission, the term 'mediation' is used to describe a process that is essentially a legal settlement over the applicant's rights and entitlements, and never becomes a facilitated mediation in the pure sense of the model, but is a partially facilitated process at best.[143] However, despite the challenges posed by interdisciplinary studies, research on relationship science over the last few decades has shown that meaning making—or making meaning from life experiences—is an essential process for human mental and physical wellbeing, and that no factor is more meaningful or essential to human wellbeing than that of close relationships.[144]

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[139] Gillath, Adams and Kunkel, above n 131, 5.
[140] Ibid; Jack Block, 'A Common View of the Five-Factor Approach to Personality Description' (1995) 117 *Psychological Bulletin* 187, 209; Arthur W Staats, 'Uniting Psychology Requires New Infrastructure, Theory, Method, and a Research Agenda' (1999) 3 *Review of General Psychology* 3, 6.
[141] For example, the term 'mediation' has become synonymous with the term 'dispute resolution' in some legal contexts, such as used by registrars in various NSW courts, instead of being known as a particular form of dispute resolution.
[142] Block, above n 140; Gillath, Adams and Kunkel, above n 131, 6.
[143] Further evidence to support this claim is the use of the word 'mediation' to describe what is at best a settlement conference or a possible 'conciliation' in court annexed mediations conducted mainly by registrars or other court staff. It is common knowledge in the Dispute Resolution industry that talks given by judges or registrars about 'mediation' do not describe the models taught by the training institutes for mediators such as the Australian Commercial Dispute Centre (ACDC) now amalgamated with the Australian International Dispute Centre (AIDC) to become the Australian Dispute Centre, (ADC); or by LEADR/IAMA.
[144] Gillath, Adams and Kunkel, above n 131, 3.

Any mediation process must deal with the legal obligations of the parties, even if the agreement is not specifically to handle the legal technicalities. An understanding of the sociocultural perspectives surrounding legal obligations would be useful, but is unfortunately not currently available from research on relationship science. Thus, there is a need for a better understanding of the theoretical integration and practical interdisciplinarity of relationships[145] that unfold during the mediation process between parties. This study proposes that a social constructionist approach to mediation that includes a normative framework to assist meaning making enables such an understanding of relationships. If the effect of loss on the psychological wellbeing of parties and subsequent outcome of a dispute is considered in the mediation process, an interdisciplinary approach to making meaning from the loss to form new close relationships can gain support from the research findings in the field of relationship science.

As discussed above, meaning making must occur on behalf of the mediator as well as the parties. In particular, it is important to emphasise the implications of this insight for conceptualising the mediator as a relational learner. The new interdisciplinary paradigm presented in the RM involves using the mediator as a relational learner. This model recognises that the mediator does affect the parties. The traditional notion of mediator neutrality and impartiality, which has been challenged for the last ten – fifteen years and is now widely discredited, claims to affect the process, but not the content, of the mediation. The new paradigm acknowledges that the interplay of relationships between the mediator and parties influences how the content of the dispute is handled.[146]

By offering parties an opportunity to consider the assumptions and expectations that comprise the meaning behind the dispute, a social constructionist mediator learns from the parties the meaning each had attributed to the loss. By sharing that knowledge and

[145] From the field of dispute resolution, the latest research from Mayer discusses the forms of sustenance that mediators can offer to disputants engaged in enduring conflict in order to shift the narrative of their dispute, thereby demonstrating the interdisciplinarity of the process needed to move forward. Tania Sourdin discusses a principles from gaming that may be applied to the mediation process by analysing what motivates the desire to play a game—hence again learning from interdisciplinary means. Toohey discusses the significance of neuroscience in explaining how the two systems of the brain—the automatic (System 1) and the conscious thought (System 2)—affect decision-making capacity during mediations. Daniel Toohey, 'My Neurons Made Me Do It' (Speech delivered at the National Mediation Conference, Sydney, 11 September 2012).

[146] Johnson, above n 62.

then offering the parties an opportunity to reconstruct the context of the previous meanings, a social constructionist mediator models for the parties a consistent and authentic attitude of respect and trust about how they can all learn from the evolving interplay of relationships with each other. In this manner, the interplay of relationships contributes to a better understanding of the substantive issues (content) between the parties.[147]

By extending the role of the mediator to that of relational learner, along with the parties, the mediator can model for the parties an opportunity in the mediation process to better understand the dispute as being forms of actions in their own relational process. Once the parties consciously acknowledge that their relational process affects the content of the dispute, a social constructionist mediator offers the parties opportunities to better accept their own approaches to and responsibility for co-creating a resolution to their dispute. Such a resolution will be as effective as the parties' circumstances allow, given that the meaning the parties continue to attribute to the loss manifests as the outcome of the dispute—an outcome that may or may not be in agreement.[148] By assisting the parties to be mindful of the ongoing relational processes between them that continue to affect the content of their issues, a social constructionist mediator encourages a conscious effort from the parties to reality test the possible then probable outcomes of the dispute that can become agreements.[149]

Although many other mediators using other models also consciously reality test possible and probable outcomes with their parties, the point I make is that such mediators are being social constructionists but not necessarily aware that they are being so. As discussed in Chapter 2, the idea of mediator neutrality is challenged in detail in the mediation discourse. The next issue to consider is how parties can accept responsibility for their negotiation styles. By adopting a social constructionist approach, it is argued

[147] Ibid.
[148] Ibid.
[149] 'Reality testing' possible and probable outcomes means ensuring the effectiveness of outcomes once implemented. See for an elaboration of 'reality testing' in Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co, 4th ed, 2012) 382. In family law cases where children are involved, such relational processes between parties can manifest as 'shuttle mediations', particularly when emotions prevent the parties understanding the issues of both sides, and when emotions prevent either side from understanding or implementing the full extent of their responsibility as long-term co-parents. Such circumstances highlight the significance of the findings regarding the importance of meaning making from the field of relationship science.

that the RM offers an explanation of how the substantive elements of an agreement can be misunderstood to form a dispute

1.9 Relational Learning, Responsibility and the Psychology of Type[150]

The argument here is that relational learning assists the parties to see how the substantive elements of an agreement can be misunderstood to form a dispute. To do this the parties learn how to accept responsibility for their differences in negotiation style. These differences are briefly described by the psychology of type (PT) approach and the basic DISC model in particular. Before developing my argument, I will briefly explain the PT approach and DISC model.[151] Incorporating an adapted version of the PT—and particularly the basic DISC model—into the RM can better enable the participants (mediator and parties), as relational learners, to further address some of the reasons that their expectations have not been met, and how the substantive elements of their original agreement have been misunderstood to form a dispute. It can also better enable the participants, including the mediator, to accept responsibility for the dispute, based on their own level of readiness, willingness and ability to cope with as much of the loss of expectations that led to the dispute as they can handle. Similarly, a social constructionist interpretation of the ideology behind the PT approach explains why that approach assists the parties to better handle their loss.

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[150] There is a later discussion about the DISC in section 3.14 outlining its history and development. It is important to note that the PT from which the DISC evolved developed as a tool for coworkers to identify the strengths and weaknesses of each of the four major functional styles that arise when parties undergo severe stress. Parties are naturally predisposed to revert to one of the following styles: direct (dominant, decisive), influencer, stabiliser or conscientious. The DISC model is a shortened version of the Myers-Briggs Type Inventory (MBTI). The DISC version used in the RM is based on Robert Rohm, who developed an excellent collection of practical application tools using the DISC model, which divides the range of human behaviour into four quadrants based on two axes: extrovert/introvert and task oriented/people oriented. This division results in direct type individuals who are outgoing, task oriented and tend to be dominant and decisive—usually focusing on results and the bottom line. Influencer type individuals are outgoing, people oriented, inspirational, influencing and usually focused on talking and having fun. Stabiliser type individuals are reserved, people oriented, supportive, steady and usually focus on peace and harmony. Conscientious type individuals are reserved, are task oriented and tend to be cautious and conscientious—usually focusing on facts and rules. Robert Rohm, *Positive Personality Profiles: 'disc-over'* (Personality Insights, 1994). The MBTI is a formalised approach to personality type inventories, as opposed to the DISC, which is a less formal tool for coworkers to identify strengths and quickly gain insight regarding what environments are the most appropriate to achieve a common goal. de Jonge and Dormann, above n 6; Briggs and Briggs, above n 6; Condliffe, above n 6.

[151] See Jung, above n 6; Briggs and Briggs, above n 6; Keirsey and Bates, above n 6; Eysenck, above n 6; Marston, above n 6; Condliffe, above n 6.

As stated earlier, the forms of relational learning inherent in the process of social constructionism in action empower parties to recognise their loss, whatever form it takes, as a construct that is brought into meaningful existence by being 'talked into being' in everyday life. Given that a construct can be 'talked into existence', it can also be changed—'talked out of existence'.[152] Thus, the concept of relational learning is significantly affected by the importance of the parties accepting responsibility to accommodate the loss as part of their ongoing relationship, and to do so in anticipation of diminishing any future conflict as they engage with support to move forward with the loss from the dispute. One way of enabling parties to better understand each other's thinking styles is to use the very basic version of PT, particularly the basic DISC model, which makes the consequent co-creation of new realities by the parties easier through their subsequent relational learning. Through the assistance of the DISC,[153] the parties can accept responsibility by considering what is to be constructed and how that construction process occurs to change the way they relate following their loss.

The argument is that a social constructionist interpretation of disputes allows parties to consider how constructs can be changed by them during the mediation process, as a matter of choice and willingness, in their attempt to construct solutions/stories. These stories are best understood when parties are familiar with their own and the other party's particular negotiation style, and can be assisted by using the DISC model.[154] The purpose of understanding the significance of negotiation styles is to accept that differences in opinion can stem from differences in perceptions—a true social constructionist interpretation of events, supported by the PT literature.[155] The construction of solutions/stories can create enduring connections with the loss in the midst of embarking on a new life. The outcome of the mediation process not only reflects the readiness of parties to accommodate their own loss, but also affects their

[152] Gubrium and Holstein, above n 5.
[153] Marston, above n 6. DISC proponents believe that all individuals possess all four behavioural styles in the DISC, to varying degrees, through an interplay of behaviours—otherwise known as 'blends'. Jack Morrison conducted a correlational study in 1984 with the 16 Personality Factors Questionnaire (16PF) and the DISC Personal Profile System, and concluded that certain dimensions of personality are held in common by both models. As such, the DISC can be considered to have construct validity when compared with the 16PF. The DISC model is a shortened version of the Myers-Briggs model. John Millar, *DISC Personality and Behavioural Testing* (2011) <http://moreprofitlesstime.com/products-and-services/team-selection-and-development/disc-personality-and-behavioral-testing>; Condliffe, above n 6.
[154] Ibid.
[155] See Jung, above n 6; Briggs and Briggs, above n 6; Keirsey and Bates, above n 6; Eysenck, above n 6; Marston, above n 6; Condliffe, above n 6.

ability to acknowledge, understand and accommodate the other party's perspective in order to make sense of their loss. By understanding each side's negotiation style, it is easier to accept that neither side wilfully and deliberately sought to create difficulty for the other.[156] Thus, the aim of a social constructionist interpretation of mediation is not only to resolve the dispute, but for the parties—especially those in ongoing relationships—to gain insight to or at least better understand their own and their counterpart's situations. In this manner, both parties can balance their personal losses against their legal responsibilities and obligations.[157] It may be asked, "how does this differ from transformative mediation?' The answer is, 'It doesn't' differ in outcome, but does differ markedly in the normative benchmark provisions offered to the parties to hopefully better understand their differences in negotiation style and their differences in how they arrived at their current situation. Such a better level of understanding enables the parties to consider how best to move away from their dispute in a way that enables their agreed outcome to be better endured into the future.

This thesis proposes that the RM is an example of how the relational aspects in the process of mediation can be a double-edged sword, in that relational aspects can either cut or create forms of actions that co-create new realities for the parties. The forms of action ultimately gain meaning from the way the participants go along together. Under a social constructionist interpretation, as adapted from Gergen, [158] the process of mediation becomes a 'means of relating', from which parties gain meaning through reshaping their views in order to move forward with as much understanding of the loss as they are capable of handling at that time.[159] In this manner, social constructionist theory aligns with psychological theory on 'meaning reconstruction' following loss by proposing that each party can maintain an enduring connection with the loss in the

[156] Practitioner mediators frequently observe that a social constructionist interpretation of any mediation helps enable insight for parties to the reasons for their disputes. It offers parties the opportunity to better understand the global context of their ongoing relationship, despite the dispute, and better enables them to end the existing relationship or create a new way forward, either together or separately. These ideas have been substantiated during my experience of using the RM as a social constructionist approach to mediation for resolving workplace and family disputes.
[157] Katherine Pavlidis Johnson, 'When All Else Fails—The Psychologist's Response to Mediation in the Workplace' (Speech delivered at the College of Counselling Psychologists, Sydney, 12 July 2012).
[158] 'Go along together' infers the constant changing relational patterns between the parties until the decision is made. Gergen, above n 17.
[159] Ibid.

midst of embarking on a new life.[160] Social constructionist theory fits with psychological theory in its use of mediation to enhance the effectiveness of ADR in dealing with loss in a relational world. The RM is a model of mediation in which parties are offered an opportunity to consider their search for meaning in relation to the effect of their loss.[161]

1.10 Conclusion

By adopting a social constructionist approach, the RM offers an explanation of how the substantive elements of an agreement can be misunderstood to form a dispute.[162] It adopts a relational flow approach between psychology and law to explain the dual effect of how parties' losses affect not only their worldviews and psychological wellbeing, but also the legal outcome of their dispute.[163] The RM offers a framework with which to develop a social constructionist model of mediation and extends the dispute resolution continuum to include the disciplines of psychology and law. The RM forms a normative framework (the NIS) to engage in relational learning, and enables the parties to take personal responsibility for the differences in negotiation styles (otherwise known as the PT). The RM offers an explanation of the relevance of relational learning to law as the beginning of a theoretical explanation for a social constructionist model of mediation.

Having explored and elaborated the preliminary issues, this study now moves on to the core argument of the thesis—that effective dispute resolution requires both parties to understand their loss as a first step in the process of resolving the dispute. It can be argued that many of the assumptions inherent in the mediation process have nothing to do with law. Chapter 2 therefore extends the discussion on the relevance of relational learning to law by analysing how the inherent assumptions about mediation function in the shadow of the law as part of the dispute resolution discipline.

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[160] Linda Machin, *Working with Loss and Grief: A New Model for Practitioners* (Sage Publications, 2009) 3.

[161] Space in this thesis does not allow an in depth description of the many examples using the RM. Instead this thesis is the summation of my lived experience of resolving matters using this RM model for the past 20 years.

[162] See Chapter 1 and particularly 1.9 to explain how the substantive elements of an agreement can be misunderstood to form a dispute – especially constructs being 'talked in and out of existence'.

[163] Having recognised that the RM developed from such realisations, I did not allow any preconceptions about the background study or literature review to prejudice my own findings over the last 20 years, which are presented as the five proposals of this thesis.

Chapter 2: Making Meaning of Loss as a More Effective Means of Dispute Resolution

2.1 Understanding Loss

The previous chapter discussed how the RM is an example of social constructionism in action, and considered the arguments for the first of the five proposals—that disputes occur when expectations are not met.[164] This chapter focuses on the second proposal—that the main reason for participating in any mediation is to deal with or make sense of loss. Thus, this chapter focuses on the psychology of loss, and specifically how this psychology contributes to forming a normative framework to ask questions about how best to handle loss. This normative framework forms a methodology for parties to more effectively fulfil their legal obligations by comparing their own responses to 'normal' responses to loss. By so doing, parties can assess their readiness through the process of relational learning and, if ready, can reconstruct the meaning around their loss as a personal access-to-justice measure. This normative framework is termed the 'NIS' and the methodology for this is discussed in detail in Chapter 3.

Chapter 2 is divided into three parts. Part 1 outlines the inherent assumptions of mediation in the dispute resolution discourse that must be addressed in using a social constructionist approach. It also discusses the definitions of mediation and the difficult topic of mediator neutrality in order to argue for a new definition of mediation to incorporate a social constructionist approach, and a new role for the mediator as a relational learner. Part 2 outlines the most prominent psychological theories around grief and loss that contribute to a better understanding of a social constructionist approach to mediation. [165] The theories of affective determinants, meaning reconstruction, narrative learning and appreciative inquiry form the interdisciplinary

[164] See footnote 22 and discussion of possible exceptions on p 9.

[165] Ricci's relationship chart and Kubler-Ross's theory on coping with grief and loss form the basis for the relational learning that occurs for parties from the substantive content of the NIS. They are discussed in detail in Chapter 3 as part of the methodology. See generally Isolina Ricci, *Mom's House, Dad's House*: *A Complete Guide for Parents Who are Separated, Divorced or Remarried* (Fireside, 1997); Isolina Ricci, *Mom's House, Dad's House for Kids: Feeling at Home in One Home or Two* (Fireside, 2006); Isolina Ricci, *The Co-Parenting Toolkit: The Essential Supplement for Mom's House, Dad's House* (Custody & CoParenting Solutions, 2012).

matrix underlying the process of the RM. These theories are required to consider the second proposal—that the reason for participating in any mediation is to deal with or make sense of loss. Part 3 extends the psychological theories around grief and loss to the realm of social constructionism. It overviews the constructionist theory and develops an argument that the RM can be understood as a method of using grounded theory to organise mediation. This part analyses in some detail the NIS as an illustration of the RM principles in action to introduce the methodology of the RM that is explained in Chapter 3.

2.2 Part 1: Inherent Assumptions About Mediation

I will not summarise the well-known arguments about the desirability of ADR, which are easily found in any report of the former National Alternative Dispute Resolution Advisory Committee (NADRAC) or other literature.[166] Instead, I will look at the assumptions that occur in any dispute resolution process by scholars or individuals—the first of which is that mediation is generally preferable to adversarial approaches, especially when there is an ongoing relationship between the disputing parties, such as in family law where children are involved[167] or in workplace grievance disputes. When the parties have demonstrated a prior history of cooperation, mediation is similarly assumed to be the preferred approach to resolving a dispute.[168] The negotiation styles of the parties are recognised by the mediator, who redirects any competitive techniques and tactics of the parties into a collaborative framework. The mediator uses negotiation tactics, as described by Lee Jay Barman:

> Negotiation is a continuum from very competitive to very collaborative. To be a complete negotiator, you must become familiar and practiced with all approaches to negotiation. To be a complete mediator, you must be able to

[166] NADRAC was absorbed into the Federal Attorney-General's Department in late November 2013. See, eg, NADRAC, *The Resolve to Resolve—Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General* (2009) Attorney-General's Department <http://www.nadrac.gov.au/publications/PublicationsByDate/Documents/TheResolvetoResolve.pdf>; Bagshaw, above n 124, 317; Robert A B Bush, 'One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance' (2004) 19 *Ohio State Journal on Dispute Resolution* 67; see also Katherine A Mills, 'Can a Single Ethical Code Respond to All Models of Mediation?' (2005) 21 *Bond Dispute Resolution News* 5 <http://www.bond.edu.au/law/centres/drc/newsletter/Vol21Dec05.pdf>; Tania Sourdin, *Alternative Dispute Resolution* (Thomson Lawbook Co, 2nd ed, 2005) 19; Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation* (Jossey-Bass, 1984) 7; Boulle, above n, 21, 13.

[167] Bagshaw, above n 165, 317.

[168] Ibid 317.

> recognize these styles in your participants, be fluent in responding to each technique and tactic, and eventually become masterful at orchestrating a negotiation in order to bring about agreement.[169]

Underlying these assumptions and expectations is the idea that using a facilitative problem-solving approach and constructive confrontation between parties in dispute is better than litigation in order to reach more productive and creative solutions and outcomes. These creative outcomes promote the evolution of more functional relationships between parties in the future. The additional assumption is that people in mediation are willing to make rational decisions and have the ability and competence to examine their own stories and decipher the facts, problems, feelings and attitudes in these stories.[170] These assumptions must be examined here not only for their practical relevance to any mediation process, but also, more importantly, for their relevance to how well they align with the literature on the topics of loss, relational learning, meaning reconstruction and social constructionism.

A widely accepted definition of mediation is that presented by NADRAC,[171] which focuses on the most common mediation approach—the facilitative or problem-solving approach. In general terms, NADRAC's definition states that mediation is usually considered a process in which, with the assistance of the dispute resolution practitioner (the mediator), participants identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The definition further states that the mediator is usually regarded as having a facilitative role and will not provide advice on the matters in dispute. It emphasises that the mediator may have no particular experience or expertise in the subject area of the dispute, but should be expected to have experience and expertise in the mediation process itself.[172]

The recent [173] introduction of concrete proposals for mediator accreditation led NADRAC to provide two further descriptions of mediation. The first states that the mediator has no advisory or determinative role regarding the content of the dispute or

[169] Ibid 37.
[170] Ibid.
[171] NADRAC is an independent body charged with providing policy advice to the Australian Attorney-General on the development of ADR, and with promoting the use and raising the profile of ADR. As of 8 November 2013, NADRAC was 'absorbed' into the Attorney-General's portfolio and no longer exists as an independent body.
[172] See Attorney-General's Department, *Alternative Dispute Resolution* (2013) <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx>.
[173] The years 2008 to 2010 saw the MSB established as the body for mediator accreditation.

outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.[174] The second description is that mediation may be undertaken voluntarily, undertaken due to a court order, or subject to an existing contractual agreement.[175] An alternative in the second description is that mediation is 'a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute'.[176] NADRAC was cautious about presenting an absolute definition of mediation because the range of mediation processes is so varied and wide[177] that it presents problems in establishing a universal definition[178]—hence the caveat that these two additional descriptions should be seen as a resource and are not to be seen as prescriptive.[179]

Legislation introducing mediation into various courts similarly often leaves the term 'mediation' undefined.[180] The definition of mediation most frequently quoted in the literature comes from Folberg and Taylor:[181]

> The process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.[182]

Due to the diversity in mediation practice, there are difficulties in defining and describing mediation. Boulle,[183] another prominent writer regarding mediation, provides his own definition of mediation, and distinguishes the definition of Folberg and Taylor as conceptualist because there is an element of what mediation should be, rather than

[174] See NADRAC, *Dispute Resolution Terms* (Attorney-General's Department, 2003) 9.
[175] ibid
[176] ibid.
[177] See, eg, Leonard Riskin, 'Mindfulness in the Law and ADR: The Contemplative Lawyer: On the Potential Contributions of Mindfulness Mediation to Law Schools, Lawyers and their Clients' (2002) 7 *Harvard Negotiation Law Review* 1; Craig Hassed, 'Training the Mindful Health Practitioner: Why Attention Matters' in Amanda Le, Christelle T Ngnoumen, and Ellen J Langer, *The Wiley Blackwell Handbook of Mindfulness* (John Wiley & Sons, 2014). Bush, above n 152, 67; see also Mills, above n 152, 5.
[178] Even though these descriptions pre-date the establishment of the formation of the Mediator Standards Board (MSB) they are still useful and currently the only authoritative descriptions given that the MSB is still devising such updated descriptions at the time of writing this thesis.
[179] The definitions provided by NADRAC can be criticised because they focus on the settlement of the dispute, which differs to the stated objectives of some models of mediation, such as the transformative model, which does not concentrate on problem solving.
[180] Sourdin, above n 149, 19.
[181] Folberg and Taylor, above n 166, 7.
[182] Ibid.
[183] See Boulle, above n 21, 13.

acknowledgement of the various ways mediation is practised. To overcome this difficulty, Boulle defines the process of mediation in the following manner:

> Mediation is a decision-making process in which the parties are assisted by a third party, the mediator, who attempts to assist the parties in their process of decision making and reach an outcome to which each of them can assent without the mediator having a binding decision-making capability.[184]

Boulle acknowledges the difficulties of his own attempt to provide a comprehensive definition for the term 'mediation' and, for that reason, analyses the main models of mediation as an attempt to overcome some of these difficulties. For example, he states that it is useful to talk in terms of four models of mediation—the settlement, facilitative, transformative and evaluative models—and states that these are paradigm models because they are not discrete forms of mediation practice, but are ways of conceptualising the different tendencies in practice. He states that the models are not distinct alternatives to one another because, in practice, two or more of the models may be displayed in a single mediation. He gives examples where mediation might commence in the facilitative mode, but develop into the settlement or evaluative mode.[185]

It is beyond the scope of this thesis to engage in a full discussion of all the unresolved issues regarding defining the mediation process.[186] The literature acknowledges the primacy facilitative model described above, which is shared to some degree with the evaluative model.[187] Despite definitions such as Boulle's that attempt to encompass the various practices of mediation as they unfold in the field of dispute resolution, there remains a number of unresolved issues and assumptions that the mediation literature has not yet addressed—one of which affects the content and argument of this thesis: the unresolved issue of mediator neutrality.[188] Thus, I now discuss the issue of mediator

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[184] Ibid.
[185] Folberg and Taylor, above n 166, 7.
[186] It is important to note that these arguments have been ongoing for about 20 years in the practice of dispute resolution and mediation in particular, and for about the same time in the academic literature. See, generally, Morgan Brigg, 'Mediation, Power, and Cultural Difference' (2003) 20 *Conflict Resolution Quarterly* 287; Dale Bagshaw, 'Challenging Western Constructs of Mediation' in Dale Bagshaw and Elisabeth Porter (eds), *Mediation in the Asia-Pacific Region: Transforming Conflicts and Building Peace* (Routledge, 2009); Dale Bagshaw, 'The Three M's—Mediation, Postmodernism, and the New Millennium' (2007) 18 *Mediation Quarterly* 205; Dwight Golann, 'Is Legal Mediation a Process of Repair or Separation? An Empirical Study, and its Implications' (2002) 7 *Harvard Negotiation Law Review* 301; Leonard L Riskin and Nancy A Welsh, 'Is That All There Is? "The Problem" in Court-Oriented Mediation' (2008) 15 *George Mason Law Review* 863.
[187] Folberg and Taylor, above n 166, 7.
[188] For a discussion of the long history of critique of the idea of mediator neutrality, see

neutrality and compare it to the role of the social constructionist mediator as a relational learner.[189]

2.2.1 Self-reflexivity and Relational Learning in Mediator Neutrality[190]

The debate over mediator neutrality in the literature ranges from differences in meaning relating to the mediator's disinterest in the outcome of a dispute, independence from the parties, and impartiality in the way the dispute resolution process is conducted—especially in relation to issues of fairness and even-handedness.[191] Astor and Chinkin[192] present a detailed discussion of mediator neutrality and view it as an issue dependent on context. For example, they state that the extent of mediator influence depends on a number of factors, such as mediators' understanding of their role; of the importance of neutrality, power and power dynamics in mediation; and primarily of their own level of self-reflexivity to be mindful of their ideologies and behaviour during the mediation process. This acknowledgement of mindfulness on behalf of the mediator is particularly

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Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2nd ed, 2002) 149; Brian L Heisterkamp, 'Conversational Displays of Mediator Neutrality in a Court-Based Program' (2006) 38 *Journal of Pragmatics* 2051; Linda Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality—Towards an Ethic of Partiality?' (2001) 10 *Social Legal Studies* 505; Evan M Rock, 'Mindfulness Mediation, The Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice' (2006) 6 *Cardozo Journal of Conflict Resolution* 347; Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 *Social Legal Studies* 221; Scott Jacobs, 'Maintaining Neutrality in Dispute Mediation: Managing Disagreement While Managing Not to Disagree' (2002) 34 *Journal of Pragmatics* 1403; David Dyck, 'The Mediator as Non-Violent Advocate: Revisiting the Question of Mediator Neutrality' (2000) 18 *Conflict Resolution Quarterly* 129; Bagshaw, 'Challenging Western', above n 169; Bagshaw, 'The Three M's', above n 169, 205, Craig Hassed, 'Training the Mindful Health Practitioner: Why Attention Matters' in Amanda Le, Christelle T Ngnoumen, and Ellen J Langer, *The Wiley Blackwell Handbook of Mindfulness* (John Wiley & Sons, 2014).

[189] NADRAC's description of the facilitative model, as confirmed by Boulle, was initially adopted to develop the RM. Boulle suggests that all mediations have a tendency to blend some or all of the 'pure modes' of facilitation, settlement or evaluation—all of which are problem-solving models. It can be argued that the RM is also a blend of the traditional problem-solving models because it can simultaneously evolve into a settlement or evaluative or transformative mode (depending on the willingness, readiness and ability of the parties, based on their needs at that time) to become a social constructionist approach. This is discussed in detail in Chapter 3. For now, it is enough to acknowledge that the RM begins with the facilitative mode and develops into a transformative mode to the extent that the parties are ready, willing and able to do so. However, as will be seen in Chapters 3 and 4, the RM extends the traditional modes by focusing on the relational learning that occurs to make sense of loss.

[190] Astor, above n 188, 226–8. The process of mediation is said to require impartiality and neutrality; however, in some contexts, the actual practice of mediation does not seem to be as neutral as stated. Alison Taylor advances the idea that neutrality must be seen on a continuum, and that the ethical practice of neutrality may vary depending on the context of the dispute and mandate given by participants. For example, whether a mediator will use certain techniques or modes may depend on how these relate to the level of emotions dealt with during the mediation. In turn, the model the mediator uses will depend on the mediator's concept of what constitutes undue influence, impartiality and neutrality.

[191] Boulle, above n 21, 32.

[192] Astor and Chinkin, above n 188, 153.

significant for the RM because it introduces the concept of 'relational learner' as vital in a social constructionist interpretation of mediation—not only for the mediator, but also for the parties. This concept of self-reflexivity on behalf of all participants during the mediation process is the key defining factor of the RM as a social constructionist approach.

In the literature about traditional mediation processes, discussions of mediator neutrality come from specific perspectives. For that reason, it is necessary to analyse the currently dominant perspectives[193] within each of the 'pure' models. For instance, the concept of mediator neutrality places the problem-solving/solution-focused models of the settlement, facilitative and evaluative models [194] at odds with the transformative model. [195] In problem-solving models, the literature often accuses the mediator of possibly being too directive for the sake of settlement, and may miss the psychological effect of the loss on the outcome of the dispute.[196] Although this accusation does not intend to apply equally to all facilitative mediators, the literature is pointing out that the tendency to settle is in itself and very often a driver of the agenda. In the transformative model, the outcome of the dispute rests on the ability of the parties to state their grievance, recognise the dispute from the other perspective, and somehow move forward—either together or separately. The outcome of the dispute in the transformative

[193] A major aim of this thesis is to contribute to the discussion on ideology by applying a social constructionist interpretation to the mediation process by using the RM—a contribution that is discussed in detail in Chapters 4 and 5.
[194] Dorothy J Della Noce, Robert A Baruch Bush and Joseph P Folger, 'Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 39, 45.
[195] According to Bush and Folger in their book *The Promise of Mediation*, the transformative approach does not seek resolution of the immediate problem, but seeks the empowerment and mutual recognition of the parties as the primary goal, thereby enabling the parties to approach their current problem, as well as later problems, with a stronger, yet more open, view. 'Empowerment' is defined as enabling parties to define their own issues and seek solutions on their own, while 'recognition' is defined as enabling parties to see and understand the other's point of view—to understand how the other side defines the problem and why the other side seeks the solution that they do. Bush and Folger note that seeing and understanding the other side's story does not constitute agreement with those views. Although empowerment and recognition pave the way for a mutually agreeable settlement, settlement is only a secondary effect. The primary goal of transformative mediation is to foster the parties' empowerment and recognition—a process that avoids the problem of mediator directiveness that is so often a part of problem-solving mediations. In contrast, transformative mediations place responsibility for all outcomes on the disputants. Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass Publishers, 2005); see also Robert A Baruch Bush, 'Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 67; Robert A Baruch Bush and Joseph P Folger, 'Mediation and Social Justice: Risks and Opportunities' (2012) 27 *Ohio State Journal on Dispute Resolution* 1.
[196] Ibid.

model is not focused on settlement, and the mediator's role is to help parties reach the empowerment and recognition needed to move forward.[197]

In contrast, a social constructionist mediator becomes a relational learner who—like other mediators—has no vested interest in the outcome of the dispute, makes no judgement of the way the parties have conducted their lives in the past or wish to conduct their lives in the future, and maintains confidentiality. However, what is crucially different is that a social constructionist mediator offers the parties an opportunity to co-construct whatever new way of being fits their current immediate needs to accommodate their current losses and leave their disappointment/ resentments and or grief behind in the hope that the parties create their own form of social justice.[198] The focus has shifted to what the mediator 'learns'. This shift requires some explanation to indicate why the mediation should be about the learning of the mediator. This is because the mediator's learning about the readiness levels of the parties enables the mediator to take the disputing parties beyond their present state of blame, anger and so forth to a future 'business relationship'. In the business relationship, there are only explicit agreements and no assumptions or other expectations from either party about the other's behaviour—at least none that are consciously acknowledged.[199] More will be said about this later under the mediator's opening statement.[200]

As a co-relational learner, the social constructionist RM mediator becomes a catalyst by learning about the views of each party in the dispute and acknowledging the grief and loss of both parties. The mediator enables the parties—as fellow relational learners and co-creators—to engage in their own learning process, in which they and the mediator learn from each other how best to move forward from the loss and subsequently from the dispute. The relational learning that follows may result in a blended process of 'pure models' of mediation that work best at that point in time and that work only to the extent that the parties, as co-creators, are willing and able to make them work.

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[197] For a critique of the standard arguments offered to reconcile the use of mediation with the goal of improving social justice, showing that none of those arguments ultimately succeed, see Bush and Folger, above n 178, 1.

[198] Bush and Folger affirm that using mediation can indeed be compatible with the pursuit of social justice. Ibid.

[199] This is a characteristic of Ricci's negative intimacy—the state at which parties arrive at mediation. See generally Ricci, *Mom's House, Dad's House*: *A Complete Guide*, above n 165; Ricci, *Mom's House, Dad's House for Kids*, above n 165; Ricci, *The Co-Parenting Toolkit*, above n 165.

[200] Mediator's opening statement, see 3.3.1.

For example, if the anger over loss is still great, and the meaning of deprivation attached to the loss is still high, the parties will more than likely engage in a traditional settlement model to achieve consensus through emphasising incremental bargaining techniques, and have nothing more to do with each other in the future. This is as legitimate an outcome for the RM process and RM mediator as it is for any other model of mediation that uses a blended approach; but the difference is that in a social constructionist mediation, the parties have understood that their dispute arose as a result of their expectations not having been met, and the parties acknowledge that a resolution is contingent upon them both being ready to move forward in a way that incorporates addressing the losses from both sides.

This is not to assume that mediators using other models do not blend those models to achieve similar if not the same results as an RM mediator. The difference for the RM mediator is the use of a normative framework (NIS) to assist the parties to reconsider how ready they are to continue with any given issue in dispute. Through the use of the NIS the level of deprivation each party has attached to their respective losses can be put into perspective to gain as holistic a picture of the whole dispute as is possible at that point in time. It is the ease with which the NIS can be used throughout the whole mediation process that distinguishes the RM process from that of other traditional modes of mediation.

Nor do I wish to present other mediation models as occurring in their pure forms as being only 'settlement' or 'evaluative' etc. as all the evidence we have from practise is to the contrary. Yet, for ease of writing style and ease of comprehension, I will present the other models as if they appear in their traditional models in order to highlight the differences between them. For example,Iit is important to note that negotiations in the 'pure' settlement model are constrained by the legislation[201] under which the claim is sought. This means that the RM mediator, like the 'settlement mediator', focuses on a point of compromise for negotiations to be conducted as a trading approach to reach settlement. In the pure settlement model, little or no thought is given to the actual loss of the parties or to understanding the dispute from the other party's perspective, except

[201] For example, Franchise disputes are under the Franchise code of Conduct that is overseen by the Office of the Franchise Mediation Advisor; commercial matters fall under the particular commercial Act – eg shipping etc

as bargaining tools. The difference with the RM mediator using the settlement model is the acknowledgement that resolving the issues can only occur in the 'game with fixed rules'[202] for as long as the parties remain rights based.

In the evaluative model,[203] the RM mediator, like the 'evaluative mediator', uses the likely court outcome of the dispute to inform the negotiation, and uses his or her expertise in that legal area to reach agreement between the parties.[204] For example, in some franchise disputes, the RM mediator may use an evaluative model when needed, such as in cases where parties are unwilling to see the dispute from the other party's perspective, and need a benchmark of information about how their own case may be viewed by the court in order to move from their fixed positions. This approach can then be blended with the facilitative model, which draws on negotiation theory to identify the parties' underlying needs and interests so they can start to discuss a way forward from their losses.[205]

The traditional 'pure' facilitative approach enables the substantive, procedural and psychological interests of parties to be considered in a creative problem-solving manner. The mediator is not as concerned with the legal rights of the parties as in the evaluative mode, but is free to help the parties focus on a wider range of solutions than was first envisaged.[206] For this reason, the RM draws heavily on the facilitative approach in generating options around how best to live with the loss. However, the drawback of the 'pure' facilitative approach is that facilitative mediators tend to become solution focused and appear to electively sideline elements of the dispute that do not advance the cause of settlement.[207]

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[202] Gergen, above n 35. In particular, note Gergen's comment: 'But then, at the edge of consciousness, the nagging question: are we turning the "game in the making" to a game with fixed rules? Are we generating a new box, without the means to recognize that it is a box?' The worker's compensation model of dispute resolution discussed briefly in Chapters 3 and 4 is such a rights-based model based on settlement negotiations.

[203] Riskin's original grid with the evaluative and facilitative categories has been revised so that the grid and concepts are now renamed 'directive' and 'elicitive'. See L Riskin, 'Decision Making in Mediation: The New Old Grid and the New New Grid System' (2003–2004) 79 *Notre Dame Law Review* 2.

[204] Again, the evaluative model is often used in the worker's compensation model of dispute resolution, especially when negotiations between parties during the settlement phase are not leading to agreement. Note the considerable critique of the evaluative model of mediation. See, eg, Lela P Love, 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1997) 24 *Florida State University Law Review* 937.

[205] Johnson, above n 54. This idea was formulated from my professional experiences and observations.

[206] Boulle, above n 21, 44–5.

[207] See Hilary Astor, 'Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner' (2005) 16 *Australasian Dispute Resolution Journal* 30.

Alternatively, in the RM model, if parties understand that differences in expectations have occurred between them regarding the original terms of the contract that led to the dispute, a discussion of those differences with the social constructionist mediator can lead to further discussion of the parties' new needs arising from their combined perceived losses. This can lead to a transformative outcome for either or both parties. As co-constructionists, the parties can, at any time, change the meaning of deprivation attached to the original loss in order to accommodate a means to live with an enduring sense of their loss, so that they can leave their disappointments/grief behind and move forward from their dispute.

The literature[208] often claims that the emphasis on problem solving and process in the 'pure' settlement, evaluative and facilitative models has meant that traditional mediators using these models in the early part of their careers have reflected very little[209] on the issue of mediator neutrality [210] and the underlying theories and assumptions that comprise the mediation process.[211] However the practise of mediation over the course of time leads many mediators to be very self-reflexive and reflective of the intertwining needs and issues of the parties irrespective of the model of mediation used. In contrast, the distinguishing factor for the RM mediator is the relative ease for constant self-reflexivity made easier through the use of the NIS. The RM mediator has a 'template' of information in the NIS from which they can reflect around their own effect on each of the parties and the process, and how this fits with the broader ideological perspectives that aim to empower the parties to focus on solutions for the future—sometimes at the expense of agreement or settlement.[212]

Della Noce, Bush and Folger[213] state that mediators often fail to encourage a serious examination of the reality that their practice influences the parties' conflict. They state

[208] Della Noce, Bush and Folger, above n 194, 39, 45.
[209] The lack of reflection may also extend to concerns relating to power in the mediation setting. See Hilary Astor, 'Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner' (2005) 16 *Australasian Dispute Resolution Journal* 30.
[210] Boulle notes a growing realisation among mediators that neutrality is an aspiration, rather than a reality, citing examples of mediators recognising their influence on the content of the mediation. See Boulle, above n 21, 35.
[211] Della Noce, Bush and Folger, above n 194, 39, 45.
[212] Johnson, above n 54.
[213] Della Noce, Bush and Folger, above n 194, 39, 47.

that mediators fail to see that their practice raises questions about what kinds of influence are appropriate and why. They further argue that the nature of differences in mediators' motives and orientations also influence the parties' conflict, and explain how different underlying ideologies shape mediators' goals, and subsequently their influence on the conflict, in very different ways.

In comparison to the transformative approach, the social constructionist approach (such as the RM) also aims to assist parties to move forward. In the transformative approach, this seeks to achieve some form of moral growth.[214] In the RM, this is an example of a social constructionist approach to better live with the loss. The role of the mediator in both the transformative model and social constructionist model is to increase the empowerment of the parties (their feeling of self-worth to capably deal with their dispute) and increase recognition among the parties (to acknowledge and respond to the other party's story as if it were their own).[215] The capacity of the RM and transformative approach to empower parties increases the parties' awareness of their own ability to deal with their circumstances, and encourages them to recognise each other's perspective.

However, there is one main difference between the transformative and social constructionist approaches. The transformative approach aims to transform the conflict into an opportunity for the parties to achieve a better understanding from which moral growth can emerge. In contrast, the social constructionist approach focuses on reconstructing the meaning attached to the loss in order to move away from the dispute. The transformation of conflict becomes a unique contribution that mediation can make to society through the transformative approach, while social constructionist mediation becomes an agent for social change to the extent that parties become 'constructionists' forging a new meaning with which to make sense of loss as they move forward from their dispute.[216]

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[214] Kathy Douglas, 'National Mediator Accreditation System: In Search of an Inclusive Definition of Mediation' (2006) 25 *The Arbitrator and Mediator* 1. Note the work of the accreditation subcommittee of the National Mediation Conference: National Mediator Accreditation System, 'National Mediator Accreditation System' (2005) 8 *Alternative Dispute Resolution Bulletin* 1.
[215] Bush and Folger, above n 14, 37.
[216] Johnson, above n 62. This idea was formulated from my professional experiences and observations.

In the traditional transformative approach, the mediator focuses on assisting the parties to grow as people, and the outcome of any agreement is a by-product of the parties' growth.[217] In the traditional facilitative approach, the mediator focuses the process on assisting the parties to reach a mutually accepted agreement and, in so doing, often misses the opportunities of empowerment and recognition for the parties.[218] In the traditional narrative[219] approach to mediation, the parties are assisted to create an alternative, but plausible, story in a way that makes sense to each of them. The RM approach can incorporate all of the above roles when required (narrative, transformative and facilitative). However, it also engages the mediator as a relational learner to create boundaries of safety in which parties can explore with the mediator how the psychological information around grief and loss (presented as part of the template in the normative framework—the NIS) relates to their specific circumstances to set the parameters for the mediation. As a social constructionist approach to mediation, the RM specifically asks how using discourse and analysis (a narrative approach) deal with loss through relational learning so that the parties are both empowered and recognised (transformative approach) to work towards an agreed outcome (facilitative approach).[220]

Bush and Folger[221] outline techniques for the transformative mediator that allow parties to explore the conflict without a focus on solution. Instead, the focus is on encouraging positive interaction between the parties so that they are better able to make their own decisions about their own circumstances. Bush and Folger[222] state that arbitration and adjudication can probably do an equally good or better job as mediation in satisfying needs and ensuring fairness. However, they state that, by the nature of their operation, these other processes are far less capable of producing conflict transformation—the aim of making sense of loss. There are striking similarities in this regard between the RM

[217] Douglas, above n 215, 1.
[218] Ibid.
[219] The narrative approach is informed by narrative family therapy. Unlike interest-based mediation, it invites parties to think of their perspective in terms of a story and its parts (such as themes, roles, plots, protagonists and so forth). These stories are like 'theories of responsibility' that work together to create a system of meaning around the dispute. The elements in the 'story' are interactively developed, modified and contested during the mediation process. This cooperative process eventually leaves the parties with the previously 'closed' interpretation of their story now being open to new possibilities and interpretations. This new climate allows the parties to find underlying interests to resolve the conflict. Sara Cobb, 'A Narrative Perspective on Mediation: Toward the Materialization of the Storytelling Metaphor' in Joseph P Folger and Tricia S Jones (eds), *New Directions in Mediation: Communication Research and Perspectives* (Sage Publications, 1994) 50–61.
[220] Ibid.
[221] Ibid 45–53.
[222] Ibid 50–61.

and transformative approach. For instance, the role of the mediator in both the transformative model, as proposed by Folger and Bush, and the social constructionist model, as presented in the RM, is supportive, but not directive, and encouraging, but not demanding. The parties in both approaches are able to see the dispute from each other's perspective with a degree of empathy; however, in the social constructionist approach, there is greater focus on the role of the mediator and the parties as relational learners in which they constantly learn from each other how best to move forward.[223]

Bush and Folger state that the mediator's role is to help parties make positive interactional shifts (empowerment and recognition shifts) by supporting the exercise of their capacities for strength and responsiveness, through deliberation, decision making, communication, understanding others' perspectives and other activities.[224] They state that the mediator's primary goals are to support empowerment shifts by supporting (but never supplanting) each party's deliberation and decision making at every point in the session where choices arise (regarding process or outcome). It is also to support recognition shifts by encouraging and supporting (but never forcing) each party's freely chosen efforts to achieve new understandings of the other's perspective.[225] Although all these goals for the mediator in the process of transformative mediation, as presented by Bush and Folger, can equally apply to a social constructionist mediator, the difference between the two approaches is striking. The main difference is in the degree of acknowledgement given by the parties, including the mediator, to their role as relational learners. [226] The most distinguishing factor between the RM and transformative approach is the inclusion of a normative framework consisting of a template of information about relationships and loss presented to parties by the mediator to assist the process of relational learning throughout the course of the mediation.[227]

The role of the mediator as relational learner allows parties to openly communicate with each other in a safe environment where there is a free flow of communication on a 'no fault, no blame' basis, which enables the mediator to gain a better understanding of the

[223] This new role is discussed in more detail in Chapters 3 and 4.
[224] Bush and Folger, above n 14, 40.
[225] Ibid. A careful reading of the definition of transformative mediation indicates a high degree of similarity with a social constructionist interpretation of mediation as being the 'game in the making', as opposed to law, which can be described in Gergen's words as the 'game with fixed rules'. See Gergen, above n 35.
[226] Johnson, above n 54. This idea was formulated from my professional experiences and observations.
[227] Ibid.

level of readiness of the parties to move forward. In turn, the level of readiness of the parties to let go of the loss—as demonstrated by their willingness to empathise with each other—allows them the freedom to co-create a different reality, either together or separately. The new reality co-created by the parties can range from a settlement (if the level of readiness to empathise is non-existent or very low) to a transformative experience (if the level of empathy and consequent understanding of the various social constructs of the dispute is high).[228] The outcome of the dispute under the RM, as a social constructionist approach, is as flexible as the parties (including the mediator) are ready, willing and able to understand the loss forming the dispute—to accept the differences in expectations that created the dispute.[229] It must be noted that accepting differences in the expectations of either party does not mean agreeing with those differences.

From the arguments presented, it can be concluded that the RM model, with the mediator as a relational learner, is the best definition of mediation and mediator role to achieve a psychological shift for parties in relation to their loss, and subsequently lead to a more effective long-term resolution of the dispute. The extended definition of transformative mediation presented by Bush and Folger states that:

> mediation is a process in which a third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities for resolution.[230]

Thus, the context of the transformative model presented by Bush and Folger can be included in the definitions of mediation proposed by NADRAC and Boulle to form a more comprehensive definition of mediation. Further, the transformative definition above should be extended to include the concepts of relational learning and loss in order to form a social constructionist definition of mediation that would contribute to the diversity of practice in expanding the dispute resolution continuum.[231] A social constructionist definition of mediation would subsequently state that:

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[228] Ibid.
[229] Ibid.
[230] Bush and Folger, above n 179, 65.
[231] A social constructionist interpretation of the mediation process, such as the RM, should also be included as part of the diversity of practice available in the mediation field. The concepts of grief and loss should be acknowledged as the catalysts for the search for meaning to move forward from a dispute when engaging the disciplines of law and psychology. The need to expand the dispute resolution continuum to include a social constructionist approach to mediation would be useful.

> Mediation is a process in which a third party assists disputing parties as fellow relational learners to change the quality of their conflict from negative and destructive to positive and constructive, by exploring and discussing issues and possibilities for resolution which redress their perceived losses that led to the dispute.

Thus, the RM is a blend of traditional mediation approaches that uses discourse and analysis from the narrative approach to explain the loss in relation to the law. It also uses empowerment and recognition from the transformative approach to enhance the relational learning of the parties to deal with the psychological effect of the loss. Finally, it uses reality testing of options from the facilitative approach so that the parties can more effectively live with the loss in relation to their legal rights and obligations.

Understanding the inherent assumptions underlying the mediation process enables a social constructionist definition to be formed. Understanding the assumptions with which parties enter mediation better enables them to recognise that the only reason they are participating in the mediation process is to better live with their loss. Such an understanding helps parties fulfil their legal rights and obligations, and can become a means to access justice. The following part considers the psychological theories behind grief and loss that inform the concept of the RM.

2.3 Part 2: Psychological Theories Dealing with Loss

This part focuses on the psychology around loss, and specifically on how the psychology contributes to forming a normative framework for asking questions. The factors that contribute to effectively dealing with loss include affective determinants, understanding how meaning may be reconstructed, and a process termed 'appreciative inquiry'. These theories[232] are discussed and simultaneously related to the RM in social constructionist terms in order to demonstrate the need for interdisciplinary and multi-level understanding when considering the affective determinants to meaning making.

[232] Kenneth Doka, *Disenfranchised Grief: New Directions, Challenges, and Strategies for Practice* (Research Press, 2002); Worden, above n 29; Robert Neimeyer (ed), *Meaning Reconstruction and the Experience of Loss* (American Psychological Association, 2001).

2.3.1 Affective Determinants

I argue that the aim of social constructionist mediation, such as the RM, requires parties to effectively deal with their loss. Thus, it is important that there is a firm understanding of the various affective determinants, such as emotions, motivation, moods, stress and wellbeing. Understanding the significance of these determinants derives from various disciplines. For example, the concept of loss in law can be reduced to quantifiable measurements of damages, whereas, in psychology, the emotional effect of the loss may never be corrected. The process of relational learning offers parties an explanation of the interdisciplinary nature of what is required for them to deal with their loss. Thus, it is significant that the psychological and legal aspects of analysis around loss are sought through the mediation process.[233] In the following discussion, the focus is on the macro level of analysis of neurophysiology, with explanations of conflict used to illustrate the argument that levels of analysis matter. The RM is such an attempt to incorporate interdisciplinarity in relation to the role of empathy and the significance of affect in relation to loss when resolving disputes.

The following is an illustration of how even knowledge of neurophysiology is relevant for understanding and managing the RM. The work of the National Centre for Competence in Research in Affective Sciences—which brings together disciplines that study the biological, psychological and social dimensions of affect—is relevant. The different scientific projects aim to provide a better understanding of affective phenomena from various research perspectives and multiple levels of analysis.[234] The aims of the National Centre for Competence in Research include the appraisal processes in decision making and the role of empathy and pro-social behaviour in non-adversarial processes.

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[233] For example, the NIS of the RM emphasises the significance of affective determinants when seeking which model of mediation best suits the readiness, willingness and ability of the parties to deal with their loss within a particular jurisdiction. Through analysing their loss and comparing their response to the benchmark in the NIS, the parties are better able to engage in the various appropriate models or combination of models to move forward to the extent that they can at that time. This is expanded at a later stage in section 3.3.

[234] Joanna Kalowski, 'Training for Mediators' Brains: What is Worth Doing in the name of Continuing Education' (Paper presented at the LEADR National Mediation Conference, Melbourne, 10 September 2009) 1. Although this is an unpublished work, it is the most current information specifically on this topic that is relevant to this thesis.

In a paper on the neurophysiology of conflicts, Ken Cloke states that all conflicts are perceived by the senses, manifested through body language and kinaesthetic sensations, embodied and given meaning by thoughts and ideas, steeped in intense emotions, made conscious through awareness, and potentially resolved by conversations and experiences. He states that all conflicts develop into character, nurture a capacity for openness and trust, and contribute to learning and the ability to change. Cloke claims that, although conflict and resolution have yet to be reduced to a simple set of deterministic biochemical events taking place exclusively in the brain, research clearly demonstrates that basic neurological processes provide all humans with alternative sets of instructions that lead towards impasse or resolution, stasis or transformation, or isolation or collaboration. For these reasons, it is important for mediators to understand more about the neurophysiology of conflict.[235]

While this thesis does not overview the neurophysiology of conflict, it is well accepted by now to note that research on an international level concludes that interdisciplinarity is the key to mastery in the mediation process,[236] and that the above quotation by Cloke can equally apply to a social constructionist approach, such as conflict resolution. Cloke concludes that neurophysiological research may find solutions to the chemical and biological sources of aggression, which will not only require a profound understanding of how the brain works, but also require a global shift in attitudes towards conflict that begins with a willingness to change our own attitudes.[237] Cloke claims that the human brain's capacity to understand and alter the world—starting with itself—is an extraordinary phenomenon. However, the human species may be unable to collaborate in solving its most urgent problems, or may survive them without the ability to translate the knowledge about how the brain operates into practical techniques, such as successful conflict resolution experiences.[238]

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[235] Kenneth Cloke, *Bringing Oxytocin into the Room: Notes on the Neurophysiology of Conflict* (January 2009) Mediate <http://www.mediate.com/articles/cloke8.cfm>.

[236] See generally Barbara A Babb, 'An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective' (1997) 72 *Indiana Law Journal* 775; Kalus R Scherer, Ronald P Abeles and Claude S Fischer, *Human Aggression and Conflict: Interdisciplinary Perspectives* (Prentice-Hall, 1975); Janet Rifkin, 'Mediation from a Feminist Perspective: Promise and Problems' (1984) 2 *Law and Inequality* 21; Jacqueline Nolan-Haley, 'Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective' 7 *Harvard Negotiation Law Review* 235.

[237] Cloke, above n 236.

[238] According to Cloke, the most significant problems faced by humans—from war and nuclear proliferation to terrorism, greed and environmental devastation—can arguably be traced to the human

2.3.2 Relevance of Psychotherapy as Biological Input for the RM

In relation to how these theories relate to the RM, it is proposed that Cloke's theory regarding the brain's capacity to understand and alter the world can translate into the capacity of each party to understand and alter their own position in the world, starting with themselves. Moreover, it extends to understanding the position in the world of their counterpart. Depending on the degree to which the parties are prepared to accept responsibility for their own worldview, they can engage in a level of analysis around their loss that may empower them to change their worldview and themselves in the process. The readiness of the parties to move forward or 'rewire' the brain is determined by the level of analysis around the loss in which they will engage.

Kalowski discusses the role of 'talking therapies', such as psychotherapy, as a biological intervention, and cites Norman Doidge,[239] who discusses the ability of 'talking therapies' to help rewire the brain, as much as drugs do, but in a different and very specific way.[240] For example, Doidge says:

> In treatment, when a patient speaks about a problem, they activate the circuits and memories related to that problem. These circuits enter a brief period when they become more plastic and alterable. Treatments for trauma, for example, don't just make people 'stew in their own traumatic juices' needlessly. *The patients actually create an opportunity to change how intense their emotional reactions to those traumas are.* Brain scans have demonstrated and confirmed this change [my emphasis]. [241]

Doidge confirms the 'plasticity of the brain'[242] during moments of intense emotional reactions that allow it to change the intensity of those reactions. By accepting Doidge's

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brain's automatic responses to conflict. Toohey's work on System 1 and System 2 thinking, as discussed earlier, is reminiscent of Cloke's work highlighting the significance of neurobiology on the resolution of conflict in everyday life.

[239] See generally Norman Doidge, *The Brain That Changes Itself* (Penguin Group, 2007). Doidge is a psychiatrist and psychoanalyst. In this book, he investigates evidence of the plasticity of the brain due to being dissatisfied with conventional wisdom that the human brain is hardwired and unchangeable. He discusses the role of 'talking therapies', such as psychoanalytic and cognitive therapy.

[240] Kalowski, above n 235, 2.

[241] Ibid.

[242] Bowlby's attachment theory explains how human relationships develop, and how resilience develops in children when they are loved and experience secure parent–child interactions. His research shows that, without these positive experiences, a child's brain does not develop the pathways needed to understand the social world and rules of relationships, nor does the child develop a capacity to feel worthwhile or enjoy being with others in order to reach his or her potential. Elizabeth Hoehn, 'The Importance of Early Relationships' (Paper presented at 27th Annual Calabro SV Consulting Family Law Residential: Complex

conclusions, in a traditional mediation, parties can be said to be at a phase of 'brain plasticity' due to the intense emotions experienced through the dispute, such that they are at a phase where thoughts can be 'rewired'.[243] Thus, it can be argued that parties can transfer the ability of the brain to change into a collaboration to solve their existing problems. This is exactly what the RM intends to do, based on the readiness, willingness and ability of the parties to let go of the original meaning attached to their loss in order to move forward—in order to 'rewire' their brain.

The process is reminiscent of Toohey's[244] work on systemic thinking, which states that the brain can be rewired during conflict to change attitudes and beliefs.[245] Klaus and Kennell further support the notion that affective determinants influence attitudes and beliefs in stating words to the effect that attachment relationship is 'an affectionate bond between two individuals that endures through time and space and serves to join them emotionally'. [246] They state that this 'bond' that 'joins them emotionally' is at a primal level i.e., long lasting.[247] Similarly, Toohey explains that attitudes to which people are attached and that have served them well in the past often hinder coping strategies in the present when not adequately addressed. I argue that the RM is a tool in mediation that attempts to address such attachments. The RM creates an opportunity for disputing parties to change the intensity of their emotional reactions to their loss from one of negative intimacy to one of a business relationship, where both can amicably move

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Issues for Modern Families, Queensland, 17–18 August 2012) 1; see also John Bowlby, *A Secure Base: Parent-Child Attachment and Healthy Human Development* (Basic Books, 2008) 122.

[243] Carolyn Quadrio and Elizabeth Hoehn confirm that the brain changes throughout life, but the changes in the first three years of life have the greatest effect on the brain's potential. Both researchers claim that the expanding brain is directly influenced by early environmental enrichment and social experiences, and that the experiences of infants are crucial because connections develop between neurones in response to activation by experiences. They also claim that experience decides which neurones survive and how they connect with each other—that is, experience wires the brain and ongoing repetition strengthens the wiring. Carolyn Quadrio, 'Legal Aid Seminar: Mental Health & Parenting' (Speech delivered at UNSW, Sydney, 22 November 2013); Hoehn, above n 243, 3–4. Although this is an unpublished work, it is the most current information specifically on this topic that is relevant to this thesis.

[244] See Introduction. Toohey, above n 60; see generally Kahneman, above n 4, from which Toohey drew his analogy of System 1 and System 2 thinking. Matthew Lieberman has some useful papers on this general topic area. See, eg, Morelli and Lieberman, above n 4; Torrisi, Lieberman, Bookheimer and Altshler, above n 4.

[245] Daniel Siegel states that human connections create the neural connections from which the mind emerges. He argues that relationships and the brain interact to create who people are. He states that interpersonal relationships affect the structure and functioning of the brain, and help shape a person's emotional, social and mental functioning. Hoehn, above n 243, 2; see also Daniel J Siegel, *The Developing Mind: How Relationships and the Brain Interact to Shape Who We Are* (Guilford Press, 2nd ed, 2012) 145, 335.

[246] Marshall Klaus and John Kennell, *Parent-Infant Bonding* (The CV Mosby Co, 2nd ed, 1982), cited in Hoehn, above n 243, 9.

[247] Ibid.

forward in a sustained civil relationship—a manifestation of the rewiring of the brain at that time.

To understand how such rewiring happens so that parties can function in a business relationship, parties must accept the fact that there is a loss, even if that loss is simply a loss of the original expectation about the performance of the contract -social or otherwise- that was entered into. To accept that there was a loss of original expectation, the parties must analyse what the loss has meant to their respective worldviews.[248] To make some sense of that loss, they must reconstruct the original meaning of the emotional impact attributed to the original loss in order to rewire their worldview. By 'rewiring' their worldviews, the parties can better live with the impact of their original loss into the future. Thus, I argue that affective determinants contribute to the second proposal—that the only reason for participating in mediation is to make better sense of the losses felt. The 'reconstruction of meaning' that occurs by addressing the affective determinants requires a discussion of the theory of 'meaning reconstruction' proposed by Robert Neimeyer and Diana Sands.[249] This theory demonstrates the need for interdisciplinary and multi-level understanding when considering the affective determinants to meaning making, and forms the basis for explaining conflict as an illustration of the argument that levels of analysis matter.

2.3.3 The Theory of Meaning Reconstruction

Neimeyer and Sands quote Jerome Bruner, who states that in 'acts of meaning' people seek an order, foundation, plan and significance in human existence—particularly their own.[250] Neimeyer and Sands confirm that incontrovertible occurrences ,such as life-changing conflict, can cast individuals into a world that is alien and that radically shakes or severs the taken-for-granted 'realities' (assumptions) in which they are rooted, and on

[248] Hoehn, above n 243, 8. Bowlby emphasises that attachment to protective and loving caregivers who provide guidance and support is a basic human need that is rooted in evolution and essential for the survival of the species.
[249] See generally Robert Neimeyer and Diana Sands, 'Meaning Reconstruction in Bereavement: From Principles to Practice' in Robert Neimeyer, Darcy Harris and Howard Winokuer (eds), *Grief and Bereavement in Contemporary Society: Bridging Research and Practice* (Routledge, 2011).
[250] Jerome S Bruner, *Acts of Meaning* (Cambridge, 1990), cited in Ibid, 1. This is a significant source because it encompasses the literature on suicide, which is the ultimate source of loss, offering an outline of the research on how the family members of people who commit suicide make sense of the event through meaning reconstruction. Sands and Neimeyer comprehensively cover the literature to include an argument for meaning reconstruction that counteracts apparently opposing views.

which they rely for a sense of secure purpose and connection. They state that disruptive events can stress and destroy the vulnerable assumptions on which people's meaning of the world is based, especially when expectations, understandings and illusions meet with incontrovertible occurrences, such as the diagnosis of serious illness, betrayal by an intimate partner or news of a loved one's sudden death. Although such events are not 'disputes' as such, they apply equally to disputes. For example, Neimeyer and Sands define 'meaning making' as:

> the capacity to construct and inhabit a symbolic world that permits us to embroider experience with language, to speak and be heard, to relate, revise and resist stories of events of our day or the entirety of our lives. [251]

In relation to the RM, in family law, divorce constitutes such an incontrovertible occurrence; in workers' compensation, serious injury changes the way a person will work and view themselves in the future; and, in workplace grievances, the dispute challenges the person's identity in the workplace. The RM provides a means for disputing parties to explain their current conflict to each other at a level of analysis at which they are ready, willing and able to function, thus stressing that levels of analysis do matter.[252]

Neimeyer and Sands [253] state that psychologists—like philosophers, linguists and theologians—emphasise the role of meaning in human life. This is particularly the case for psychologists who fall into the classical and contemporary constructivists tradition, such as Kelly[254] and Neimeyer,[255]who focus on the processes by which people organise life events into meaningful episodes and discern recurrent themes that give personal significance and validation in their relationships with others. [256] As a social constructionist approach to the process of meaning making, the RM affirms that the purpose of dispute resolution is to reorganise loss into meaningful episodes that fit some

[251] See generally Neimeyer and Sands, above n 233.
[252] The RM invites attention to such crises of meaning from a social constructionist perspective, and offers some principles and procedures to assist the reconstruction of meaning in the lives of disputants who maintain ongoing relationships after separation.
[253] See generally Neimeyer and Sands, above n 233.
[254] See generally George A Kelly, *The Psychology of Personal Constructs* (Routledge, 1955/1991).
[255] Robert A Neimeyer, 'Fostering Posttraumatic Growth: A Narrative Contribution' (2004) 15 *Psychological Inquiry* 53–4.
[256] See generally Kelly, above n 255; Robert Neimeyer, 'Narrative Disruption in the Construction of Self' in Robert A Neimeyer and Jonathan D Raskin (eds), *Constructions of Disorder: Meaning-making Frameworks for Psychotherapy* (American Psychological Association, 2000) 207, cited in Neimeyer and Sands, above n 233, 2.

sort of recurrent theme in the lives of the parties and gives personal significance and validation to the relationship between the parties when forming an agreement.

According to Neimeyer and Sands, the quest for meaning can be viewed in narrative terms to construct a life story that is distinctively personal, drawing on the social discourse of the individual's place and time[257]—the result being a self-narrative. They define a 'self-narrative' as:

> an overarching cognitive-affective-behavioural structure that organises the 'micro-narratives' of everyday life into a 'macro-narrative' that consolidates our self-understanding, establishes our characteristic range of emotions and goals and guides our performance on the stage of the social world.[258]

That is, identity can be seen as a narrative achievement because the sense of self is established through the stories parties tell about themselves and relevant others, the stories that are told about the parties by others, and the stories that are enacted in the presence of others. This explanation is in itself a social constructionist approach. Neimeyer and Sands state that incontrovertible occurrences or seismic life events, such as death, profoundly shake the self-narrative from which parties gain their sense of identity and instigate the processes of reaffirmation, repair or replacement of the basic plot and theme of one's life story.[259]

The principles behind these findings can be extrapolated to apply to other forms of loss that can be as significant as death, such as divorce, a severe injury and identity crises—each being a 'death' of 'the way things were'. For example, in commercial matters, where a loss is considered in terms of 'sunk costs',[260] one's life story may appear to need little or no mending in the process of dealing with that loss. However, when the loss takes on greater significance, whatever the legal field, the parties' sense of identity can be seismically shaken, requiring a resolution that can repair or replace the basic life plot and life theme of the parties' life stories. A social constructionist approach such as the RM informs parties about their place on the continuum of repairing or replacing the basic plot of their life story, offering an opportunity for conscious choice to accept

[257] See generally Robert A Neimeyer, Dennis Klass and Michael R Dennis, 'Mourning, Meaning and Memory: Grief and the Narration of Loss' in Jose Ciprut (ed), *On Meaning* (MIT Press, 2010); Neimeyer, above n 233, 53–4; see Neimeyer and Sands, above n 233, 2.
[258] Neimeyer, above n 233, 53–4.
[259] Lawrence Calhoun and Richard G Tedeschi (eds), *Handbook of Post-traumatic Growth* (Lawrence Erlbaum, 2006), cited in Neimeyer and Sands, above n 233, 3.
[260] Hal R Arkes and Catherine Blumer, 'The Psychology of Sunk Cost' (1985) 35 *Organizational Behavior and Human Decision Processes* 124.

responsibility for the meaning they attribute to the loss in the mesh of relationships that occurs when reconstructing their lives.

Neimeyer and Sands further explain that, in the aftermath of life-altering loss, the bereaved are commonly precipitated into a search for meaning at levels that range from the practical (how did this happen to me?) to the existential (who am I now that I am no longer what I was?) to the spiritual (why did god allow this to happen?). Similarly, parties in workers' compensation matters,[261] family law or workplace grievances can experience life-altering events that precipitate a search for meaning at all levels. The search for meaning ranges from the practical, upon which the rights and entitlements are based (how did the loss occur? who is to blame?) to the existential (who am I now that I have to live with this loss?) and the spiritual (why did god allow this to happen?). The parties' answers to such questions and to questions involving the rehabilitation process (such as, how can I now contribute to the workforce/family/society?) constitute the foundations upon which settlement of rights and entitlements under a mediation agreement are formulated.

Neimeyer and Sands concur that the way parties engage these questions—and whether they actually do engage these questions and resolve the issue, or simply stop asking the questions—shapes how the loss is accommodated and who the parties become through dealing with the loss. This thesis proposes that this equally applies to parties in mediation, and can take the form of anguished and intermittent questioning on behalf of the parties in their search to live as authentic and compassionate a life as possible.[262] Neimeyer and Sands argue that parties' search to revise their self-narrative is driven by the need to find significance in the event story that led to the loss, and simultaneously deal with the back story (the self-narrative prior to the loss), which is woven together intimately with their prior and now present identities.[263] I argue that the RM, as a social constructionist approach to mediation, similarly enables parties to deal with their identities as part of their ongoing self-narratives. Unlike the psychotherapeutic approach to dealing with loss, where such stories are explored with the individual client for the

[261] Parties in workers' compensation matters require a 15% whole-person impairment resulting from their injury before they can make a claim. This is relevant because it demonstrates the extent of loss that needs to occur prior to being able to make a claim.
[262] Neimeyer and Sands, above n 233, 3.
[263] Ibid.

purposes of reconstructing a new identity, the RM considers the event story and backstory of each party and offers an opportunity for both parties to co-create a self-narrative. This narrative intimately braids together their prior and present identities from those stories in an attempt to meet their own and each other's relational needs.

Neimeyer and Sands confirm that a growing body of research examining meaning reconstruction after loss supports the broad outlines of their proposed model. They claim that this research is adding clinically useful detail to understanding how the bereaved negotiate the unwelcome change introduced to their lives by loss, for better and worse, and how professional helpers may best support their clients' search for significance.[264] They state that loss does not necessarily destroy survivors' self-narratives and mandate a revision or reappraisal of life meanings. They assert that many survivors of loss find consolation in systems of secular and spiritual beliefs and practices that have served them well in the past.[265] They also confirm that, when the loss is relatively normative and anticipated (such as sunk costs), only a minority of people report searching for meaning in the experience, and the absence of such a search is one predictor of a positive bereavement outcome.[266] Applying this theory to the RM as a social constructionist approach to mediation shows that many commercial disputes result in a positive bereavement outcome where no search for meaning of the self-narrative is required. However, learning from any commercial loss always requires a reconstruction of meaning of the way business is thereafter conducted, thereby affecting not only the self-narratives of the parties (no matter how slightly) and the social system of the 'way business is conducted here'.[267]

Neimeyer and Sands state that research of bereaved parents reinforces the powerful role of meaning making in predicting bereavement outcomes.[268] They describe 'normative grief' as sadness in relation to missing the situation before the loss, and 'complicated grief' as 'the ongoing inability to care about other people as well as long-term

[264] Ibid 4.
[265] Thomas Attig, *The Heart of Grief: Death and the Search for Lasting Love* (Oxford Press, 2000), cited in Neimeyer and Sands, above n 233, 4.
[266] Christopher G Davis et al, 'Searching for Meaning in Loss: Are Clinical Assumptions Correct?' (2000) 24 *Death Studies* 497, 515; see also Neimeyer and Sands, above n 233, 4.
[267] Johnson, above n 146; Sara Cobb, 'Empowerment and Mediation: A Narrative Perspective' (1993) 9 *Negotiation Journal* 245; Mikael Leiman, 'Toward Semiotic Dialogism: The Role of Sign Mediation in the Dialogical Self' (2002) 12 *Theory Psychology* 221.
[268] Neimeyer and Sands, above n 233, 5.

disruption of functioning in work and family contexts'.[269] Applying this definition to the process of mediation, I argue that the symptoms of normative grief and complicated grief can equally apply to parties in family law, worker's compensation and workplace grievance matters as they apply to those bereaved by death. This is because, like death, there is no going back to the same basis for the relationship or circumstances that existed prior to the loss, even for parties who remarry.[270] To prove their definition of grief, Neimeyer and Sands cite studies[271] of parents who suffered a child's death, stating that those who invoked specific sense-making themes—such as attributing the death to god's will or having a belief that the child was no longer suffering—experienced fewer maladaptive grief symptoms.[272] Similarly, those who reported 'benefits' from the death of a child, such as reordered life priorities, also experienced fewer maladaptive grief symptoms.[273]

Applying these findings to mediation, I argue that losses incurred in family law, workers' compensation and workplace grievance matters equally require parties to specifically make sense of their losses followed by a reordering of life priorities, despite the differences in the nature of the losses incurred. The fact that these sense-making themes may not be obvious during the mediation process does not mean that they do not exist; instead, their outcomes are no less important to assess and facilitate during mediation. Neimeyer and Sands conclude that bereavement adaptation entails more than simply surmounting the painful symptoms of grief and depression in that significant numbers of people report resilience or even personal growth after loss.[274] In other words, meaning making contributes to adaptive outcomes, as demonstrated by longitudinal research on loss, such as studies on widowhood.[275]

[269] Ibid.
[270] Ibid.
[271] Ibid; Wendy G Lichtenthal et al, 'Sense and Significance: A Mixed Methods Examination of Meaning-making Following the Loss of One's Child' (2010) 66 *Journal of Clinical Psychology* 791; Rachel A Coleman and Robert A Neimeyer, 'Measuring Meaning: Searching for and Making Sense of Spousal Loss in Later Life' (2010) 34 *Death Studies* 804; Davis et al, above n 244, 497.
[272] Lichtenthal et al, above n 272, 791, 804; see also Neimeyer and Sands, above n 233, 6.
[273] Lichtenthal et al, above n 272, 791, 802.
[274] Robert A Neimeyer, Nancy S Hogan and Anna Laurie, 'The Measurement of Grief: Psychometric Considerations in the Assessment of Reactions to Bereavement' in Margaret S Stroebe, Robert O Hansson, Henk Schut, Wolfgang Stroebe (eds), *Handbook of Bereavement Research and Practice: Advances in Theory and Intervention* (American Psychological Association, 2008) 133.
[275] Ibid; Coleman and Neimeyer, above n 249, 804; see also Neimeyer and Sands, above n 233, 6.

2.3.4 The Therapeutic Outcome of Meaning Reconstruction

Neimeyer and Sands concur that theories fostering a reconstruction of a world of meaning seem to be a therapeutic priority for many bereaved clients.[276] Research[277] on bereavement professionals indicates that they routinely draw on a host of strategies to facilitate such meaning reconstruction in support groups or psychotherapy contexts.[278] Although counselling the bereaved is not an aim of the RM, the theories of meaning making presented by Neimeyer and Sands play out as social constructionism in action, and, like transformative mediation, often have a therapeutic outcome. For example, the RM attempts to determine whether the symptoms of grief arising from the loss are complicated or normative. If complicated, it acknowledges that the parties may not be able, ready or willing to cope with the legal obligations required to finalise matters at the time due to grief symptoms. The role of lawyers to acknowledge their client's state of mind and level of grief when instructions are taken has new significance if the effect of law on the psychological wellbeing of the parties is considered.

The RM offers parties an opportunity to recognise each other's disappointments, and empowers them to renew a sense of hope and self-efficacy by comparing their own pain with a 'normalised' response.[279] The parties and mediator become relational learners who use their own experiences as grounded theorists to make sense of their loss, thereby engaging a more therapeutic outcome for future relationships than when they first

[276] Neimeyer and Sands, above n 233, 7.
[277] Diana Sands, 'A Study of Suicide Grief: Meaning Making and the Griever's Relational World' (PhD Thesis, University of Technology, Sydney, 2008) 18–35; see also Davis et al, above n 244, 497; Lichtenthal et al, above n 272, 791; Neimeyer and Sands, above n 233.
[278] Neimeyer and Sands, above n 233, 6.
[279] Through the NIS. This will be explained later in Chapter 3.

entered the mediation process.[280] If the parties are not ready, willing or able to reconstruct the meaning attributed to the loss, the best outcome is a settlement, and the worst is a determination; and in both scenarios, there is a feeling of little or no justice having been reached by the parties.

Neimeyer and Sands explain that fostering a sense of presence to the needs of the grieving party—where a safe and supportive relationship, characterised by deep and empathic listening, is cultivated—forms the first step to meaning making.[281] This could similarly be a description of the RM environment, in which parties have an opportunity to be heard, recognised, validated and empowered through the deep empathic listening of the mediator in a safe supportive environment, where the mediator demonstrates to the parties how they can cultivate a deep empathic listening of each other. Neimeyer and Sands confirm that the second stage to meaning making[282] involves psycho-education about loss, where clients are encouraged to tell their story, explore their spiritual and existential concerns, process their emotions and use their existing strengths and resources.[283] This could also describe the second phase of the RM, with the difference being that therapy is not actively pursued, but a therapeutic outcome may still result.[284] Parties are similarly encouraged to tell their story around the loss, and explore

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[280] For example in a worker's compensation dispute, it may be argued that the losses of the worker are one-sided; and that it is reasonable for the worker to be compensated for his losses commensurate with his level of injury. But the fact remains that the insurer also suffers a loss in the form of compensation payments made to the applicant. To understand the broader context of the dispute, the mediator informs the applicant about the limitations of the *Workplace Injury Management and Workplace Compensation Act 1998* and the obligations of the insurer under the Act as well as the constraints on any judge should the matter go to Court. The applicant is thus given the opportunity to make an informed personal decision (micro level) about how best to move forward given the constraints of the legislation to present sufficient evidence to prove negligence and accountability for compensation payments made (macro level).

By understanding the dispute from the macro and micro perspective from both sides, the applicant and the insurer can both make an informed realistic decision within their respective rights and entitlements under the Act so that although the amount of compensation to be paid for the specific losses (injuries incurred) by the applicant may be specified under the Act, both parties are given the opportunity to achieve the best outcome under those particular constraints. It is this opportunity given by the RM mediator to the parties to achieve the best possible outcome under all the socio-legal and economic constraints imposed on the parties under the Act that offers both of them access to co-create some justice however poor, for both sides.

Although there will be no ongoing relationship between the parties in the instance, there will be a more therapeutic outcome for the applicant should he engage in any future compensation matters by better understanding the macro-perspectives.

[281] Neimeyer and Sands, above n 233, 7.

[282] For the psychotherapist dealing with a grieving client.

[283] Neimeyer and Sands, above n 233, 7.

[284] Authors such as Dale Bagshaw and Kathy Douglas state that mediation is problematic as it amounts to the law taking on the role of therapy, rather than taking on the role of dispute resolution. My answer to

their practical concerns in order to move forward to an agreed position in which they can live with their loss. Parties are also similarly encouraged to process their emotions and use their strengths and resources to attempt to reformulate their relationship as 'heads of agreement'—a process likened to that of narrative mediation. Most significantly, the RM resembles Neimeyer and Sands's model in offering psycho-education about loss.[285] By requiring the mediator to act as an educator and relational learner,[286] parties are offered information to assist them to similarly become fellow educators of their own emotions and thoughts in order to tell as much of their stories about loss as they are ready, willing and able to do.

Neimeyer and Sands state that the final stage of meaning making is to include a wide range of narrative, ritual expressive and pastoral methods to help clients make sense of the loss and their changed lives. This is beginning to receive support as evidence-based treatments in randomised controlled trials.[287] In the RM, the use of narrative helps parties make sense of their loss and their changed lives. The use of pastoral methods in family law, by referral to parenting classes in family relation centres, maintains the type of support needed. Thus, the RM not only enables parties to make meaning from their self-narratives as they unfold within the mediation process, but also enables them to extend those narratives to include those of the other party thus forming a basis for a new relationship (such as agreeing to divorce). Exploring this further requires a brief discussion of the narrative approach to meaning making, and particularly a discussion of 'narrative intelligence' in relation to law, through the process of 'appreciative inquiry', to demonstrate the interconnectedness of relational learning. I argue that such interdisciplinary knowledge is relevant for the way mediation is conceptualised in legal scholarship and practice; and further argue that the parties' respective levels of readiness, willingness and ability impact on their own levels of analysis and consequent legal outcomes.

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such comments is that genuine dispute resolution, such as TJ, may lead to therapeutic outcomes as resolution and is therefore not problematic. See generally Bagshaw, above n 124; Douglas, above n 215, 1.

[285] Neimeyer and Sands, above n 233, 7.

[286] For example, in presenting the NIS, as described in Chapter 3.

[287] See generally Wendy G Lichtenthal and Dean G Cruess, 'Effects of Directed Written Disclosure on Grief and Distress Symptoms Among Bereaved Individuals' (2010) 34 *Death Studies* 475; Birgit Wagner, Christine Knaevelsrud and Andreas Maercker (2006) 'Internet-based Cognitive-Behavioural Therapy for Complicated Grief: A Randomised Controlled Trial' 30 *Death Studies* 429; see also ibid.

2.3.5 The Narrative Approach to Meaning Making

King et al. concur that using narrative helps people explore and deal with the effect of emotion when reaching an agreement. They state that an increased understanding and appreciation of 'emotional intelligence' increases rational decision making. [288] They cite Silver,[289] who believes that thinking and feeling are not mutually exclusive, and that rational decision making is actually dependent on emotional input. They further cite Burton,[290] who defines 'narrative intelligence' as 'the ability to solve a problem in the context of a sequence or flow of events rather than a strictly logical or mathematical mode of thinking', and agree with Burton that analysing legal principles alone overlooks the human element of a case narrative—the plot, character and context.[291]

Like Burton, King et al. confirm that legal education that concentrates only on legal elements and processes removes a student's appreciation of the moral and contextual considerations of a case. They state that the way a narrative is understood is affected by the perceptions of the listener and influenced by the listener's beliefs, prejudices, experiences and culture.[292] Subsequently, there may be multiple perspectives on how a narrative is to be understood or how meaning should be drawn from it. Therefore, the 'truth' of a narrative depends on the listener, and not on the presentation of facts alone.[293] For example, Jane Magruder Watkins[294] states that there has been a huge shift in the speed of change in the many ways people make meaning from their interchanges. She states that the theory and philosophy behind what she terms 'appreciative inquiry' (AI) is not just a shift from negative to positive thinking, but an ability for humans to

[288] King, Freiberg, Betagol and Hyams, above n 25, 244.
[289] Marjorie A Silver, 'Emotional Intelligence and Legal Education' (1999) 5 *Psychology, Public Policy, and the Law* 1173, 1181 as cited in King, Freiberg, Betagol and Hyams, above n 25, 244.
[290] Angela Olivia Burton, 'Cultivating Ethical, Socially Responsible Lawyer Judgement: Introducing the Multiple Lawyering Intelligence into the Clinical Setting' (2004) 11 *Clinical Law Review* 15, 24.
[291] Ibid.
[292] Sally Frank, 'Eve was Right to Eat the Apple: The Importance of Narrative in the Art of Lawyering' (1996) 8 *Yale Journal of Law and Feminism* 79, 82 as cited in King, Freiberg, Betagol and Hyams, above n 25, 244..
[293] Ibid; see also King et al, 244–5.
[294] Jane Magruder Watkins, *The Power of Language* (September 2010) Brief Encounters from the Taos Institute <http://www.taosinstitute.net/Websites/taos/Images/ResourcesBriefEncounters/12-2010%20Jane%20Watkins%20-%20Ideas.pdf>.

actually create narrative from a world full of positive, generative and shifting realities.[295] She explains that these 'shifting realities' do not come from scientific inventions, but simply from the decision each person has the capacity to make—that is, the decision to imagine, describe and co-create. She describes 'co-creation' as a process that is ongoing, dynamic and ever changing. These descriptions can equally apply to the decision-making capacity of disputing parties engaged in the RM as a social constructionist approach to mediation.

Watkins's AI theory enhances the field of organisational development and accords with the theory by Doidge,[296] which confirms the 'plasticity of the brain' and allows the conclusion that AI is a theory and philosophy that applies to any choice people make about seeing, understanding and making sense of the world.[297] As a social constructionist approach to mediation, the RM attempts to encourage AI in parties, where the mediator and parties act as grounded theory researchers who make a conscious choice to socially construct reality in generative, creative, imaginative and appreciative ways that lead to a world of possibilities. These possibilities seek to create the parties' most desired future, as described in the narratives they tell.

In summary, I have argued that affective determinants and the research behind the concept of meaning reconstruction, narrative and AI are significant factors in being able to better live with loss, so that it makes sense in parties' worldviews. This second part of Chapter 2 has sought to explain that levels of analysis matter. The discussion below explores how these insights may be translated into the methodology of mediation to deal with loss. The constructionist view of knowledge is the basis on which the RM can be built as the appropriate methodology for conducting more effective mediation to deal with loss in a relational world.

2.4 Part 3: The Methodology in Mediation to Deal with Loss

Scholars agree that the leading idea behind constructionist research has always been that the world in which people live and their place in it are not simply and evidently 'there'

[295] Ibid.
[296] See generally Doidge, above n 240.
[297] Ibid.

for research participants.[298] Instead, participants actively construct the world of everyday life and its constituent elements. Constructionist research has highlighted that the dynamic contours of social reality and the processes by which social reality is put together and assigned meaning are becoming an intellectual movement whose empirical insights are now widely recognised.[299] The following discussion traces some of these developments to show how the RM, as an interdisciplinary model of mediation, combines elements of education (relational learning), psychology (meaning reconstruction) and law (individual rights) within a social constructionist framework. The issues discussed below are constructionism and grounded theory, the RM as a model that puts grounded theory into practice, and the NIS as an illustration of the RM principles in action.

2.4.1 Social Constructionism and Grounded Theory

Charmaz[300] states that grounded theory methods emerged from Glaser and Strauss's successful collaboration during their studies of hospital staff dealing with the dying and death of seriously ill patients. In their book *The Discovery of Grounded Theory*,[301] Glaser and Strauss first articulated the strategies that social scientists could adopt to study many topics, and advocated for developing theories from research grounded in data, rather than deducing testable hypotheses from existing theories.[302] Charmaz states that the move towards quantification in research methodology was supported by the fact that every way of knowing rests on a theory of how people develop knowledge. Beliefs in a unitary method of systemic observation, replicable experiments, operational definitions of concepts, logically deduced hypotheses and confirmed evidence—often

[298] See generally Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (Sage Publications, 2006); Gubrium and Holstein, above n 5; Gergen, above n 17; Anselm Strauss and Barney Glaser, *The Discovery of Grounded Theory* (Aldine Publication Co, 1967).
[299] Gubrium and Holstein, above n 7, 3.
[300] Charmaz, above n 299, 4; Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Sage Publications, 2008) 299; David Silverman, *Doing Qualitative Research: A Practical Handbook* (Sage Publications, 2nd ed, 2009) 108; Robert M Emerson, Rachel I Fretz and Linda L Shaw, *Writing Ethnographic Fieldnotes* (University of Chicago Press, 2nd ed, 2011); Donald Ary, Lucy Cheser Jacobs and Chris Sorensen, *Introduction to Research in Education* (Wadsworth Cengage Learning, 9th ed, 2014) 494; Sharan B Merriam, *A Guide to Design and Implementation: Revised and Expanded from Qualitative Research and Case Study Applications in Education* (Jossey-Bass, 2009) 35; Johnny Saldana, *The Coding Manual for Qualitative Researchers* (Sage Publications, 2nd ed, 2013) 217. It is noteworthy that none of the other cited authors disagree with Charmaz's perspectives. Therefore, Charmaz's work has been the source of grounded theory perspectives for the RM.
[301] Strauss and Glaser, above n 299.
[302] Charmaz, above n 299, 4.

termed ‘the scientific method’—form the assumptions upholding quantitative methods. These assumptions support positivism—the dominant paradigm of enquiry in routine natural science—which stresses objectivity, generality, replication of research and falsification of competing hypotheses and theories.[303] Charmaz argues that social researchers who adopt the positivist paradigm aim to discover causal explanations and make predictions about an external knowable world, in which beliefs in scientific logic, a unitary method, objectivity and truth reduce the qualities of human experience to quantifiable variables.[304]

Positivist methods assume an unbiased and passive observer who collects facts, but does not participate in creating them. Positivist methods also assume the separation of facts from values, the existence of an external world separate from the scientific observer’s world and methods, and the accumulation of generalised knowledge about the world. Positivists reject other possible ways of knowing, such as through interpreting meanings or intuitive realisations, viewing those methods as impressionistic, anecdotal, non-systematic and biased. They prioritise replication and verification, which ignores human problems and research questions that do not fit positivistic research designs, and they treat qualitative research—such as interviews or observations—as a preliminary exercise to refine quantitative instruments, such as more precise surveys or more effective experiments.[305]

This is probably one reason that Charmaz states that positivist research seldom leads to new theory construction. In contrast, Glaser and Strauss[306] join epistemological critiques with practical guidelines for action, and propose that systematic qualitative analysis has its own logic and can generate theory. Charmaz states that, for Glaser and Strauss,[307] the defining components of grounded theory practice include:

- simultaneous involvement in data collection and analysis
- constructing analytic codes and categories from data, rather than from preconceived logically deduced hypotheses

[303] Ibid 3.
[304] Ibid.
[305] Ibid 5.
[306] Strauss and Glaser, above n 299.
[307] Ibid.

- using the constant comparative method, which involves making comparisons during each stage of the analysis
- undertaking advancing theory development during each step of data collection and analysis
- recording to elaborate categories, specify properties, define relationships between categories and identify gaps
- sampling that is aimed at theory construction, not for population representativeness
- conducting the literature review after developing an independent analysis.[308]

Charmaz claims that engaging in these practices listed by Glaser and Strauss helps researchers control their research process and increase the analytic power of their work.

This thesis proposes that, throughout the whole process of the RM as a social constructionist approach to mediation, the mediator and parties engage in the practices listed by Glaser and Strauss when they study each other's behaviour, beyond descriptive studies into the realm of explanatory theoretical frameworks. Parties do this by listening carefully to each other's narratives and theoretical frameworks in their opening statements about loss to further appreciate the significance of the loss in each other's lives. By doing so, they can provide abstract conceptual understandings of their circumstances that are useful, are durable over time, are modifiable, have conceptual density, have explanatory power and have a close fit with the data provided.[309]

Despite heated debate about the worth of social constructionist theory and research,[310] all would agree that the constructionist perspective implicates everyone—from those whose lives the ostensible facts examine, to those who studied these facts through scientific investigation. For example, Charmaz distinguishes between constructivism and constructionist research by defining constructivism as a social scientific perspective that addresses how realities are made. This perspective assumes that all people,

[308] Charmaz, above n 299, 5–6.
[309] Ibid 186. Many examples can be cited but space does not allow an in-depth description of examples that can do justice to this concept.
[310] See generally Ian Hacking, *The Social Construction of What?* (Harvard University Press, 1999); James A Holstein and Gale Miller, *Reconsidering Social Constructionism: Debates in Social Problems Theory* (Aldine de Gruyter, 1993); Michael Lynch, 'Against Reflexivity as an Academic Virtue and Source of Privileged Knowledge' (2000) 17 *Theory, Culture & Society* 26; Sal Restivo and Jennifer Croissant, 'Social Constructionism in Science and Technology Studies' in Gubrium and Holstein, above n 7, 3.

including researchers, construct the realities in which they participate. Thus, constructivist enquiry begins with the experience and asks how members construct it. To the best of their ability, constructivists enter the phenomenon, gain multiple views of it and locate it in its web of connections and constraints. Charmaz notes that constructivists acknowledge that their interpretation of the studied phenomena is itself a construction. [311] Creswell similarly views social constructivists as holding the assumption that individuals seek understanding of the world in which they live and work. Creswell claims that, according to social constructivists, individuals develop subjective meanings of their experiences that are then directed towards certain objects or things.[312]

Constructionism is not a way of looking at the world, but is a lens of personal constructs or worldviews through which people understand the way they relate (e.g., to their social, economic, linguistic, etc environments). [313] Social constructionism is defined as a theoretical perspective that assumes that people create social realities through individual and collective actions. Rather than seeing the world as given, constructionists ask how it is accomplished. Instead of assuming realities in an external world (including global structures and local cultures), social constructionists study what people at a particular time and place consider real and how they construct their views and actions. When different constructions arise, they examine whose constructions are considered definitive and how that process ensues.[314] This definition could just as easily describe the intent of any traditional mediation process to study what people in a particular time and place consider real; how they construct their views and actions; and, when different constructions arise, whose constructions become considered definitive and how that process ensues. It describes a social constructionist approach to mediation, such as the RM.

Constructionism has flourished as a frame of understanding and vocabulary for conducting empirical research; however, Hacking [315] warns of the importance of considering the scope of the 'realities' that are constructed, and encourages researchers

[311] Charmaz, above n 299, 186.
[312] John W Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (Sage Publications, 3rd ed, 2009) 234.
[313] For a full explanation of relational learning, refer to Chapter 4.
[314] Charmaz, above n 299, 186.
[315] See generally Hacking, above n 311.

to consider what constructionism has become in its analytical and empirical ambitions.[316] Gubrium and Holstein[317] present the various assumptions of the research enterprise[318] and attempt to deal with the reflections and assessments of constructionist researchers about what has been done. Constructionism is a rubric for a mosaic of research efforts with diverse, but shared, theoretical, methodological and empirical groundings and significance. I propose that the RM aligns with constructionism as another such research effort. Some may question whether mediation or the RM is the context in which research should be happening. The answer to this is that the RM, as a process, is not so different to constructionist research. I will pursue this analogy.[319]

Mixed-methods research has been called the third research paradigm—following the developments of first quantitative and then qualitative research—because it is an intuitive way of doing research that is constantly being displayed in everyday life through multiple ways of seeing and hearing. I propose that a social constructionist approach to mediation, such as the RM, incorporates a mixed-methods research methodology because it is an intuitive way for the parties to do their own research around their losses. Through multiple ways of seeing and hearing, the RM mixes all phases of the research process to become a methodological orientation with its own worldview, vocabulary and technique.[320] It can be defined as a combination of qualitative and quantitative approaches[321] which combines the worldviews of the parties, their positions, inferences and their interpretations of their losses. This accords with Creswell and Clark's view that mixed methods research 'actively invites us to participate in dialogue about multiple ways of seeing and hearing … making sense of the social world and multiple standpoints on what is important and to be valued and cherished'.[322]

[316] Gubrium and Holstein, above n 7, 3.
[317] Ibid.
[318] See, eg, Holstein and Miller, above n 311.
[319] In fact, based on my experience, I argue that all mediation is the process of constructionist research, whether the parties are aware of it or not.
[320] John W Creswell and Vicki L Clark, *Designing and Conducting Mixed Methods Research* (Sage publications, 2nd ed, 2011) 5.
[321] Quantitative studies of the success rate for mediation proliferate in the court and other registered mediation accreditation bodies, while quantitative studies of instances of domestic violence in family law and so forth are also well founded.
[322] Creswell and Clark, above n 297, 5.

Gubrium and Holstein[323] emphasise that constructionist research is not a synonym for qualitative enquiry and constructionism is not fully congruent with symbolic interactionism, social phenomenology or ethnomethodology, although they share an interest in social interaction. Instead, it is a distinctive way of seeing and questioning the social world—a vocabulary and language of interpretation [324] with distinctive empirical implications, methodological concerns and technical challenges that flow directly from constructionism's analytical vocabulary.[325] In other words, constructionist research deals with practical workings of what is constructed and how the construction process unfolds.[326]

2.4.2 The RM as Constructionist Research

It can be argued that any traditional mediation process deals with the practical workings of what is constructed between the parties, and, in that regard, is like constructionist research. However, the RM is a process where the parties and mediator are constantly mindful not only of the practical workings of what is being constructed by them, but also of how the construction process unfolds to include the effect of the law on their wellbeing. The RM offers parties an opportunity to consider both the macro and micro aspects of the flow of interactions that unfold during the process. Thus, it can be argued that the RM is the process of constructionist research, with parties being their own grounded theory researchers, where 'grounded theory' is defined as a practical process of learning where the theory develops from the practice.[327]

For example, on a private micro scale, the RM is a framework for asking questions such as: what are the issues that constitute the dispute arising from the parties' social constructions? As grounded theory researchers, parties are encouraged to note the complex contours of meaning associated with the social forms that are produced during their interactions and discourse. On a macro social scale, constructionist research asks

[323] Ibid.
[324] Gubrium and Holstein, above n 7, 5.
[325] Ibid.
[326] Ibid 6. In line with the *Handbook of Research Methods for Studying Daily Life*, I propose that the mediation process, as social constructionism in action, is such a method, where the parties study what is best in their daily life to use as a blueprint for what will work best for them in the future. Matthias R Mehl and Tamlin S Conner (eds), *Handbook of Research Methods for Studying Daily Life* (The Guilford Press, 2012).
[327] Melanie Birks and Jane Mills, *Grounded Theory: A Practical Guide* (Sage Publication, 2011) 4.

questions such as: what are mental illness and child abuse, as social constructions? This offers major contributions by describing the complex contours of meaning associated with social forms that are produced during interactions and discourse on a societal level.[328]

Constructionist research also outlines the historical and contextual development of social forms, such as how homelessness emerged as a recognisable phenomenon in the 1970s.[329] It can specify the processes and practices in which social forms are brought into meaningful existence, such as how family troubles or emotional disturbance are 'talked into being' in the course of everyday life. Similarly, the RM asks for an outline from each party of the historical and contextual development of the issue between them that emerged as a recognisable phenomenon that was 'talked into being' and can now be 'talked out of being'. Gubrium and Holstein confirm that constructionist research is generally more empirically robust when implemented as a broad framework for appreciating, rather than critiquing, everyday reality-constructing practices in general sociology. Similarly, I propose that the RM can be considered a broad framework for asking questions around appreciating, rather than critiquing, everyday reality-constructing practices, with which parties can coexist with an enduring sense of their loss through their ongoing conflict.[330] Gubrium and Holstein[331] state that constructionist research does not focus on what constructionism is, but on what it can be, as described by a variety of approaches, such as discourse analysis; interactional analysis; interview analysis; and analysis of diverse texts, documents and other informational media. Similarly, by analysing their own discourse, interactions, texts, documents and other informational sources (as would grounded theory researchers), parties can describe the issues that have been socially constructed between them, and can confirm their findings via private interviews with the mediator and joint sessions.

[328] Charmaz notes that constructionist vocabulary does not lend itself easily to dealing with the 'why' questions that predominate in more positivist-oriented enquiries of social problems. Kathy Charmaz, 'Constructionism and the Grounded Theory Method' in Gubrium and Holstein, above n 7, 397.
[329] Ibid 4.
[329] Ibid 5.
[330] Ibid 6–7.
[331] Ibid 7.

Creswell defines qualitative research as a means of exploring and understanding the meaning individuals or groups ascribe to a social or human problem.[332] The process of research involves emerging questions and procedures, data typically collected in the participants' setting, data analysis, inductively building from particulars to general themes, and interpreting the meaning of the data. The final written report has a flexible structure and inductive style, with a focus on individual meaning and the importance of rendering the complexity of a situation.[333] Like constructionist research and qualitative research, the RM examines the 'how' and 'what' of reality and representation, and spans conventionally macroscopic and microscopic levels of analysis, as it links substantive, theoretical and procedural matters and their ongoing challenges to become a mixed-methods research approach.[334] By having parties explain, in their opening statements, the 'how' and 'what' of their reality around their issues that led to the loss, the parties are 'researching' their data of feelings of loss and its consequent challenges. Without such 'research' grounded from their experience to better understand and appreciate each other's perspectives, there is no way to move forward from the loss or dispute.

2.4.3 The RM As a Normative Framework Using a Grounded Theory Approach

Birks and Mills[335] are forerunners among several eminent researchers in using a grounded theory approach.[336] They emphasise that, in a grounded theory approach, researchers take either a position of distance or acknowledged inclusion in both the field and final product of the study, depending on their philosophical beliefs and adopted methodology. They stress that, methodologically, there are no right or wrong approaches to using grounded theory methods because all research is interpretive and

[332] Creswell and Clark, above n 298, 5.
[333] Ibid.
[334] Gubrium and Holstein, above n 7, 7.
[335] Birks and Mills, above n 328, 4.
[336] See generally Juliet Corbin and Anselm Strauss, 'Grounded Theory Research: Procedures, Canons and Evaluative Criteria' (1990) 19 *Qualitative Sociology* 418; Kaisa Backman and Helvi Kyngas, 'Challenges of the Grounded Theory Approach to a Novice Researcher' (1999) 1 *Nursing and Health Services* 147; David L Rennie, Jeffrey R Phillips and Georgia K Quartaro, 'Grounded Theory: A Promising Approach to Conceptualisation in Psychology?' (1988) 29 *Canadian Psychology* 139.

guided by the researcher's set of beliefs about the world, and particularly about how the world should be understood or studied.[337]

A grounded theory approach is relevant for the present study because it allows the mediation process to be informed through psychological research. That is, in the RM, parties devise a theory/story from their own research of each other's version of the facts, and, by doing so, are using a grounded theory approach. Their interpretations of the facts are guided by their own sets of beliefs and feelings about the world, and particularly about how the world should be understood or studied. Beginning with a position of inclusion in the field of their dispute, parties are encouraged to take a position of distance in the final product by researching each other's positions to better understand how these perspectives can be incorporated as part of the final product/worldview with which both parties can live.[338] In instances where the worldviews of the parties are too disparate, the best outcome could be an amicable parting of ways, with room left to safely re-engage, should circumstances permit in the future.

Birks and Mills[339] do not wish their views to be categorised as merely a qualitative descriptive analysis, and present a list of essential grounded theory methods that constitute a solid grounded theory approach. This list includes initial coding and categorisation of data, concurrent data generation or collection and analysis, writing memos, theoretical sampling, constant comparative analysis using inductive and abductive logic, theoretical sensitivity, intermediate coding, selecting a core category, theoretical saturation and theoretical integration.[340] These categories are very similar to those proposed originally by Glaser and Strauss in 1965, but more refined. For example, Glaser and Strauss's first category is simultaneous involvement in data collection and analysis, whereas Birks and Mills's first category is initial coding and categorisation of

[337] Norman Denzin and Yvonna Lincoln, 'Introduction: The Discipline and Practice of Qualitative Research' in Norman Denzin and Yvonna Lincoln (eds), *Handbook of Qualitative Research* (Sage Publications, 3rd ed, 2005) 22.
[338] This is done by each party listening carefully to the story of the other to determine where their 'agreement' went astray; in other words, what expectations and/or assumptions were different in each other's stories. By asking the relevant questions, the parties 'research' each other's positions to better understand each other's stories. They then can both formulate a common story with which they can each live with.
[339] Birks and Mills, above n 328, 4.
[340] Ibid 8.

data. Glaser and Strauss's second category is constructing analytic codes and categories from data, not from preconceived logically deduced hypotheses, whereas Birks and Mills's second category is concurrent data generation or collection and analysis. Glaser and Strauss's third category is using the constant comparative method, which involves making comparisons during each stage of the analysis, whereas Birks and Mills's third category is constant comparative analysis using inductive and abductive logic.[341]

I propose that, during the RM, a grounded theory approach is generated by parties using the methods described above as a social constructionist interpretation of the mediation process. In other words, grounded theory serves to explain the phenomenon being studied and considered. Thus, I argue that the RM, as a social constructionist interpretation of mediation, is very appropriate as a grounded theory approach to dispute resolution.

Like Gubrium and Holstein and Birks and Mills,[342] Charmaz[343] defines grounded theory as a method of conducting qualitative research that focuses on creating conceptual frameworks or theories through building inductive analysis from the data—the analytic categories are directly 'grounded' in the data. That is, grounded theory methods consist of systematic, yet flexible, guidelines for collecting and analysing qualitative data to construct theories grounded in the data.[344] The method favours analysis over description, fresh categories over preconceived ideas and extant theories, and systematically focused sequential data collection over large initial samples. This method is distinguished from others because it involves the researcher (the RM parties and mediator) in data analysis to inform and shape further data collection. Thus, the sharp distinction between the data collection and analysis phases of traditional research is intentionally blurred in grounded theory studies.

[341] Although the stages do not coincide perfectly, they still contain the same concepts, but in a more refined version from Birks and Mills. For example, the fourth stage of Glaser and Strauss is 'advancing theory development during each step of data collection and analysis' to 'theoretical sampling' and 'theoretical sensitivity'. The fifth stage is 'recording to elaborate categories, specify their properties, define relationships between categories and identify gaps' compared to 'writing memos' and 'selecting a core category theoretical saturation'. The sixth stage is 'sampling aimed toward theory construction, not for population representativeness' compared to 'intermediate coding' and 'theoretical integration', and finally, 'conducting the literature review after developing an independent analysis'. See Strauss and Glaser, above n 299.
[342] Birks and Jane, above n 328, 4.
[343] Charmaz, above n 299, 2.
[344] Ibid.

In a social constructionist mediation, the data shared by parties throughout the whole mediation process forms the foundation for their theories/narratives, and the analyses of these data generate the concepts/realities that the parties co-construct. By collecting each other's data to develop theoretical analysis from the beginning of the mediation process, the participants, including the mediator, try to learn what intra-psychic psychological constructs (willingness, readiness and ability) form the setting for the dispute, and what external factors impact on the lives of the parties.

As a grounded theory researcher presenting a social constructionist interpretation of mediation, I outlined in Chapter 1 my own set of beliefs about the field of dispute resolution in the form of five proposals to guide the study, and this aligns with a grounded theory approach. I have further outlined my beliefs about how mediation should be understood and studied. I have taken a position of inclusion in both the field of mediation and the final product of the outcome of the mediation process by proposing that the only reason to conduct any mediation is to deal as constructively as possible with the disappointments arising from the search for meaning to make sense of loss.[345]

As relational learners,[346] the parties and mediator become participants who analyse what is occurring between them in the mediation process, each from their own worldviews and within their own roles. This creates a new story/meaning about the loss (narrative), with which both parties can move into the future (facilitative) and with which both parties can live in the present. By so doing, the parties and mediator together engage in a process that can be described as social constructionism in action. The categories for grounded theory presented by Birks and Mills could follow in such a manner to analyse

[345] Although it is true that mediation can be used for a variety of reasons, the reason that parties engage in a mediation is because their expectations have not been met and result in a loss, even if it is the loss of that expectation. See argument on pages 9-10.

In accordance with the first proposition, during a social constructionist mediation, such as the RM, the mediator and parties together use a grounded theory approach within their respective roles to resolve their dispute. For instance, using the RM, parties are taken from empowerment and recognition (transformative model) to relational learning, where the mediator and parties together engage in the 'game in the making' as relational learners, with each having a distinct role. In practice, this means that both parties listen carefully to each other's stories and co-construct one story that both can live with.

[346] 'Relational learners' is a term that I use to describe the process of learning that occurs for all parties in a social constructionist mediation, where the parties learn from each other how best to move forward from their losses, depending on the degree to which they are ready willing and able to do so.

and explain what occurs in a social constructionist mediation process, such as the RM. Below, I explain how these concepts may be implemented by mediators using the RM. For ease of writing, the following discussion assumes that the RM proceeds as follows.

The normative framework of the RM would begin with the mediator presenting an NIS[347] to explain what 'normally' happens when people undergo the shock that accompanies a loss of expectations about how things were believed to be. The NIS would end with a series of 10 questions[348] that each party is asked to answer to themselves before being invited by the mediator to make their opening statements.[349] The NIS set of 10 questions[350] is designed to challenge parties' existing worldviews and encourage the parties to keep an open mind to form a different/modified worldview, rather than maintaining their prior unmet expectations, which resulted in loss and grief.

Having encouraged the parties to maintain a cooperative frame of mind at the conclusion of the NIS, the RM mediator would consider which party is most ready to move forward from the loss to provide the most information-rich source of data about their own and the other parties' needs. The selected party is likely to be the one initially seeking mediation (but not always) and the one that sets the parameters for a social constructionist unfolding of the mediation process. The RM mediator decides which party to ask to first offer their opening statement based on observations about the attitude, body language and general demeanour of the parties during the presentation of the NIS, and compared to conversations held with each party during the formal separate pre-mediation sessions prior to inviting them to conduct the mediation.

A two-way process occurs for the RM mediator from the onset of the initial request for mediation. First, the mediator focuses on presenting[351] information about the mediation process during the pre-mediation teleconference session to each party confidentially, and then presenting the NIS to both parties jointly, as part of the mediator's opening statement. Second, the mediator focuses on monitoring and learning from the parties

[347] See Appendix.
[348] See Appendix.
[349] See Appendix.
[350] See Appendix.
[351] The selection of which party should give the opening statement first is also assisted from information gained from the parties about their own readiness to understand their loss and the loss of the other side, when the mediator explains the mediation process during the formal pre-mediation session.

how the information presented during the pre-mediation session and NIS is being accepted by each of the parties. This process goes beyond self-reflexivity alone to include a process that I term 'Observer Self',[352] which enables the mediator to have an overview of everything that is happening for the participants, including the mediator, during the entire mediation process at any point in time.[353]

By using the 'Observer Self', the mediator becomes a model for the parties to engage their own 'Observer Selves', with which they not only see the dispute from their own perspective, but also, more importantly, from the perspective of the other party (recognition—in the transformative model). Seeing the dispute from the perspective of the other party—engaging in the process of recognition—does not only include the other party, but also includes the viewpoints of management, co-workers and anyone else involved or affected by the dispute, including any representative for children (in family law matters) and the mediator.

The purpose of applying a research model at this stage is to explain that all mediation irrespective of the reason for which it is conducted stems from the experience of the parties and is therefore grounded in their experience. The aim is not to take out the emotions and values which 'enrich the parties' statements' out of their stories and not to teach the research techniques and jargon to the parties but to explain that facilitative mediation and other models of mediation including the RM all use grounded theory research. This segment of the thesis is not intended to explain how the RM differs from other models, but to simply explain that like all mediation models, it too fits into grounded theory research. The purpose of noting this similarity is to highlight the significance of grounded theory research to any mediation process and to provide a theoretical background that incorporates the relational aspects to what occurs so naturally in practice, which is currently lacking in the literature.

[352] This term is originally mine, but the idea stems from TA, which discusses the role of the Parent, Child and Adult as different parts of the functional whole personality. The 'Observer Self' relates to the Adult section of the personality, which sees the holistic picture of the entire scene, including the feelings, actions and thoughts of all participants from all perspectives. In dispute resolution literature, this phenomenon is often termed ' going to the balcony', which refers to the ability to see the bigger picture as if you were invisible, standing on a balcony, looking down and seeing what the participants cannot see. See generally Sourdin, above n 149.

[353] The 'Observer Self' or 'Adult' is discussed in detail in Chapter 4.

In determining which party will present their opening statement first, the RM mediator engages the first step of data analysis to initially code and categorise the data obtained from the parties during the pre-mediation phase and the presentation of the NIS in the mediator's opening statement. In turn, the parties similarly engage together in their first step of data analysis after their opening statements when they cooperatively analyse/code and determine/categorise which data will constitute the main substantive issues for resolution as the agenda for the mediation.[354]

During the agenda-setting phase, the parties engage in vivo codes. The parties use important words or groups of words (usually verbatim quotations from the parties) as a code or label to identify an issue or legal category (a group of related codes/labels),[355] such as during divorce proceedings, which include property, children, finances and other subcategories.[356] These in vivo codes are listed on a whiteboard by the mediator to form the agenda of the issues to be discussed during the mediation, and the basis to move forward from the loss. Thus, the criterion for writing memos for a valid grounded theory approach occurs when the mediator uses a whiteboard or notepad to record any significant thoughts about the parties during the entire mediation process, from undertaking the pre-mediation to the final agreement/outcome phase. Information arising from the array of data presented by the parties during the pre-mediation, opening statement, and agenda-setting phases of the RM is a way of identifying the important words that constitute the dispute—words that are accordingly labelled/coded into appropriate legal categories and noted as the agenda for the mediation. In accordance with grounded theory, the notes written during a social constructionist mediation process can assist parties to build their intellectual assets and empower them to transform the dispute from a set of disparate and conflicting ideas, resulting in loss and grief, to an agreement with which both parties can live.[357]

[354] When the parties are asked 'What are the issues in dispute?' they are actually analysing or coding their own experiences to select the issues they believe are relevant within the realm of the dispute. Similarly, when the parties are asked to prioritise their issues, they are determining or categorising which of the issues on the board should be dealt with first. This is a common process in any mediation. The point here is to demonstrate that it is part of grounded theory research.
[355] Immy Holloway, *A-Z of Qualitative Research in Nursing and Healthcare* (Wiley-Blackwell, 2008), cited in Birks and Mills, above n 328, 10.
[356] Charmaz, above n 299; Holloway, above n 329.
[357] Birks and Mills, above n 328, 10.

Although the structure of the RM after the opening statements of the parties resembles the template of a usual facilitative mediation process, there are differences. For example, following the opening statements of each party, the mediator summarises not only the substantive issues presented by the parties, usually in their own words (in vivo codes), but also verbally acknowledges and confirms with the parties their feelings around the losses raised by the substantive issues. By so doing, the parties know that their feelings around the loss have been considered, which leaves them free to concentrate on the initial coding and categorising of data required for the issue-identification and agenda-setting phases of the mediation. Thoughtful and responsive public acknowledgment of the emotional content, particularly the grief, of the parties by the mediator enables the parties to participate freely in the next phase—termed 'option generation'—where they engage concurrent data generation and analysis. During the option-generation phase, each issue listed for resolution during the agenda-setting phase is analysed and coded to produce a range of suitable options that are collected as 'possible solutions' for the parties.

Concurrent data generation, collection and analysis also occurs when the mediator collects some data from the parties for each option as an initial purposive sample that is then coded and explored during the following issue-exploration phase, before more data are collected or generated. The 'possible solutions' of the option-generation phase now become 'probable solutions' through this purposive theoretical sampling, as the issues are further coded and explored to reach a sample of options or theories that more closely meets the emotional, psychological and relational needs of both parties during the issue-exploration phase. Birks and Mills[358] stress that concurrent data generation or collection and analysis is what differentiates grounded theory from research where data are initially collected and subsequently analysed, or where a theoretical proposition is constructed and then data collected to test the hypothesis.[359] In this manner, grounded theory seems to align well with a social constructionist interpretation of the mediation process, where the relational needs of the parties during the issue-exploration phase manifest as probable solutions for their substantive losses.

[358] Ibid.
[359] Strauss and Glaser, above n 299.

Theoretical sampling also occurs when the mediator makes a strategic decision about what sample of 'probable solutions' is required to shift the parties forward from the issue-exploration phase into a private session. The mediator also decides who can provide the most information-rich source of data during the private session in order to meet both parties' needs and thereby move forward from the loss and dispute.[360] Mapping or analysing the problem during the issue-exploration phase in the first joint session (before the private session) allows parties to engage in theoretical sampling of options that will probably meet the psychological and relational needs of both sides. At the same time, it creates an important audit trail of their decision-making process for later use during the second joint session (after the private session) in forming long-term agreements with which both parties can live.

Constant comparative analysis happens during the process of concurrent data collection and analysis that occurs for each issue during the issue-exploration phases of the mediation process, resulting in a final integrated theory. This phase of constant comparative analysis makes it apparent that more information is needed to saturate each category under development in issue exploration, until agreement occurs for each issue in dispute.[361] For example, comparing incident to incident, incident to labels/codes, labels/codes to codes, codes to categories, and categories to categories continues until a grounded theory is integrated—that is, until the parties develop a set of options for each issue that, when combined, constitutes a story/meaning with which they can both live. In accordance with grounded theory methods, the new story of agreement can be referred to as inductive because it develops by the parties from the data.

Induction of theory is achieved through successive comparative analysis of the issues in dispute, especially during the option-generation and issue-exploration stages. Similarly, abductive reasoning[362] occurs at all stages of analysis, especially during the constant comparative analysis, leading to theoretical integration. When using abductive reasoning, the mediator and parties decide to no longer adhere to the conventional view of the issues, based on their original positions in the dispute, but to bring together things

[360] Birks and Mills, above n 328, 10.
[361] Ibid 11.
[362] Ibid 10. Abductive reasoning is the creation of new ideas from what might appear to be unrelated issues during the thought exchanges that occur in the mediation process.

they had not associated with one another, so that 'a cognitive logic of discovery'[363] unfolds. Abductive reasoning occurs most readily during the option-generation phase, when any tangential thought is listed as an option, irrespective of its immediate apparent relevance.[364] Charmaz concurs that abduction is a type of reasoning that begins by examining data, and, after scrutinising these data, entertains all possible explanations for the observed data, and then forms hypotheses to confirm or disconfirm until the researcher arrives at the most plausible interpretation of the observed data.[365] Thus, a social constructionist interpretation of mediation aligns well with a grounded theory approach of abductive reasoning.

Theoretical sensitivity[366] for the social constructionist mediator can be said to be deeply personal to reflect the level of insight into both themselves and the circumstances/parties with which they are mediating. Self-reflexivity in relation to theoretical sensitivity is akin to the use of 'Observer Self'. It reflects the intellectual history of both the mediator and parties, and further reflects the type of theory or philosophy that forms the core values for the parties' and mediator's worldviews, which manifest as their everyday thought. As the parties and mediator become immersed in the data of the dispute, their level of theoretical sensitivity to analytical possibilities increases, as it does for the grounded theory researcher.[367] Theoretical sensitivity is particularly relevant during the RM process. This is because the mediator and parties are constantly engaged in using their 'Observer Selves' to analyse their own worldviews and gain a holistic understanding of the needs, interests, rights and responsibilities of all parties involved with or affected by the dispute, from their various perspectives.

Coding is the process of defining what the data are about. Unlike quantitative researchers, who apply preconceived categories or codes to the data, a grounded theorist creates qualitative codes by defining what he or she sees in the data. The codes emerge from the data and develop as the researcher studies the data.[368] Intermediate coding[369]

[363] Jo Reichertz, 'Abduction: The Logic of Discovery of Grounded Theory' (2007) 11 *Forum: Qualitative Social Research* <http://www.qualitative-research.net/index.php/fqs/article/view/1412/2902>; Birks and Mills, above n 328, 10.
[364] It is during these moments in transformative mediations that one experiences the 'aha!' moment.
[365] Charmaz, above n 299, 186.
[366] Ibid 10.
[367] Ibid 11.
[368] Ibid 186.
[369] Ibid 12.

occurs during the option-generation phase, when concurrent data collection occurs, or during the issue-exploration phase, when the generation, analysis and constant comparison of data occurs. In both phases, parties move between initial coding from the opening statement and issue-identification phase to intermediate coding in the issue-exploration phase. Initial coding is often considered to fracture the data—pull it apart—for analysis, while intermediate coding reconnects the data in more abstract ways than would be produced by thematic analysis to build a story. In so doing, the mediator assists the parties with intermediate coding to develop fully individual categories. By connecting subcategories and fully developing the range of properties and their dimensions that link the categories, a set of options are formed that combine to create an integrated story of agreement with which the parties can live.

Identifying a core category[370] through the process of intermediate coding increases the level of conceptual analysis apparent in the developing story/grounded theory. Here, with the assistance of the social constructionist mediator, the parties can engage in further theoretical sampling and selective coding to focus on actualising the core category in a highly abstract conceptual manner to form a practical working arrangement. For example, in divorce proceedings, the core category for mediation may be 'spending time with the children'. Once identified, this core category is subject to a full theoretical saturation that includes major categories: whether equal shared parental responsibility is sought, with which parent the children will live, and which parent the children will spend time with, as follows. The 'as follows' includes saturation of subsidiary categories, such as determining the number of times per week each parent will physically see the child, the travelling distance involved to see the child, whether the parents will drive to make travel easier, and the changeover arrangements for spending time with the child. The subcategories to the subsidiary categories involve the times and dates of the week to contact the children by telephone, Skype or letter; the hours of day for visitation; and the days of the week for visitation. Saturation of the properties of the subcategories includes special events, such as time spent with the children for Christmas, Easter, Mother's Day, Father's Day, birthdays and so forth—all of which form a practical working agreement abstracted from a core of otherwise confused data for the parents.

[370] Ibid.

Advanced coding [371] is critical to theoretical integration of the parties' story of 'agreement' because it is comprehensive and does not assume a one-size-fits-all approach to be the answer to any issue in a dispute. Instead, it includes a storyline technique[372] as a mechanism of both integrating and presenting a grounded theory that manifests as the story with which the parties can live. Theoretical codes can be drawn from existing theories, such as what is a 'normal' response to grief, to assist in the theoretical integration of the parties' story. The use of psychological theory on the effects of grief and loss adds explanatory power to the final product of the parties' 'agreement' story, which was previously grounded in their personal worldview and is now situated in relation to the broader theoretical body of knowledge dealing with grief and loss as an access-to-justice measure.[373]

Finally, the end product of a grounded theory approach is an integrated and comprehensive story/grounded theory that explains a process or scheme associated with a phenomenon. Similarly the final phase of the RM is one of reality testing probable outcomes to ensure that all alternatives have been canvassed, including the best and worst alternatives to a negotiated agreement.[374] In this manner, a grounded theory can be presented by parties as an integrated and comprehensive story that allows both sides to recognise whether they are ready to leave behind their grief and attach a different meaning to their loss, with which to move forward from the dispute, either together or separately.

The RM mediator is open to what is happening during the information session, despite presenting the information in the NIS as part of the mediator's opening statement. That is, the RM mediator notices how the parties are responding to the information in the NIS that is being presented by the mediator, and then notices how the participants present their opening statements and respond to each other's presentation of their opening statements. During the next phases of the mediation process, the mediator invites the parties to study each other's stories—particularly to analyse how their

[371] Ibid.
[372] Corbin and Strauss, above n 277.
[373] Birks and Mills, above n 328, 12. Note that this body of knowledge is a combination of legal, sociological and psychological interplay.
[374] Otherwise termed 'BATNA' and 'WATNA'.

statements and actions make sense—in order to learn about the effect of the loss on each other's lives during the course of the dispute, or to learn about the participants' stakes in the dispute.[375] The role of the RM mediator is to create a safe place for the parties to formulate their theories and to reconstruct their realities by attending to what is heard, seen, sensed and learnt during the mediation process.

For example, during the phase of agenda setting, the RM parties would be encouraged to follow their hunches that emanate from thinking about their collected data from their opening statements, and are encouraged to ask questions of each other (and the mediator) in order to distil the issues that must be addressed. During the phase of option generation, parties are encouraged to analyse the potential from their earlier ideas, using 'abductive reasoning' to later shape the data and test their serviceability during the reality-testing phase. Through studying, comparing and interpreting their collected data as tentative analytic categories during the exploration of issues phase, the parties can record the defined ideas that best fit their needs as part of forming their subsequent theories that result in possible agreement.[376] The parties can learn more about each other by defining ideas that best fit, and interpret the data held as tentative analytic categories. These analytic categories coalesce as the parties interpret the collected data, but also become more theoretical as the parties engage in successive levels of analysis, gathering additional data to check and refine the emerging analytical categories. During the reality-testing phase, the emerging analytical categories are refined, and, during the agreement or conclusion phase, the refined data culminate in an abstract theoretical understanding of the mediated experience.[377]

By using a grounded theory methodology to explain the RM process, it becomes possible to better understand how the psychology around loss can contribute to a more effective means of dispute resolution and, in the process, mediation can act as an access-to-justice measure. Once the need of the RM in these terms is understood, it can be further argued that a common template for conducting mediation should be developed. This is the topic of Chapter 3, which details the development of the NIS arising from the Family Court, and argues that it can provide such a template.

[375] Birks and Mills, above n 328, 12.
[376] Ibid.
[377] Ibid.

Chapter 3: Developing a Normative Framework Using Social Constructionism and Grounded Theory—Deconstructing the Loss

This chapter explores how the insights from the psychological literature relating to loss discussed in Chapter 2 may be translated into methodology to deal with loss. It begins by asking: how does understanding the psychology of loss contribute to a more effective means of dispute resolution as an access-to-justice measure? To answer this question, the constructionist view of knowledge is presented as the basis on which the RM is developed as the appropriate methodology for conducting mediations in a relational world to effectively deal with loss. This chapter considers the third proposal—that the first step towards moving away from a dispute is to deal with or analyse the loss. This chapter also explores the methodology with which to deconstruct the loss.

The theoretical underpinnings of the RM are traceable to the practice of the Family Court[378] (in its IS). They are also traceable to the practice of mediating workplace grievance disputes and the practice of grounded theory collectively. This chapter is divided into two parts, with a preliminary discussion of the need to develop a common template [379] to resolve *all manner of disputes*, from family law to workplace grievances.[380] The chapter begins with a brief outline of the similarities between family law and workplace grievance disputes in order to provide a context for discussing the issues in Parts 1 and 2.

Part 1 includes an introduction of how the mediation practices in the Family Court's Sydney Registry in the 1990s incorporated psychological insights[381] as part of the

[378] From the Mediation Unit in the Sydney Registry, with Di Gibson in charge in the 1990s.
[379] Serious workplace disputes from which these similarities were drawn occurred in both rural and metropolitan areas, and included Farm Debt mediations and mediations under the Employee Assistance Programmes in various workplace organisations, both public and private.
[380] The number of family law and workplace grievance matters conducted over the last 20 years are in the hundreds and do not constitute a small sample of disputes.
[381] Examples of this include Ricci's relationship chart and Kubler-Ross's stages of grief. Many of Ricci's pioneering concepts have become accepted standards that are cited in courtrooms, classrooms and legal publications, such as 'parenting plans'; the 'business-like' approach to managing conflict and communications; and using better words to replace legal terms, such as 'custody' and 'visitation'. She also headed the Statewide Office of Family Court Services for the California courts for 15 years, and

substantive content of its IS. It argues that the IS can be understood as the predecessor of the proposed NIS in the RM, and provides a historical background to the RM. The differences in use between the IS and the NIS are outlined and the new role of the mediator as relational learner is explored in the pre-mediation phase and then in the course of the mediation itself, by comparing the new role to the traditional roles of the mediator under the various models.[382] Part 2 analyses the practice of the NIS as an illustration of grounded theory in action to demonstrate how social constructionism informs grounded theory, which subsequently informs the concept of the RM. It develops a framework for asking questions that make sense of loss through the process of relational learning. The comparison in the following section between family law and workplace grievance does not mean that the RM is confined to these kinds of disputes, but does in fact apply to other kinds of disputes. The comparison only refers to the way that the NIS was developed.

3.1 Introduction: Similarities between Workplace and Family Disputes[383]

In the 1990s, the IS from the Family Court's Sydney Registry[384] provided many parallels between workplace and family disputes, especially as the issues dealt with all involved losses of some kind—either relational or material.[385] For example, in both family and workplace mediations, there is a need for both parties to maintain an ongoing relationship after the dispute—in the workplace because both parties continue to work for the same employer, and in the family because both parties maintain some parental responsibility[386] for their children, despite the divorce. In both settings, there is

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conducted research on divorce and child adjustment at Stanford University. See generally Ricci, *Mom's House, Dad's House*: *A Complete Guide*, above n 165; Ricci, *Mom's House, Dad's House for Kids*, above n 165; Ricci, *The Co-Parenting Toolkit*, above n 165; Elisabeth Kubler-Ross, *On Dying and Death* (Scribner, 1969) 51–123.

[382] The phases of the RM are later presented, and examples given of how the RM can be used to overcome specific circumstances, such as impasses in rights-based or interests-based disputes.

[383] Conducting workplace mediations does not afford the luxury of time for the elaborate intake procedures used by the Family Court in the 1990s. Thus, the intake process for the RM has been considerably modified from the original model of the Family Court.

[384] From the Mediation Unit with Di Gibson in charge.

[385] Serious workplace disputes from which these similarities were drawn occurred in both rural and metropolitan areas, and included Farm Debt mediations and mediations under the Employee Assistance Programmes in various workplace organisations, both public and private.

[386] Equal shared parental responsibility is the legislative norm; however, even in cases where one parent has full responsibility, there is always some parental responsibility for the other parent as a right of the

a huge investment of time and energy by the parties to a common cause[387] that does not have a commonly shared vision—hence the dispute. Focusing on a commonly shared vision between parties can enable them to maintain a business relationship, especially in cases where ongoing relationships must exist, despite the dispute. Most importantly, the intensity of emotion and commitment to workplace matters is often seen by parties to be as significant as their commitment to personal relationships, such as to a marriage or children. The losses—both real and perceived—are greatly felt, and a means of assisting parties in workplace matters to cope with the grief arising from their losses, without counselling, is very important, particularly if long-term, enduring relationships capable of overcoming future conflicts are desired from the mediation process.[388]

In both family and workplace settings, confusion between parties is intense when the behaviour of one (or more) does not match the expectations of the other. To overcome this confusion, it is necessary to reassess the assumptions behind the failed expectations, and allow time for the accompanying shock, grief and anger arising from the failed expectations to subside. Analysis of the assumptions that led to the failed expectations often sheds a different light on the loss. For example, where the losses are a shock to the parties' expectations, but do not severely affect the values and essential worldviews of the parties, the loss can be reassessed and reconstructed to more readily fit into the valued or slightly modified worldview, whether the dispute is in family law or the workplace.

In contrast, where the loss is intense and severely affects a party's worldview, the grieving for the family or workplace loss will similarly affect the party's readiness to move forward from the dispute, which will affect the outcome of the mediation process. If mediation persists during times when one party is not emotionally ready to move

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child to have a meaningful relationship with both parents. *Family Law Act* s 61DA. See Jennifer McIntosh and Richard Chisholm, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation' (2008) 14 *Journal of Family Studies* 37; Bruce Smyth and Ilene Wolcott, 'Parent-child Contact and Post-Separation Parenting Arrangements: Research Report No 9' (2004) Australian Institute of Family Studies <http://aifs.gov.au/institute/pubs/resreport9/1.html>; see generally Anthony Dickey, *Family Law* (Thomson Reuters, 6th ed, 2014).

[387] Such as a workplace goal or issues related to children.

[388] This idea was formulated from my professional experiences and observations. There is very little, if any, literature on this specific topic in the psychological or legal disciplines. My searches for similarities between the losses incurred through workplace grievance and family law revealed nothing. The most similar is the work on intersubjective theorists. See Stolorow and Atwood, above n 40; Stolorow, Atwood and Orange, above n 40.

forward over a particular issue, the chances are that any settlement of the issue will not last, irrespective of the setting of the dispute (family or workplace). Thus, the time required to overcome the grief seems to be proportional to the effect of the loss on the worldviews of the parties, and not dependent on the setting of the dispute.[389] Equally, the concept of readiness to move away from the grief arising from the dispute applies as much to workplace grievance disputants as it does to divorcing parties in family law. Like divorcing parties, disputants in workplace grievance matters suffer a severe loss with which they have to live on a daily basis as coworkers, and must re-establish their lives by letting go of the severity of the grief to develop a new role as coworkers within the workplace.

Within the spectrum of agreement, ranging from settlement at one end and transformation through relational learning at the other, every combination of agreement depends on the readiness of the parties to consciously address the meaning they attribute to their version of the loss during the mediation process, irrespective of the setting where the dispute occurs. In family law or workplace settlements, parties must at least be ready to modify their original meaning/story attributed to the loss in order to acknowledge the story of the other party, even if that story is not accepted or believed. In transformative matters, whether family or workplace, parties must be ready to accommodate the other side's story as part of their own expanded worldview or value base, by co-creating a new reality that transforms their original understanding of the conflict and offers both parties an opportunity for personal growth through the process of relational learning. Thus, the response of the parties to learn from each other during a social constructionist approach to mediation, such as the RM, is indicative of their level of psychological readiness to move forward from the loss.

One way of generating this readiness is to engage in a social constructionist interpretation of disputes. The RM can become a means to better handle the loss of the parties by addressing and reconstructing the meaning attributed to the original terms of

[389] Worden, above n 29; Robert Neimeyer, 'Grief, Loss, and the Quest for Meaning: Narrative Contributions to Bereavement Care' (2005) 24 *Bereavement Care* 27; Tim Ayers,, David Balk and Jacques Bolle, 'Report on Bereavement and Grief Research' (2004) 28 *Death Studies* 491; Kathleen R Gilbert, '"We've Had the Same Loss, Why Don't We Have the Same Grief?" Loss and Differential Grief in Families' (1996) 20 *Death Studies* 269; Glassock, above n 15; Doka, above n 233; Machin, above n 149; Neimeyer and Sands, above n 233; Diana Sands, 'A Tripartite Model of Suicide Grief: Meaning-making and the Relationship with the Deceased' (2009) 12 *Grief Matters: The Australian Journal of Grief and Bereavement* 10.

the contract/agreement, irrespective of the setting of the dispute. Thus, the need for a common model/template to deal with the parties' losses across settings is apparent.[390] These observed outcomes align with the theory of meaning reconstruction proposed by Neimeyer and Sands[391] and confirmed by Charmaz, Gubrium and Holstein and Birks and Mills.[392]

Thus, the distinguishing feature between the RM and other traditional mediation processes is that it can provide an opportunity for relational learning through the NIS, provided the parties take responsibility for doing so. This chapter now examines in detail how parties take responsibility to engage in relational learning from experiencing the NIS.[393] The discussion below introduces a brief historical outline of the IS that led to the NIS, and subsequently develops the argument that the mediator, as a relational learner, can assist parties to take responsibility by facilitating the RM in specific ways.

3.2 Part 1: The Development and Aim of the NIS—Historical Context

This section presents a brief history of the development of the RM. It traces the developments in family law in Australia and how the mediation practices in the Family Court Sydney Registry in the 1990s incorporated psychological insights into its IS. The application of psychological theories to the process of divorce completely reformed the earlier *Matrimonial Causes Act 1959* (Cth), which was partly a fault-based divorce law, with the enactment of the *Family Law Act 1975* (Cth), which used a no-fault divorce law that led to the Family Court.[394] The changes in law arising from the *Family Law Act 1975*[395] were on two fronts: the introduction of the no-fault divorce and an emphasis on ADR[396] to resolve disputes. The aim of this part of this chapter is to understand the

[390] Serious workplace disputes from which these similarities were drawn occurred in both rural and metropolitan areas and included Farm Debt mediations and mediations under the Employee Assistance Programmes in various workplace organisations, both public and private.
[391] See generally Neimeyer and Sands, above n 233.
[392] Charmaz, above n 299, 2; Birks and Mills, above n 328, 4; Gubrium and Holstein, above n 7, 5.
[393] The NIS also includes the DISC model, which the original IS of the family court did not. Although the IS forms a vital part of the NIS, it does not form all of it. The discussion here will analyse all the NIS, including the DISC analysis. In addition, the original use of the IS by the Family Court did not include the concept of relational learning.
[394] Eidelson, above n 115.
[395] *Family Law Act 1975* (Cth).
[396] Ibid pt 2 (ss 10F-10P) provides provisions for non-court-based family services, including the definition of dispute resolution. See also Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009). See Appendix A.

emphasis on ADR and the move away from the usual emphasis on rights. Importantly, this move has significance for the argument of this thesis regarding how to manage the emotional aspects of a dispute.

I argue that the way the Family Court (Sydney Registry) handled the issue of dispute resolution based on the emphasis of *Family Law Act 1975* on ADR shows that the intention of the court was more than just making mediation available. The early practices of the Family Court's Mediation Unit are discussed below to explain how the institutional response was radical. It acknowledged the systemic and personal losses of divorce, which can enable parties to acknowledge both the legislation and practices of the registry as an educative tool.[397] In this manner, the Family Court's practices form the precursors to the contemporary issue of reconceptualising mediation as the RM.

3.2.1 From the IS of the Family Court to the NIS of the RM

The IS[398] was designed[399] by the Family Court as an educative tool to help divorcing parties better understand their own position, emotionally and substantively, in regard to their losses arising from their divorce proceedings. Specifically, the IS was designed to help divorcing parents accept that the loss of what could have been was irretrievable,

[397] By the 1990s, the continued application of psychological theories around relationships to deal with the losses of divorce led to the Family Court's Mediation Unit, with Di Gibson at its helm in the Sydney Registry. In matters where children were involved, it was fundamental that the Mediation Unit developed effective long-term relationships between the parties to co-parent the children after the divorce. To do so, the IS of the Mediation Unit came into being. See appendix.

[398] In 1996, the Family Court Sydney Registry's intake procedure for mediation contained a very thorough set of selection criteria aimed at assessing the parties' readiness for mediation. If the parties 'passed' the selection criteria, they were invited to attend the Family Court's IS for divorcing couples. The elaborate intake process ensured that only those parties who were the most able, willing and ready were invited to attend mediation, which led to a very high success rate for the Sydney Registry's Mediation Unit (about 90%) at that time. The selection criteria for intake to the mediation process began when an intake officer of the Family Court received a call from a divorcing party seeking advice about divorce proceedings. The intake officers were specifically trained to assess these calls for readiness to attend mediation by asking a set of directed questions to the caller. Depending on the number of 'correct' answers received, an invitation was offered to both parties to attend the Family Court's IS at the Mediation Unit in the Sydney Registry. If both divorcing parties accepted the invitations, they were deemed to have successfully completed the first phase of the intake process and were ready for the second phase, which was to attend the IS. At the end of the IS, the parties were again invited to participate in the third phase of the intake process—the joint counselling questionnaire session. If this was successfully completed, the parties were only then offered mediation. This information comes from my own personal involvement as a researcher of the system used by the Sydney Registry Family Law Mediation Unit in the 1990s under the supervision of Di Gibson, who was head of the Family Law Mediation Unit at the time.

[399] The IS was set of overheads designed by the psychologists/counsellors employed by the Mediation Unit at the Sydney Registry in the 1990s to inform the general public about the impact of loss in separation and divorce.

and that such loss carries appropriate grief that affects the outcome of the dispute if not addressed. The IS also assisted parties to re-establish their lives after their divorce by presenting a benchmark for the 'normal' grieving process following loss, against which they could measure their own loss.

The IS established a benchmark for creating a normal 'business relationship' as a co-parent following separation and divorce. These practices of the Sydney Registry were an example of a social constructionist approach to mediation in real life, even though there was no acknowledgment of this at the time. It is important to distinguish here the differences in use of the IS and NIS. The original use of the IS did not include the concepts of relational learning. In addition, there was no awareness on behalf of the Mediation Unit staff in the Family Court of actively using the IS as a catalyst to engage the process of social constructionism in action, even though they may have been unconsciously doing so.

It is important to explain that I am now discussing the NIS as I have conceptualised its use in the RM. For example, although the content of the IS is fully used as the substantive part of the NIS, the way the content is used (in social constructionist terms) is completely different—hence the different name to accommodate the different use. In the NIS, parties, including the mediator, are actively encouraged to be relational learners by using the substantive content of the IS and DISC[400] to constantly learn and monitor their awareness regarding their levels of ability, readiness and willingness to move forward at any point in time, and to do the same with the other party.

In the original use of the IS, the parties were, at best, interested participants in a lecture designed to determine those who were ready to mediate and those who were not. Those who were overwhelmed at the end of the presentation of the IS were invited to return on another occasion or were referred to counselling to become ready to mediate. Those who stayed after the IS were invited to participate in the next process for mediation, which did not occur on the same day as the IS presentation. However, the presentation of the NIS by the mediator is meant to occur on the same day of the mediation to enable

[400] Section 1.9.

all participants, including the mediator, to become relational learners or 'constructionists', unlike the purpose and use of the IS.

The IS was a screening mechanism for readiness to participate in mediation, while the NIS becomes an instructional normative benchmark for parties to use as a framework to analyse their loss throughout the whole mediation process. What the IS did not do was consciously assist parties to relinquish the severity of their grief and maintain a meaningful bond with their learning from their own and each other's loss in order to specifically re-establish their continuing role as co-parents, together.[401] This is what the NIS is designed to do—using the NIS offers parties an understanding of the psychology behind loss to more effectively deal with their dispute.

The Family Court's concept of 'readiness' (in the early to mid-1990s) was understood to be the degree to which each party could relinquish their losses and damaged relationship sufficiently to remain civil to each other and move forward as 'business partners'[402] in the co-parenting of their children. The NIS takes this one step further to include an understanding not only of the party's own position against the norm, but also the other side's position, in becoming effective co-parents. 'The other side's position' can include anyone else involved in the dispute, including children.[403] By focusing on how the dispute unfolds from all sides, instead of comparing a party's response alone to the norm, as part of the IS, the NIS is designed to encompass more than family law mediation. It enables the development of new roles by assisting parties to maintain a bond with the new meaning attached to the loss, from which new ways of coworking evolve. Often, it is through maintaining this continuing bond with the loss that the basis for restructuring the workplace is formed. The NIS also encourages a conscious acceptance by parties of the fact that their readiness to move away from the grief has a significant effect on the outcome of their dispute.

[401] At the end of the IS, the parties were invited to remain, and did so if they felt ready to continue to the next stage of the process. If they felt overwhelmed by the information presented, they were free to leave and not participate in the mediation process at that time. Instead, they were again referred to the Family Law's Counselling Unit or to external counselling providers to better deal with their circumstances in the hope to prepare for a future mediation.
[402] See the chart by Ricci as part of the IS in Appendix.
[403] This is done through using the process of the 'Observer Self', as discussed in 2.4.3.

The NIS empowers parties with external resources to assess their own position regarding their loss against a benchmark from the psychological literature about 'normal grieving' and 'normal relations'. Comparing their own responses to each other and in relation to the benchmark enables parties to engage in self-reflexivity. By so doing, they can then co-create an alternate reality that allows each of them to gain a more meaningful understanding of the reasons for their dispute, even if the outcome of the dispute is a permanent parting of ways.

I argue that the information in the NIS confirms for parties that different life experiences and different social interactions with others cause a different 'reality' for each party of what happened. Since each party has a different background, there can only be each party's own unique perception or social construction (personal construct) about their dispute. Thus, I argue that the RM enables parties to become their own grounded theory researchers around loss, with which they can meet their legal obligations to resolve their dispute. Although it would be useful to have an understanding of the sociocultural perspectives surrounding the legal obligations of the parties, such perspectives are not currently available from research on relationship science.[404] Instead, I propose that fulfilling the legal obligations of the parties is a process linked to their search for 'justice', which is made difficult when parties recognise that there is no single 'right' or 'wrong', such as a transcendent truth. I further argue that understanding the inherent assumptions with which each party enters the mediation process better enables them to overcome their feelings of being wronged, which helps them leave their grief behind.

I argue that moving forward from the grief of the loss is an important part of the parties' sense of achieving 'justice', and that, to do so, both sides should engage a relational responsibility to acknowledge, validate, accept and address each party's 'truth', even if this 'truth' is not believed.[405] The focus on better understanding how the loss arose enables parties to simultaneously create a sense of moral justice[406] with which the loss can be better endured in the future. In turn, moving towards a broader concept of justice

[404] Gillath, Adams and Kumkel, above n 121.
[405] See 1,5,2.
[406] See 3.8 for Ricci's Relationship Chart.

to include an individual perspective through a relational context [407] contributes organically to the evolution of a more fair society from a grassroots level.[408] I further propose that the 'truth' of any party's narrative depends on the listener, and not just on the presentation of facts.[409] As a blend of traditional mediation approaches and a form of mixed methods research, I contend that the RM uses:

- discourse and analysis from the narrative approach to explain loss in relation to the law
- empowerment and recognition from the transformative approach to enhance the relational learning of parties to deal with the psychological effect of the loss
- reality testing of options from the facilitative approach to enable parties to more effectively live with the loss in relation to their legal rights and obligations.[410]

The role of lawyers to acknowledge their clients' state of mind and level of grief when instructions are taken has new significance if the effect of law on the psychological wellbeing of the parties is a significant consideration, and if the concept of being wronged is addressed.[411] Addressing feelings of being wronged engages the process of self-reflexivity of all participants, including the mediator, through using the NIS. Thus, the NIS becomes the major point of distinction of the RM from other traditional mediation approaches, and the self-reflexivity of all participants, including the mediator, as relational learners, becomes another key defining factor of the RM as a social constructionist approach to mediation.[412]

I argue that, through self-reflexivity, the parties and mediator, as relational learners, can acknowledge and validate each other's truth (even if they do not believe it) and, by so doing, better overcome their feelings of being wronged. Once each party's truth is validated, they can co-create a new 'social contract' or 'business relationship', in which they explicitly agree on the terms that will constitute their new 'business relationship' in

[407] This is a way of moving forward from the first four waves of reform. The four waves are: (i) equal access to legal services; (ii) changing structural inequalities in the legal system; (iii) promoting ADR systems, such as mediation; and (iv) reforming legal professional rules. The fifth wave involves taking personal responsibility within the institutionalisation of ADR. Access to Justice Taskforce, above n 106.
[408] Johnson, above n 64.
[409] For a fuller explanation of mixed methods research, see 2.4.1; Frank, above n 269, 79; King, Freiberg, Betagol and Hyams, above n 25, 244–5.
[410] See 2.4.1.
[411] Ibid p. 79.
[412] Ibid p. 59.

the future in a way that means will only implement those behaviours for which each of has the skills to meet the agreed terms.[413] That is, I argue that the new 'social contract' that emerges, as a business relationship, forms the basis of a new 'normal' relationship from which trust and acceptance between the parties can again develop, and, if willingly accepted by each side, can become the 'norm' that the parties manifest as macro structures that embody their own version of justice.[414]

This requires an understanding of how the elements of individual resilience interact to affect the relational outcome of the parties. For example, I argue that, in the RM, the interplay of the elements of readiness, willingness and ability[415] form the basis to the resilience of the parties, with which they can move away from the dispute. I further argue that the concept of resilience is required for parties to maintain a business relationship with which to move forward. However, each element of readiness, willingness and ability contributes significantly to the social construct of resilience, so that if they are not present, the resilience of the party is markedly affected.

Similarly, each element can itself be understood as a social construct. As social constructs can be 'talked into existence', they can also be 'talked out of existence.[416] For example, the argument is that using the methodology of grounded theory research enables parties to deconstruct each element (talked out of existence) before reconstructing them within a normative framework (NIS) with a meaning acceptable to both.[417] I recognise that the grounded theory process of constant analysis, coding, recoding and identifying core categories until saturation point for each element/issue in the mediation process constitutes what Gergen calls 'social constructionism in action'.

[413] Ibid.
[414] 2.2.1, p. 59.
[415] The combination of readiness, ability and willingness forms the concept of resilience.
[416] Gubrium, above n 5; Gergen, above n 17, Lock and Strong, above n 41. For example, in relation to the intersection of the concepts of 'readiness' and 'ability to remain in a business relationship', a normative approach suggests that the ability of a disputant to learn from the information shared during the mediation process is directly related to the level of preoccupation felt from the effect of the loss on the worldviews of each disputant. People who are too angry or shocked or who have had their worldview dramatically altered are unable to accommodate the information of the other party into their own narrative. In contrast, people who are ready to move forward are able to at least acknowledge, if not accommodate, the information of the other party as part of their own relational learning. By doing so, they form an expanded worldview that incorporates the other's perspective, and are better able to either reject the story of the other party and go their separate ways (at one extreme), co-construct a new reality/story/integrated theory together (at the other extreme), or engage in any combination of outcomes between these two extremes. See 2.3; 3.2.1, see also p. 105, 110, 133, 135, 142.
[417] 2.4.3, p. 98. Once a dispute is deconstructed, the factors of willingness, ability and readiness to move forward are determining factors to any satisfactory outcome for mediation.

Consequently, I recognise that willingness, readiness and ability are key elements to the resilience needed by parties to incorporate the relational learning from the interdisciplinarity of the NIS.[418] For example, the degree of willingness to cooperate in the relational learning process affects the degree of empowerment and recognition (transformative approach) of parties, which affects the parties' ability to work towards an agreed outcome (facilitative approach). In this manner, the constructs of the readiness, willingness and ability of the parties constantly interact to become critical factors of the resilience of the parties, and constituent parts of the relational learning that makes the RM an effective dispute resolution procedure that can also serve as an access-to-justice measure.[419]

It follows that, if the ability to remain in a business relationship, willingness to understand the other party's perspective, and emotional readiness to overcome the grief and move forward from the loss are all implemented by both sides during the mediation process, some resolution around those issues will occur.[420] It also follows that such a resolution depends proportionately on the degree of readiness, willingness and ability of the parties to reconstruct meaning surrounding the loss.[421] Conversely, if any one of the constructs of ability, readiness or willingness fails to authentically[422] manifest for either party during the mediation process, there will be no final long-term settlement or resolution of those issues from that mediation, especially for parties involved in ongoing relationships. A further dispute over the same issues will arise in time.[423]

Thus, I argue that the level of readiness to move away from the grief in response to the loss is the determining factor for being able to move forward effectively from the

[418] See Charmaz, above n 299. See also Chapter 2, 96-8—particularly the coding and recoding section. By discussing and analysing their stories (narrative approach), parties are able to see the dispute from both sides (recognition) and are encouraged to accommodate what they understand of the other side into their own understanding or worldview. If they are willing to accept the challenge to expand their worldview and accordingly modify or reconstruct the prior meaning attributed to the devastation from the loss, they can (empowerment) shift their level of consciousness (from the former assumptions) to a consciously tested set of agreed terms. These terms accommodate the loss and note how the loss has affected each party's worldview. Gergen, above n 17; Gubrium and Holstein, above n 5.
[419] See Introduction Part 2, p. 7.
[420] See 3.2.2, p. 117.
[421] This is based on grounded theory findings from the last 20 years. Charmaz, above n 299, 4; Corbin and Strauss, above n 277, 299; Silverman, above n 277, 108; Emerson, Fretz and Shaw, above n 277; Ary, Cheser Jacobs and Sorensen, above n 277, 494; Merriam, above n 277, 35; Saldana, above n 277, 217.
[422] Such as phishing expeditions, where the parties are not making a genuine effort to resolve the dispute, but are simply wanting or phishing for information to take to court.
[423] See 3.2.2, p. 117.

dispute. In addition, the construct of willingness is a better predictor than the constructs of readiness or ability of the quality of the relationship that will result from the outcome of the dispute, if any.[424] I further argue that the ability of parties to let go of the prior meanings attributed to the devastation from the loss in the dispute affects the level of empathy each can generate for the other. Where there is very little or no empathy, the best outcome for resolution is a settlement. Where there is high empathy for each other, there is the possibility of transformation and personal growth. Thus, the degree of willingness to cooperate in the relational learning process affects the degree of empowerment and recognition (transformative approach) of the parties, which affects the parties' ability to work towards an agreed outcome (facilitative approach).[425]

Although such a grounded theory analysis of the elements of readiness, willingness and ability may appear to be an individual response to the loss, the grounded theory methods required for analysis, coding, decoding and recoding are only valid in the context of the parties' relationship. This aligns with the vast range of current thinking[426] that places the view of the independently responsible individual as being the cause of blame in a dispute in strong question. The NIS removes the pressure from parties to feel that they must 'resolve' their dispute (or particular disputed issues) during their mediation, and enables them to understand that any 'agreement' regarding an issue that they are not ready to resolve is likely to have unfavourable and ineffective long-term consequences.[427] The knowledge that they do not have to resolve enables parties to focus on the issues they can resolve, and allows time for the other issues to move towards being resolvable or being modified while resolving easier issues to a form that can be accepted by both sides.

Thus, the aim of the NIS is to offer parties a way of thinking about how to study their own stories about their relationship in order to develop their own conceptual analysis of how best to live with their losses. I make a distinction here between 'parties' and 'participants', with the former referring to parties in dispute and the latter referring to the support people or management representatives attending the mediation, including

[424] See Charmaz, above n 299, 4; Corbin and Strauss, above n 277, 299; Silverman, above n 277, 108; Emerson, Fretz and Shaw, above n 277; Ary, Cheser Jacobs and Sorensen, above n 277, 494; Merriam, above n 277, 35; Saldana, above n 277, 217.
[425] For models of mediation, see 2.2.1, p. 60-1.
[426] Introduction Part 2, p. 6.
[427] See Neimeyer and Sands, above n 233.

the mediator.[428] If parties study their own stories, they do so as stated above[429]—by adopting grounded theory methods of analyses in order to directly manage and streamline their collective data and construct an original analysis of the total data from each side, in each case.[430]

As a normative framework, the NIS in the RM—like the IS in the Family Court—offers parties an opportunity to assess their own position regarding their loss against a benchmark from the psychological literature about 'normal grieving' and 'normal relationships' following loss. The distinction is that NIS offers both parties an opportunity to extend their understanding of their own positions against the norm, while also including that of the other side.[431] The substantive content of the IS and NIS can empower parties with external resources to co-create an alternate reality that accommodates their own losses in a meaningful way. However, the NIS allows each party to gain a better understanding of the reasons for their dispute—even if the outcome of the mediation results in a permanent parting of ways for the parties.

In justifying the rationale for the NIS, the purpose of the following discussion is to outline how parties, including the mediator, engage in relational learning from experiencing the NIS. The role of the RM mediator in the pre-mediation phase of any social constructionist mediation is considered in relation to how the parties are enabled through the NIS to assume responsibility for their own and each other's losses (especially where there is an ongoing relationship between the parties, despite a separation or divorce). So that it is easier to understand what occurs during the pre-mediation phase, I use a workplace grievance matter as an illustration.

3.2.2 The Development of the RM Mediator as Relational Learner: The Significance of the Pre-mediation Phase and the Focus on Loss

[428] In workplace grievance disputes, the attendance of management representatives is mandatory to authorise any structural, policy or resource changes required in the organisation for the dispute to be finalised in an ongoing manner. *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 309.
[429] As elaborated in 2.4.
[430] Charmaz, above n 299, 2.
[431] As stated above, including all affected parties.

Whether the dispute occurs in a public (government department) or private organisation,[432] the initiating party directly requesting mediation is not usually one of the disputants [433] (as they usually are in family law).[434] Usually, an authorised officer from the workplace (such as a case manager or human resources staff member) makes the initial enquiry for mediation and expects the matter to be resolved at mediation, whether the parties are ready or not.[435] The significant point to note from the outset of any enquiry for mediation is that the initial conversations are confidential and follow a set series of questions about the losses incurred by both sides. These questions follow the general trend of the questionnaire in the NIS. This confidentiality extends to pre-mediation discussions with all the participants, prior to setting the date and time for the mediation itself. At the mediation, only the information that the parties feel ready, willing and able to share is jointly handled. However, the parties are prepared by the mediator through the NIS to go outside their original comfort zone to share information.[436]

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[432] This statement is made based on my own lived experience working in both government and private organisations over the last 20 years.

[433] As was the case in the Family Court in the 1990s.

[434] In NSW, legally aided early intervention mediations in family law are sent to the mediator by a conference organiser, who undertakes preliminary evaluations, such as determining whether there is any domestic violence evident, such as an active apprehended violence order. Preliminary intervention ensures that the matter is suitable for mediation. Otherwise, either divorcing party can engage the services of a Family Dispute Resolution Practitioner (FDRP) through access to a list from the Federal Attorney-General's department of suitable providers. The RM is a suitable access-to-justice measure for the latter, and, provided that the required documentation for legally aided mediations are met, it is also a suitable access-to-justice measure for the former. See *Family Law Act* s 60I(9)(7) (exception from requiring a s 60I certificate to go directly to court without first attending a Family Dispute Resolution Conference with a FDRP). In NSW legally aided family law mediations, a period of three hours is allocated for an early intervention mediation about parenting arrangements to spend time with children after divorce or separation.

[435] In NSW legally aided family law mediations, the conference organiser may determine that a matter is suitable for a shuttle mediation if there is an active apprehended violence order in place. If one party is not emotionally ready to proceed in person, but wants a resolution, there may be a need for a shuttle mediation. In these cases, the RM mediator is mindful of the emotional vulnerability of both parties throughout the process, and perseveres to empower both parties to remain mindful of their own assumptions and expectations. The RM mediator encourages both parties to recognise the other so that they can learn from each other how to co-parent to the best of their ability at that time. In this way, the principles of the RM process are maintained and the parties still engage in understanding the intensity of the losses from both sides, to the extent that they are able to do so.

[436] Not only is the entire RM mediation process confidential because the material shared cannot be used against either party in a court of law, but, throughout the entire process, the parties and mediator maintain vigilance around confidential information that is not to be shared. The mediator can hold private, confidential meetings that with either party in sessions called 'private caucus', and the parties can request a confidential session with the mediator at any time. Insofar as these terms for confidentiality apply to all models of mediation, I argue that the mediation process is not a natural justice process (where 'natural justice' is defined as a process in which all information is shared openly and publicly).

Due to the costs of mediation, the dispute is expected to be resolved within one working day, with exceptional circumstances sometimes leading to an extension of an extra day or so. The culture of the organisation requesting mediation is also a significant consideration if disputants are expected to fit into that culture. As with any mediation, analysing all the interacting social, economic, cultural, financial, structural and relational aspects of the disputants begins with the very first contact. The distinguishing feature for the RM mediator is that these interactions are consciously acknowledged and openly discussed with the officer requesting the mediation in an attempt to discern the level of loss felt by the participants involved in the dispute, from the management to employees, and every level in between. This information helps the social constructionist mediator decide how best to conduct the mediation—such as who to invite, where to conduct the mediation, and what is required for the mediation to be a success for the participants in that culture, being mindful of the ongoing relationship of the parties if and when the dispute is resolved.

To accommodate as many such cultural expectations as possible, the RM pre-mediation discussions are initiated at the time of the first request for mediation (either over the telephone or in person) and followed through with a request to send the relevant documentation outlining the history of the particular grievance and positions of the disputants.[437] As with any mediation, enough information is received through the pre-mediation discussions to form a clear understanding of the major substantive issues seen by each party. The difference for the RM mediator is that, from the onset of the initial contact for mediation, there is a focus on how the parties perceive their loss and whether there is any indication that the parties understand the loss of the other side. The focus is on the level of insight for relational learning that has already occurred between the parties, or that could occur between the parties.

Like any other mediator, the RM mediator has no vested interest in a particular outcome for the dispute—not even a vested interest in whether the dispute settles—wholly or partially.[438] However, the RM mediator has a vested interest in ensuring that the parties

[437] After reading these documents, private discussions are conducted with each of the parties, usually by teleconference and/or in person, depending on the circumstances of each case.
[438] However, it is reasonable to suggest that the facilitative mediator has a vested interest in settling matters, if only to remain on the panels for dispute resolution as an effective mediator. Of course, there is no way of 'proving' this assertion.

engage with as much support as they can give each other at that time, in anticipation of relating as 'business partners' to settle their issues together. The RM mediator is ready to learn from the parties what is in their best interests to fulfil their needs, and becomes a relational learner who is also mindful of his or her own assumptions and expectations of behaviour that may inadvertently be brought into the mediation. To counteract this possibility, the RM mediator invites the parties at first contact[439] to address any concerns about assumptions—perceived or otherwise—with the mediator. This emphasises to the parties that mediation is a process in which the parties decide what is in their own best interests, and thus take full responsibility for the outcome of the mediation, particularly because they will endure an ongoing relationship in the workplace after the dispute is resolved.[440]

The RM mediator encourages parties to be mindful of their own assumptions and to maintain clear, publicly acknowledged, explicit expectations about each other and the mediation process itself. The aim of the RM mediator is to completely eliminate any prior expectations and assumptions of the parties to enable the parties to start again as 'business partners' with the knowledge of the losses from the past. In this manner, they can move forward with a continuing bond from the losses that is both meaningful and can be endured into the future.

It may be argued that being a relational learner compromises the neutrality and impartiality of the RM mediator, or that presenting the NIS as part of the mediator's opening statement during the mediation process places the mediator in the position of an authority figure.[441] My response to this argument is that the mediator, as a relational learner, takes on a new role—one of a 'catalyst'. In this role, the mediator is learning from the parties how they think and feel about their losses by observing and listening to their reactions to the presentation of information about the mediation process during the pre-mediation phase and NIS. The mediator then mirrors back that information to the

[439] This may be in the pre-mediation session or as part of the NIS presentation.
[440] For this reason, it can be said that there is no 'failed' mediation in social constructionist terms—only a mediation where the parties were not ready to settle all their issues.
[441] These are traditional mediation criticisms about the effect of the mediator's presence in the room , especially if standing to present the NIS as a PowerPoint presentation. See Appendix. See generally Bagshaw, above n 124.

parties for their confirmation, thereby minimising the chances of being seen as 'directive'.[442]

By reflecting back to the parties what the mediator believes to have learnt from observations in the course of the NIS presentation and entire mediation, the mediator invites further participation from the parties to clarify and confirm their emotional and substantive evolving worldviews in their combined 'game in the making'. In turn, the parties interactively learn from each other (and from the mediator's reflections) how best to move forward from their losses. They do this by better understanding their differences in functioning style to a point that they can create a relationship that manages their substantive issues in the dispute, as much as they are emotionally ready, willing and able to do at that time.

It may also be argued that the RM mediator is no different to the mediator engaged in transformative mediation, where the primary goal is to foster parties' empowerment and recognition, thereby enabling parties to approach their current problem and later problems with a stronger, more open view. My response to this is that the primary goal of the RM is to assist parties through empowerment and recognition techniques to better handle the grief arising from their losses. This focus on managing the grief enables them to move forward from the dispute with a bond from the loss that can be endured, and a grief that can be left behind.

According to Bush and Folger,[443] achieving empowerment and recognition is assessed independently of any particular outcome of the mediation. This avoids the problem of mediator directiveness[444] that is so often found in problem-solving mediations, such as the facilitative and evaluative types. In the latter problem-solving types, conflict is often seen as a short-term problem in need of an immediate solution, instead of a long-term

[442] In NSW legally aided family law mediations, the formal NIS (in Appendix) is substituted by a formal 'mediator's opening statement' that is provided by Legal Aid NSW. This opening statement outlines the roles of the parties, mediator, lawyers and any independent children's consultants. During the issue-exploration phase of the mediation, information is given as required from what current research says about the issue in question, such as the effect of loss on the outcome of the parties' dispute. For example, a parent who requests a 50/50 time arrangement for a child who is a few months old and still breast-feeding would benefit by understanding what psychological research states about attachment theory and the need for a firm mother–child bond while the child is breast-feeding.
[443] Bush and Folger, above n 179, 2.
[444] Ibid.

process based on an opportunity for moral growth and transformation, which forms the hallmarks of the transformative and therapeutic approaches, such as TJ.[445] These characteristics described by Bush and Folger equally apply to the RM, where mediator directiveness is minimised by adopting the new role of relational learner.

According to Bush and Folger, transformative mediation[446] places responsibility for all outcomes of the dispute squarely with the parties, and places the role of the mediator as one of facilitator in the empowerment and recognition[447] process for the parties. The difference with the RM is that the mediator encourages parties to consciously engage in 'their game in the making' in order to learn how to better live with their losses as they move forward from the dispute.[448]

3.2.3 The Phases of the RM Model

The RM model's style follows the traditional facilitative model, with the exception of the NIS presentation, which takes the following form. The first step is the presentation of the NIS by the mediator as part of the mediator's opening statement. The next step involves the presentation of the parties' opening statements, followed by issue identification, agenda setting and clarification of summaries regarding the parties' losses. The next step is option generation for each of the issues identified (possible solutions), followed by exploration of the issues to identify the core categories (probable solutions). A private caucus follows, where the parties reality test their probable solutions (confidential session) and further confidential discussion occurs about how best to live with the loss and how best to share this information with the

[445] Wexler and Winick, above n 63, 1519.
[446] Bush and Folger, above n 179, 2.
[447] According to Bush and Folger, recognition is something one gives, not only something one receives. It is a process of acknowledging the other party as a human with their own legitimate situation and concerns, which must be based on empowerment—that is, based on 'The restoration to individuals of a sense of their own value and strength and their own capacity to handle life's problems'. Through empowerment, disputants gain 'greater clarity about their goals, resources, options, and preferences' and use this information to make 'clear and deliberate decisions'. Through recognition, parties must be confident in their freedom to make decisions regarding the course of the dispute. Transformative mediators allow parties to choose how much they want to recognise the views of the other side, so that it is possible for recognition to lead to complete reconciliation, or lead parties to be willing to suspend self-interest only momentarily, or not at all, in order to recognise the other. See Brad Spranger, *Transformative Mediation* (October 2013) Beyond Intractability <http://www.beyondintractability.org/essay/transformative-mediation>.
[448] In this way, the mediation process consciously becomes a process of social constructionism in action and, in turn, an agent for social change. It is also a transformative experience for some issues, if not all, if the parties are emotionally ready, willing and able to engage in the relational learning.

other side, if considered necessary by the parties. Further exploration of the issues follows as a joint session to continue reality-testing issues that can be lived with and can accommodate the loss. Finally, the agreement phase occurs, with a co-creation of core categories that both parties can live with that incorporates an enduring sense of their losses. This final phase also includes a written agreement that can be made binding by including lawyers.

The following section explains how the RM mediator prepares parties to become 'relational learners'. It further explains how the RM mediator must constantly prepare parties to remain on task for every phase of the mediation process, and encourage them to be mindful of the effects of the mediation process on their ongoing relationship after the dispute is resolved.

3.2.4 The Mediator as Relational Learner: Preparing the Parties for Mediation

The following discussion is more about the specificity of the RM mediator. The content and the way the NIS is used is attached in the appendix and not made evident in this chapter. For ease of writing, the following discussion describes how a typical RM mediation would proceed. A detailed presentation of the NIS follows from a brief explanation of how the mediator interacts with parties just after the NIS presentation. The main task of the RM mediator would be to constantly role-play for the parties to demonstrate their positions and associated emotions throughout the entire mediation process. The purpose of role-playing is to constantly reflect back to the parties what is observed and, by so doing, constantly invite clarification in substance and emotion from the parties (recognition)[449] of the feedback given. Thus, the RM mediator acknowledges the feelings of each party, especially after their opening statements, and again when discussing each of the issues in the option-generation phase. The mediator would appreciate the validity of each party's statements about the effect of the loss on their respective worldviews.

[449] This is unlike the role of the co-mediators in family law at the Sydney Registry in the 1990s, where there was both a male and female presenter—one from law and one from psychology—who conducted the IS together, which ran for one hour. Their role was simply to present the information and not to give feedback to the parties.

Such acknowledgement often takes the form of summaries or role-plays, where the RM mediator would voice the feelings of each side and confirm with the parties that their perspectives have been understood in relation to their grief and loss. Once confirmed, the parties know that their concerns have been heard, acknowledged and appreciated, and the RM mediator is assured that all participants (including the mediator) are ready to learn from each other how best to move forward.[450] This is especially important in cases where the parties do not volunteer, but are sent to mediation by their managers.[451] In these instances, it is essential that the disputing parties see the entire mediation process to be fair, just and not involving any gender bias.[452] By constantly role-playing the positions and emotions of the parties, the RM mediator would promote the perception of a fair process that resolves the dispute in an equitable manner.

Engaging the parties' participation from the onset is designed to ensure procedural fairness[453] and assist them to mitigate their hurt by maintaining their right to being respected as someone with a voice, thereby enhancing their self-effectiveness (empowerment). It would also enhance each party's understanding of what may

[450] The willingness of the parties to participate in the Family Court's mediation service in the 1990s was determined by the self-selecting mechanism of offering mediation only to clients who willingly sought advice about their divorce proceedings, were successfully screened for readiness to participate in mediation, willingly participated after attending the Family Court's IS, and successfully completed the joint counselling questionnaire. The Family Court assumed that those parties who were ready and willing to attend mediation were also able to do so, and thus did not need the support of lawyers during mediation. The court's focus was on the parties resolving their own issues by better understanding their relationship and deciding what was best for their children. Twenty years later, legally aided family law clients seeking mediation may be ready and willing to participate, but, in many instances, do not have much insight to their relationships and are not always able to focus on their role as co-parents because they simply may not have the skills to do so. These clients are better served when their lawyers attend mediation to advise them on the legal ramifications of any final decisions that will become consent orders or parenting plans. However, the relationships for conducting mediations with lawyers also present their own challenges.

[451] Increasingly, there is a move to eliminate the voluntary aspect of the mediation and simply order disputing parties to attend mediation in order to return to effective functioning of the workplace as soon as possible.

[452] The aim of the IS at the Sydney Registry of the Family Court in the 1990s was that the parties would see the whole intake process as being fair and just, and feel that the process acknowledged their grief and loss. To ensure this perception, the sessions were always conducted by a male and female presenter—one from law and one from counselling. The purpose of having both genders and disciplines was to enable the parties to counteract any perceived gender biases or perceived neglect of emotional issues when dealing with divorce proceedings.

[453] See, eg, Denis James Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996); Tom R Tyler, 'Procedural Fairness and Compliance with the Law' (1997) 133 *Swiss Journal of Economics and Statistics* 219, 226. The aim is not to have a discussion about procedural fairness but to consider the party's view of 'fairness' – a concept which the parties define in their own terms.

otherwise be felt or seen as being counterintuitive,[454] and would leave them with a feeling of agency that enables them to move forward (empowerment). In contrast, any perceived procedural injustice would be viewed as an implicit violation of interpersonal codes of conduct[455] and ultimately sabotage any agreed outcome.

Through respectful and considerate role-playing voicing the concerns of each side, the RM mediator would engage both parties to consider their assumptions and expectations that led to the dispute, and consider from what basis they could now move forward as business partners, given their ongoing relationship as coworkers or co-parents. The aim would be not to 'settle', but to gain a better understanding of how each party came to be in the dispute and how they may now wish to move away from the dispute. By encouraging the parties to acknowledge each other's position that led to the dispute and to support each other as they engage in a new role as 'business partners',[456] they would anticipate a settlement of the current dispute, while also developing a mode of working together that would resolve any disputes that may arise in the future.

Focusing on the future[457] would be made easier for the parties by better understanding their past, from both sides (recognition), regarding each issue of loss. Once the losses are acknowledged and accepted by each party, they would be better able to experience the impact of the shock from the loss on their respective values and their respective worldviews.[458] The consequent relational learning that would emerge for the parties would also acknowledge the level of pain from the loss from both sides. As the parties prepare to live with their loss as part of their new worldview, they would increasingly refine their role as business partners[459] in a bigger picture where they would use their 'Observer Selves'[460] to understand the role played by each of them in that picture.[461]

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[454] See, eg, Stolorow and Atwood, above n 40; Stolorow, Atwood and Orange, above n 40; Stolorow and Sassenfeld, above n 33, 6–7.
[455] Joanne Fitzgerald, 'Workplace Implications Arising from the Suicide of Brodie Panlock' (Speech delivered at the Inaugural Dispute Resolution and Psychology Interest Group Conference, Sydney, 14 Sepember 2012).
[456] See, eg, Gergen, above n 35.
[457] Ibid; Bagshaw, above n 124.
[458] Guidelines 7 and 8 in the NIS deal with the different levels of shock for each party at the announcement of the separation. They are intended to alert the parties about the crucial role that 'readiness' plays in the resolution of issues. See Appendix.
[459] Sourdin, above n 149.
[460] Chapter 4 discusses the 'Observer Self' or the 'Adult' in the TA literature.
[461] 'Observer Self' is a term I have coined to describe a person's ability to mindfully acknowledge the relational aspects of their worldview incorporating both the intra-psychic and the external factors that

The RM mediator [462] would offer parties the opportunity to enter a 'relational space'[463] during the mediation where they can understand their relationship in terms of a normative approach, as presented in the 'relationship chart'[464] of the NIS. They would then be better able to decide how to be 'business partners' in an informed manner to move forward from the dispute. Providing a normative framework such as the NIS would allow parties to deal with their loss and its incumbent grief in a 'normal' manner, and would align well with the findings of intersubjective psychoanalysis.[465] In workplace grievance matters, lawyers are rarely used in the mediation process. Thus, helping parties in workplace matters move forward from their losses depends on the relational experiences that develop between the parties, and their consequent emotional readiness, willingness and capacity to resolve their dispute, based on the learning from the NIS and from each other. Whether lawyers are present or not, parties must be able to

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impact their expectations and assumptions. It attempts to go one step further than Adult in TA. 'Functioning from Parent' refers to doing what should be done, and is mostly the realm of the law that outlines the rules according to which people should behave. Moral agendas in society are the domain of the Parent, as is setting the agenda in mediation because it outlines the issues that should be discussed. 'Functioning from Child' refers to engaging in the creative aspects of option generation—considering the possible and then probable options that could lead to an agreement between the parties. Functioning from Adult refers to information that is accepted and validated from the learning. All three functional styles are equally important and all three are used in daily living. Unfortunately, 'functioning from Adult' is a process that can be hindered due to the emotional turmoil experienced by the Child.

[462] This is not to say that the parties in other traditional models of mediation do not function from Adult—either consciously or unconsciously. In fact, in transformative mediation, parties are encouraged to see the dispute from the other party's perspective as part of the 'recognition' phase. However, in the RM, there is a concerted effort by the mediator to assist parties to consciously function from Adult by explaining the role of TA in the 'relationship chart' as part of the mediator's opening statement. Bush and Folger, above n 179; see Heidi Burgess, *Transformative Mediation* (1997) University of Colorado Boulder <http://www.colorado.edu/conflict/transform/tmall.htm>.

[463] 'Relational space' refers not only to the intersubjective psychoanalysis that occurs as each party attempts to handle the losses during the mediation process, but also to the interpersonal justice that is felt by having a voice, which enhances the perception of procedural fairness and offers each party a feeling of agency in controlling how the matter proceeds.

[464] Ricci's chart—see Appendix.

[465] Drawing from the findings of intersubjective psychoanalysis, Sassenfeld claims that the emotional and relational experiences of parties appear as the experience of transference. He states that emotional conflict takes form in systems constituted by the interplay between differently organised, mutually influencing subjective worlds. Sassenfeld states that the basic building blocks of personality arise from principles that unconsciously organise emotional and relational experiences, and that the recurring unconscious patterns of intersubjective transaction occur in humans' developmental systems and can offer multiple perspectives that may move people towards a more integrated understanding of who they are as conscious beings. Transposing these findings to the field of RM mediation illustrates that the interplay of the parties' transference and mediator's transference is an example of a world called an intersubjective field or system. It illustrates that the RM becomes the process of engaging individuals in efforts to change their attitudes and dispositions regarding loss, and the intersubjective field offers parties an opportunity to consciously form meaningful lives that can accommodate their loss with a more integrated understanding of who they are (as conscious beings) as they move towards their future. Stolorow and Sassenfeld, above n 40, 6–7.

identify what they find to be truly valuable for themselves in order to construct ways of living that can reflect their identified values.[466]

Where parties remain in ongoing relationships—such as divorcing parents with no or minimal skills at co-parenting, or workplace disputants who must remain working together—a strong capacity-building [467] dimension is required to change the circumstances of loss into ones with which both parties can live. Consequently, disputants in ongoing relationships need to be provided with the internal and external psychological resources to build their capacity to cope.[468] I propose that the NIS in the RM is an attempt to provide external resources to parties, such as knowledge about normal reactions to loss and relationships. These resources can be used to enhance their internal skills and subsequently change their attitudes and beliefs regarding the contextual effect of their own losses, whether they are relational or material. Devising programmes as part of the mediation outcomes that include ongoing support from external resources—such as social support, intimate relationships, ongoing education, training, coaching and employment—would allow parties to achieve their individually identified goals, which would help them attain better or good lives.[469] In family law matters, these supports often take the form of 'parenting after separation' classes in family relation centres. In workplace grievance disputes, such supports often take the form of courses offered internally or externally by the workplace through their equivalent of a human resources department.

From a social constructionist perspective, 'good lives'[470] enable individuals to achieve a sense of purpose, to achieve higher levels of wellbeing and to adhere to socially prescribed norms—all goals that concur with the theories of intersubjective psychoanalysis, and concur with using a normative framework to address parties' emotions of grief in relation to loss. In particular, adhering to socially prescribed norms addresses the levels of emotional readiness, willingness and ability of parties to move

[466] Clare-Ann Fortune, Tony Ward and Gwenda Mills, 'The Rehabilitation of Offenders: Reducing Risk and Promoting Better Lives' (2012) 19 *Psychiatry, Psychology and Law* 646, 648.
[467] Ibid.
[468] Ibid.
[469] Note the 'good lives' model of Tony Ward, as occurs in TJ, presented by Birgdin's study. Astrid Birgden, 'Therapeutic Jurisprudence and 'Good Lives': A Rehabilitation Framework for Corrections' (2002) 37 *Australian Psychologist* 180.
[470] Also concurs with the definition of 'good lives' provided by TJ, especially the good lives model by Ward. See ibid.

forward from the dispute. The RM mediator would prepare the parties to understand the concept of loss in social constructionist terms by developing a better understanding between parties of the relational learning that occurs in their ongoing relationships, whether in serious workplace disputes or family law matters.[471] As aforementioned, a social constructionist interpretation of loss can be likened to chaos theory.[472] For example, by focusing more closely on each party's interpretation of the dispute, the RM would create an opportunity for parties to move beyond the chaotic phase of loss (such as the concept of a damaged reputation in sexual harassment matters) to formulate an existence of ordered patterns of behaviour, where new forms can be reconstructed, even if only for relatively short periods.

In grounded theory, these new forms of ordered patterns arise when parties feel sufficiently empowered to identify the core categories of their dispute, even if only on a moment-to-moment basis during the mediation. The key principle here is that the parties are often stuck in their respective positions[473] and cannot be shifted until they see the losses from the other party's perspective, which can only be done when both can enter their Observer Selves as relational learners. The new forms of ordered patterns seen by the parties are glimpses of the losses from each other's perspective. The RM mediator demonstrates for the parties how this process of ordered pattern formations unfolds by incorporating glimpses of insight to the settlement process.[474] The following section details how the psychological research forming the NIS can be used to overcome the micro-elements of emotional impasse in mediation—one of the most difficult obstacles to moving forward, whether the dispute is rights based or interests based.

3.2.5 A Social Constructionist Approach to Overcoming Impasse in Mediation

[471] Workplace disputes range from intransigent sexual harassment matters to matters involving serious mental health conditions of parties in dispute.
[472] Gregersen and Sailer, above n 66, 777, 780; see generally Wheatley, above n 66.
[473] See Section 4.2.4 on TA and functioning from 'Parent–Child', 'Child–Child' and 'Parent–Parent' as descriptions of positions.
[474] The difference here to other forms of mediation is that the RM mediator specifically aims to focus on the loss and to bring the parties to their Observer Selves in order to see the loss from the other side's perspective. In other mediations, understanding loss is the by-product of the process of settlement, not the subject matter. This insight arises from my 20 years of experience in the field. See Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 3rd ed, 2003); David Spencer, *Principles of Dispute Resolution* (Lawbook, 2011); Bush and Folger, above n 14, 2. None of these references discuss understanding loss as a subject matter.

Some of what occurs during a rights-based mediation—such as in workers compensation matters—may actually be therapeutic when assisting parties to avoid or overcome an impasse because this can involve exploring underlying emotions, even when a traditional facilitative model of mediation is not used. Often, these emotions are the cause of the impasse. However, intractable parties do exist, and dealing with impasse is always very difficult. By searching for and paying attention to the underlying critical feelings regarding the loss, a social constructionist mediator can give parties a fair chance to better understand where each other is coming from and where they need to go.

When searching for meaning to make sense of their loss, parties' ability to move forward is influenced by their worldview that constitutes their 'truth'. Their consequent perceptions of 'justice' may not result in an agreement. The RM enables the outcome of any mediation to become a merging of ideas emanating from the effect of the parties' reactions to their loss (otherwise termed their 'readiness') on their subsequent responses (on the ability of the parties to fulfil their social and legal obligations to settle the dispute). Thus, the outcome of any social constructionist mediation outwardly manifests the level of internal turmoil experienced by each party regarding their emotions about the loss and their social and legal obligations required to deliver what they perceive to be a just outcome for their loss.

To better explain how a social constructionist interpretation of loss can contribute to the learning transfer for the parties,[475] I analyse the content of the NIS in detail. However, before doing so, I explain the concept of 'learning transfer'. The more open and ready a learner, the more likely relational learning will stick and be transferred back to the workplace or family. The design for transfer considers the desired performance outcomes and expected effect of relational learning, and how this can be achieved. A number of actions can be built into the mediation journey to support skills going back into the workplace or family. For example, parties can build a variety of transfer elements, such as structured follow-up activities, specific action plans and opportunities

[475] Chapter 4 presents an example of a case study, using the RM to resolve a long-lasting, very difficult workplace matter where the disputants often changed their minds about the workplace goals. This case is typical of many difficult workplace matters, and serves as a blueprint that does not expose the identities of the parties, which have been protected for confidentiality reasons.

to practice behavioural models. The reality-testing section encourages parties to plan and outline opportunities where they will apply their new skills in simulations, using real-life situations that they would now manage differently. Parties are encouraged to support each other by suggesting a three- or six-month review of their agreement to discuss ongoing applicability.

In workplace disputes, one of the most critical aspects in the success of learning transfer is to involve managers and executives in the mediation. This is termed 'organisational alignment'. Creating a learning culture based on support and encouragement from management ensures that new skills and approaches are more likely to be applied in the workplace and everyday work activities. Manager and peer support, both before and after the mediation, can have a huge, positive effect on the parties and organisation as a whole, as it leads to more engaged staff. Managers and executives are encouraged to set realistic learning and performance goals with participants, especially during the reality-testing session of the mediation. This level of engagement demonstrates commitment and support for the parties from the organisation. Parties are encouraged through the reality-testing phase to develop a post-mediation document to ensure the long-term application of new skills. For example, parties can encourage learning transfer activities to be included in staff development reviews.

In summary, improving learning transfer success involves ensuring that parties and managers are invested in learning prior to the mediation, designing a programme that includes real-world relational techniques for the parties that can be role played, and developing a post-mediation support plan. Each phase requires slightly more time, resources and planning than the usual facilitative model, but the results are worth it. The next section explores how parties' emotions of grief in relation to their loss can affect the outcome of their mediation. This provides an opportunity to explore how the mediator can work with the emotional readiness, willingness and ability of the parties to move them forward from the dispute through the process of relational learning.[476]

[476] Sarah Pallett, *How Can You Improve Learning Transfer Success*? (5 April 2013) Institute for Learning Professionals <http://ilpworldwide.org/whats-news/how-can-you-improve-learning-transfer-success>. Developing ways to transfer learning can increase the application of new learning. For example, Sarah Pallet claims that to improve learning transfer and increase overall effect, it is important to consider learner readiness, design for transfer and organisational alignment. Applying this research to mediation, learner readiness is about ensuring that the learning experience begins before the mediation so that the learner's interest is invested before the core relational learning skills begin during the mediation process.

3.3 Part 2: Combining the Theory and Practice in the NIS

The NIS uses theoretical concepts and psychological constructs[477] that enable relational learning for parties to occur, and equip them with a better understanding of the possible reasons for their dispute by providing a normative framework or benchmark against which they can compare their feelings in relation to the grief and loss experienced from their dispute. Thus, the parties are given an opportunity through the NIS to address their emotions of grief in relation to their loss as they recognise their own levels of emotional readiness, willingness and ability to move forward from the dispute.[478]

Through the theoretical concepts and psychological constructs that enable relational learning to occur, the NIS equips parties with a better understanding of the possible reasons for their dispute. Thus, parties can change the basis of their relationship and subsequently address their emotions of grief in relation to their loss. The combination of the NIS and a social constructionist approach to mediation enables a useful framework to explain how the psychological constructs underlying the emotions of loss and grief interact in relationships. The following section analyses how the elements of education (relational learning), psychology (meaning reconstruction) and law (individual rights) interact within a social constructionist framework.

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[477] The information about relational learning that constitutes the NIS is based on research from a variety of sources, including Kubler-Ross and Ricci, whose book *Mom's House, Dad's House* is considered a seminal work in the field of family law for parents coping with divorce. Although the content of the NIS dates from the work of Ricci and Kubler-Ross in the 1990s, their work has been substantiated by current writers, such as Moore, McIntosh and Winter. Ricci's work *Mom's House, Dad's House* was revised in 2013 and is still extensively cited. Kubler-Ross, above n 382; Isolina Ricci, *Mom's House, Dad's House: Making Two Homes for Your Child* (Fireside, 2nd ed, 2013); Moore, above n 475; Ruth E Deacon and Francille M Firebaugh, *Mary Winter Instructor's Manual to Accompany Family Resource Management: Principles and Applications* (Allyn and Bacon, 1981); Jennifer E McIntosh et al, 'Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment' (2008) 46 *Family Court Review* 105; Jennifer McIntosh, 'Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study' (2000) 18 *Conflict Resolution Quarterly* 55; Jennifer McIntosh and Caroline Long, 'Children Beyond Dispute: A Prospective Study of Outcomes from Child-Focused and Child-Inclusive Post-Separation Family Dispute Resolution' (2006) 3 *Family Relationships Quarterly* 3.

[478] By addressing their own emotions, the parties are in a position to erase past experiences and emotions and re-establish another basis for their relationship.

It begins with the mediator's opening statement to demonstrate that the mediator and his/her demeanour set the parameters and mindset for the mediation. The opening statement is significant as it demonstrates for the parties the level of self-reflexivity required for them to effectively resolve their dispute. The confidence and poise of the mediator demonstrate to the parties that there are no expectations from them to go beyond what they are ready, willing and able to commit to at this point in time. It is with such confidence that the NIS is then presented as the various guidelines that follow.

3.3.1 The Mediator's Opening Statement and Demeanour

Of primary importance when considering how the interdisciplinary knowledge from psychology, law and education interact in the RM is noting the demeanour of the mediator. In a social constructionist mediation, the mediator's demeanour demonstrates, from the outset, the mediator's awareness of the parties' heightened level of anxiety as they participate to establish trust with each other, while not knowing what outcomes to expect, how the content will unfold and how the content will be interpreted during the mediation process. Through using self-reflexivity,[479] theoretical sensitivity[480] and the 'Observer Self',[481] the mediator remains calm and sensitive to the interaction of feelings and ideas in the room. By remaining in 'Observer Self', the RM mediator offers the parties a relational space in which they can engage in similar self-reflective practices and in theoretical sensitivity to engage their own Observer Selves to better understand their own and the other party's issues of concern.

By maintaining a calm, disciplined and friendly manner to present the information in the guidelines that form the RM's normative framework (NIS), the mediator helps set the scene for relational learning. The mediator introduces the NIS as a benchmark of known psychological research dealing with conflict against which the parties can compare their own level of disappointment. As a normative framework, the NIS enables

[479] Douglas Macbeth, 'On "Reflexivity" in Qualitative Research: Two Readings, and a Third' (2001) 7 *Qualitative Inquiry* 35, 38; Kate Lenzo, 'Validity and Self-Reflexivity Meet Poststructuralism: Scientific Ethos and the Transgressive Self' (1995) 24 *Educational Researcher* 17, 18.
[480] This is the grounded theory approach. See Section 2.4.1 for elaboration.
[481] For an explanation of the use of self-reflexivity and theoretical sensitivity, see Guideline 7 on Readiness and Guideline 8 on understanding conflict resolution. 3.10; 3.11 p. 141.

parties to understand where their losses sit on the relational chart.[482] It enables them to put aside their grief and pain, even for a while, which leaves them free to cooperatively learn from each other how best to move forward sufficiently to feel that justice has been done. This is likely even at the beginning of the mediation process as it gives the parties hope that they will not be expected to go beyond what they are comfortable to deal with at this point in time. The NIS presentation takes about 20 minutes. During which time the parties can relax into the process and develop the appropriate frame of mind that is required of a relational learner, by mirroring the demeanour of the mediator. Throughout the presentation of the NIS guidelines, the mediator would remain mindful of non-verbal cues from the parties and their reactions to certain information. The mediator would use these cues to select which party will present their opening statement first, including allowing parties to choose who will go first. The role of the mediator as relational learner just prior to the parties' statements is to screen the parties for inflexible or abusive attitudes, for lack of capacity, or for power differences, and to reflect back to the parties the underlying needs behind these shortcomings so they can be appropriately addressed.[483] It may appear that this is asking a lot for the mediator to pick up all this information from the parties' opening statements. But the fact remains that the mediator has already formed opinions about the parties from the separate pre-mediation conferences held and uses that information as well as the demeanour of the parties through the mediator's opening statement to reflect back to the parties their underlying needs.

The mediator's demeanour is significant in encouraging parties to support each other's needs, wherever possible, in order to ensure that the parties remain as equal as possible as joint relational learners planning to move forward. By remaining in 'Observer Self'[484] mode throughout the mediation process, the social constructionist mediator remains aware of their own and everyone else's perspective, as if on a balcony

[482] Ricci's chart—see appendix and Guideline 5 at 3.8.
[483] 'Appropriately addressed' may include terminating the mediation if power differences, abusive attitudes or a lack of capacity are too wide to bridge the gap between the parties. In the 1990s, the Family Court acknowledged that, no matter how willing a party may be to do what is best for their child, it is impossible to do so until sufficient time has lapsed for the parties to regain sufficient trust, communication and understanding to move forward as the parents of their child in a business-like relationship. This explains the insistence on appropriate readiness to move forward. However, it also recognised that, no matter how sensible an approach this may be, the reality of behaviour between divorcing couples does not always fit the expected behaviours.
[484] See Section 4.2.4 for elaboration of TA.

observing the interactions of all parties on a dance floor below. The mediator invites the parties to similarly engage in the social constructionist 'game in the making' by observing themselves from the balcony, dancing with each other, the mediator and all other participants.[485]

The aim of the mediator's opening statement is to assure the parties that, if an issue arises that has not been appropriately handled emotionally, the level of anger, confusion or shock regarding that issue may be sufficient to restrict any movement forward from that issue at that time.[486] The parties are reminded that only the issues that are ready to be addressed will be handled first, leaving those that come as a surprise to be handled later, if appropriate. By accepting a normative response to issues that are not ready to be handled, the pressure to settle everything is removed and parties are able to ensure better long-term outcomes for those matters that are ready to be managed appropriately. After dealing with housekeeping matters (turning off mobile phones, agreeing on the time for lunch, pointing out where the toilets are, etc) and presenting an agenda for the day's proceedings—including an outline of the social constructionist mediation process that will be followed—the mediator presents each of the guidelines, being aware of the social constructionist principles that offer the parties a means of justice. These guidelines that form the NIS are presented in the appendix in detail. The following sections present a summary of the guidelines, noting the aim of each guideline.

3.4 Guideline 1: What is Mediation?

[485] 4.2.4.

[486] To demonstrate how the RM makes possible an opportunity for parties to move beyond the chaotic phase of loss, it is important to consider the common ground of readiness to move forward on one or several issues from one of the parties. If either party or the mediator overlooks, ignores or minimises the emotional component in the mediation, this can often lead to impasse. Framing the problem as only a substantive dispute limits the options for resolving such impasses. Exploring possible emotional factors can provide real clues to avoid or work through impasse because it is often the emotional—rather than legal—issues that provide the basis for resolution. Nonetheless, the structural elements of an organisation (the macro factors) whether in workplace grievance matters or under the constraints of an Act—such as the *Workplace Injury Management Act 1998* (NSW)—can impose limitations on the types of resolution available. John Paul Lederach, a professor at the Joan Kroc Institute of Conflict Studies at the University of Notre Dame, likens presenting issues in a conflict to the structure of a window—the window is certainly important, yet once it is in place, 'We rarely look at the window. We look through the glass, focusing on what lies beyond'. John Paul Lederach, *The Little Book of Conflict Transformation: Clear Articulation of the Guiding Principles by a Pioneer in the Field* (Good Books, 2003) 49.

Guideline 1 introduces the process of mediation from a social constructionist perspective. It is designed primarily to 'comfort' parties by introducing the mediator as a fellow relational learner in a cooperative decision-making process that is confidential and voluntary. It establishes a broad vision for the mediation process and sets the parameters in which the parties will begin their relational learning process from a base of their own grounded experience from which they elicit their data. At this point, the parties' emotions of grief in relation to their loss have not been specifically addressed. Instead, the mediator is preparing and assessing the levels of emotional readiness, willingness and ability of the parties to move forward from the dispute by setting the scene for the process of relational learning.

As discussed previously,[487] whether a dispute is a workplace grievance matter or family law matter, a social constructionist mediator asks, in the pre-mediation preparation, what happened to reach the fixed positions in the dispute to create the apparent impasse between the parties. By considering the underlying emotional issues of the parties when answering this question—such as the level of pride in the quality of work/parenting and the importance of reputation that is irretrievably lost—the underlying emotional issues regarding the loss arise. This makes it possible to effectively acknowledge the loss, thereby enabling an opportunity for parties to reverse any negative response to each other during the mediation.

In facilitative[488] or any other model of mediation, including the transformative model,[489] there is no focus on the loss itself in relation to the effect it has on an emotional and substantive level.[490] Losses are only dealt with substantively in relation to minimising damages, and any emotional component is considered a hindrance to dealing with the substantive issues. However, a social constructionist perspective focuses on the interaction between the emotional and substantive issues and recognises that, without

[487] 2.4.3, p. 95.
[488] Alexander, above n 8.
[489] Bush and Folger, above n 179.
[490] Laurence Boulle, 'Minding the Gaps: Reflecting on the Story of Australian Mediation' (2000) 3 *ADR Bulletin* 3, 4–5. Reflecting on Boulle's article, he states that some aspects of mediation fit better with the desired concept of society as a process of relational learning, as opposed to individualism. Boulle recognises that there are many conceptions of justice and competing models of justice, and acknowledges that ADR and mediation provide yet another vision of justice that emphasises the direct participation of parties in relation to their personal and commercial needs and interests, rather than their legal rights. However, there is no mention of the significance of loss as part of effective resolution in the mediation process, in this or any other article on mediation that I have read.

dealing with the loss on both an emotional and substantive level, no long-term effective solution is possible.

3.5 Guideline 2: Ways of Solving Conflict

Guideline 2 places the cooperative process required for mediation in its broader societal context by reminding parties that they work in a competitive world that is not conducive to resolving relational issues, such as workplace disputes or separation/divorce. Guideline 2 outlines the norms of fairness, mutual respect and equity of exchange that underlie the expected behaviour of cooperation required for a successful mediation. It introduces the concepts of empathy[491] and understanding the differences between each other's functional styles[492] when attempting to achieve a positive outcome for both parties. It reminds the parties that, despite their differences, there are larger competitive societal forces that have affected the lives of the parties, which makes it difficult to remain team players during the mediation process.[493]

3.6 Guideline 3: What to Expect During Mediation

Guideline 3 introduces the role of the mediator as a relational learner and confirms the roles of the parties as fellow relational learners sharing relevant information and

[491] Mark H Davis, *Empathy: A Social Psychological Approach* (Westview Press, 1994); Louis A Penner et al, 'Prosocial Behaviour: Multilevel Perspectives' (2004) 22 *Annual Review of Psychology* 365; Robert B Cialdini et al, 'Reinterpreting the Empathy—Altruism Relationship: When One into One Equals Oneness' (1997) 73 *Journal of Personality and Social Psychology* 481; Nancy Eisenberg, 'Emotion, Regulation, and Moral Development' (2000) 51 *Annual Review of Psychology* 665; Philip L Jackson et al, 'Empathy Examined Through the Neural Mechanisms Involved in Imagining How I Feel Versus How You Feel Pain' (2006) 44 *Neuropsychologia* 752.

[492] See the DISC Model. Isabel Briggs Myers and Peter B Myers, *Gifts Differing: Understanding Personality Type* (Davies-Black Publishing, 1995); Condliffe, above n 6. The relevance of understanding functional style is for parties to recognise differences in communication style as the main cause for misinterpretations, rather than a wish to make each other's lives difficult.

[493] The significance of the macro factors, such as the competitive nature of the economy, on the decision-making process of the parties should not be underestimated. Gergen, Gubrium, Holstein and Bagshaw discuss the interactive nature of the macro with the micro, but not specifically in relation to the significance of loss on the mediation process outcome. No other literature that I have read specifically discusses loss and mediation. See Gergen, above n 17, 291; Gubrium and Holstein, above n 5; Bagshaw, above n 124; Heejung S Kim, Taraneh Mojaverian and David K Sherman, 'Culture and Genes: Moderators of the Use and Effect of Social Support' in Gillath, Adams and Kumkel, above n 121, 85.

listening carefully to each other for mutual benefit into the future. Emphasising a 'fair process' encourages building trust, as opposed to engaging in 'fishing' expeditions where information is sought from each other for use in court, and not for resolution. The parties are reassured that, if issues arise requiring further input, such as counselling, therapy[494] or legal advice, they will be given appropriate referrals for assistance, and only issues ready to be managed will be considered at that time.[495]

Even within statutory provisions,[496] such as in workers compensation matters,[497] impasses can be broken if the emotional elements are addressed during the mediation. Coaching or assisting parties during the confidential session to understand the feelings and obligations of the systemic restrictions under which both parties operate further enables the mediation to move forward. At such times, a social constructionist mediator would explain the systemic restrictions under which the parties operate so that the correct messages are understood, and test their assumptions to maintain sufficient curiosity for the negotiations to flow, instead of being certain that the parties' stories have ended and the matter needs determination.[498]

Whether the matter is predominantly rights based (as in workers compensation matters) or interests based (as in workplace grievances), a social constructionist mediator encourages parties to understand the other's positions and emotions to enable them to

[494] If parties demonstrate a willingness to consider the emotional effect of the loss on their own and the other party's perspective, but lack the skill to do so, a social constructionist mediator can coach each party by role-playing the viewpoints of the parties during the private sessions. Through appropriate role-play, parties can work through their feelings and appreciate those of the other side, thereby making it possible to move forward from their positions. See generally Leslie S Greenberg, *Emotion-Focused Therapy: Coaching Clients to Work Through Their Feelings* (American Psychological Association, 2009); Margaret Wetherell, *Affect and Emotion: A New Social Science Understanding* (Sage, 2012); Joseph H Obegi and Ety Berant (eds), *Attachment Theory and Research in Clinical Work with Adults* (The Guilford Press, 2009).

[495] My readings of the literature on ADR, mediation, grief, loss and social constructionism reveal that there is no focus on dealing with the emotional significance of loss on the outcome of a dispute. Moore, above n 475; Nancy R Hooyman and Betty J Kramer, *Living Through Loss: Interventions Across the Life Span* (Colombia University Press, 2006); Brandon and Fisher, above n 81; Lock and Strong, above n 41; King, Freiberg, Betagol and Hyams, above n 25; Spencer, above n 446.

[496] Mediations within statutory provisions are still determined to be 'voluntary' insofar as the parties may still 'walk out' of the process despite the fact that they are obliged to give it a go. The way the mediation process unfolds is determined by the willingness of the parties to take advice from their lawyers in relation to their rights and obligations and balance such advice with what they consider to be in their best interests. The voluntariness is a combination of their willingness, their readiness, and their ability to continue in the process.

[497] See, eg, *Workplace Injury Management and Workers Compensation Act 1998* (NSW) pt 2 div 5, s 289-289A.

[498] Douglas Stone, Bruce Patton and Sheila Heen, *Difficult Conversations: How to Discuss What Matters Most* (Penguin Books, 1999) 3.

feel heard to avoid an impasse. Once each party can understand or articulate the other's position and their reasons for feeling as they do, both may parties realise that their respective positions are not as uncomfortable a choice as they had originally thought, making it easier to move through their impasse/disagreement.

3.7 Guideline 4: Mapping the Conflict with Common Ground

Guideline 4 explains how the parties map the current conflict, which comprises two steps. For each issue, the parties consider who is affected and note that those affected may not be in the room (such as children, in-laws, grandparents or work colleagues), but still need to have their needs and fears considered if a long-term resolution is to occur. Thus, the first part is to identify who is involved.[499] The second part to 'mapping the conflict' is to define the common ground that forms the parameters in which all the disputed issues are discussed. In family law matters, the common ground focuses on the children, while, in workplace grievance disputes, the common ground could be the need for both parties to remain employees, despite the dispute. The parties' emotions of grief in relation to their loss are explored during the issue-identification phase, and the effect that these emotions have on the outcome of the mediation are explored. During the mapping stage, the mediator works with the levels of emotional readiness, willingness and ability that the parties display to move them forward from the dispute by encouraging the process of relational learning.

By focusing more closely on each party's interpretation of the dispute, parties can move beyond the chaotic phase of loss. Non-verbal signals—such as rolling eyes, sighing deeply or turning away—indicate emotional content that, once addressed in the course of the mediation, avoids further impasse and can prompt change in the parties, which can lead to change in the organisation. Once acknowledgement occurs from both sides regarding the degree of loss felt by each party, an opportunity is offered to include both parties in the decision-making process to move ahead. Such mutual acknowledgement of emotional factors enables a willingness for agreement that encourages the parties to be more responsive to their own and the other side's emotional repercussions.

[499] No other literature that I have read specifically discusses the effect of loss on the outcome of mediation. However, the work of Fletcher, Simpson, Campbell and Overall supports the significance of expectations and assumptions in determining what a dispute is about. Garth Fletcher et al, *The Science of Intimate Relationships* (Wiley-Blackwell, 2013) 323.

3.8 Guideline 5: Mapping the Conflict with Ricci's Relationship Chart[500]

The third part of mapping the conflict using a social constructionist approach is to recognise where the parties are located emotionally on the relationship chart developed by Dr Isolina Ricci in her work as a divorce therapist for children.[501] She notes that parties often feel disenfranchised after a loss if there is inappropriate attention given to the grief felt by each party.[502] Thus, a further need arises to make sense of their relationships with each other and their children following a loss.

Thus, Guideline 5 is the most crucial benchmark in that it introduces to parties how the concept of relational learning works. The chart is presented in the form of a narrative, where the protagonists begin at the phase that Ricci calls the 'acquaintance' or 'business relationship', where they know nothing or very little about each other.[503] They then enter the stage of 'friendship' where both protagonists engage in an increase in assumptions and expectations about each other—usually in a positive manner that includes growing trust, respect and understanding as they become friends.[504] This is the stage where there is an increase in emotional exchange between the parties such that 'dating' or increased private meetings occur, and positive outcomes seem possible.

If the positive assumptions and expectations about each other continue to develop, the third phase of 'positive intimacy' is reached.[505] Here, the parties' involvement or

[500] Ricci, *Mom's House, Dad's House: A Complete Guide*, above n 165, 94-110.
[501] The relationship model developed by Ricci was adopted by the Family Court as part of the court's 1990s IS for its mediation programme in the Sydney Registry.
[502] Glassock and other loss writers agree. See, eg, Glassock, above n 15; Doka, above n 233; Machin, above n 149.
[503] Fletcher et al, above n 500, 176; Garth Fletcher, *The New Science of Intimate Relationships* (Blackwell Publishing, 2002) 260.
[504] Fletcher et al, above n 500, 176; see generally Colin M Parkes and Joan Stevenson-Hinde (eds), *Attachment Across the Life Cycle* (Routledge, 2006); Hooyman and Kramer, above n 496.
[505] 'Positive intimacy' is Ricci's term. Support for the concept of positive intimacy is found in Fletcher et al, above n 500, 181; Greenberg, above n 466, 259; see generally Gillath, Adams and Kumkel, above n 121. The essential point about positive intimacy is that, irrespective of the age of the parties or the information they are given about the other side, they engage in assumptions and expectations that are all positive. Everything is seen as agreeable, which makes the effect of the loss of expectations even greater when they realise that their positive assumptions were inaccurate. This makes the feelings of negative intimacy even stronger because they cannot carry the burden of the mistake alone, and hence involve the

investment and intensity of emotional exchange reaches its highest positive level, so that they can comfortably contact each other at any time to discuss any issue, such as telephoning at two o'clock in the morning to discuss why they cannot fall asleep. It is at the stage of 'positive intimacy' that most parties marry or live together—a stage that can be reached very quickly in whirlwind romantic affairs. It is at this stage of positive intimacy that confidences are protected, thereby leading to high positive disclosure of emotional exchanges, which leads to a high positive level of implicit agreements and assumptions, where everything appears to be agreeable.

Once living arrangements become well established, parties become aware that some of their expectations about the behaviour of the other have not been met. The parties then assess their own assumptions when entering the relationship, and either find their assumptions wanting or (more likely) feel justified in their own worldview of what one should expect from another's behaviour and subsequently feel grossly wronged in the relationship. When the feeling of being 'wronged' outweighs the need to address their assumptions or consider (let alone accommodate) the other's worldview, resentment and discord arise. Once there is sufficient discord, the protagonists enter the stage of 'negative intimacy', where separation occurs, which can be followed by divorce.[506] It is at this stage that parties usually enter the mediation process—when the involvement, investment and intensity of emotional exchange between them is at its highest negative level.

Ricci's chart clarifies that, during the phase of negative intimacy, parties can seek to hurt each other in response to the hurt they feel. At this level, parties with little skills to consider the issues from the other party's perspective begin blaming, which leads to a 'good guy, bad guy' scenario[507] that often requires litigation to resolve. Thus, the aim is not to return the parties to positive intimacy, where assumptions and expectations were not met, which led to the loss of the relationship as it was believed to be. Rather, the aim is to reach a stage where there are no assumptions and expectations of the other's behaviour by returning to zero and 'wiping the slate clean'—returning to the stage of

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other side. See Marilyn J Montgomery, 'Psychosocial Intimacy and Identity From Early Adolescence to Emerging Adulthood' (2005) 20 *Journal of Adolescent Research* 346.

[506] Fletcher et al, above n 500, 181; see generally Obegi and Berant, above n 495; Hooyman and Kramer, above n 496; Wetherell, above n 466; Parkes and Stevenson-Hinde, above n 475.

[507] Fletcher et al, above n 500, 222.

'acquaintance' or 'business relationship'.[508] The protagonists then must engage again in formal courtesies, public structured meetings, explicit agreements with low risk of personal disclosure, and high personal privacy as they leave the competitive stage of negative intimacy, where confidences are no longer respected and disloyalty reigns. However, going from negative intimacy to acquaintance is not easy for any party. The aim of Guideline 5 is to ensure that parties give themselves the opportunity to make no assumptions by acting as acquaintances, rather than to choose the victim mentality, which strengthens the dispute and keeps them in the phase of negative intimacy.

The phases sometimes overlap; thus, the party who first feels uncomfortable in the relationship tends to become insecure and starts to find faults with the other. They move from the original positive assumptions of friendship, which are now obviously wrong, to having negative assumptions and expectations of the other, before they have time to reflect on their own involvement in forming the assumptions and expectations with which they entered the relationship. During the disenchanted phase of early negative intimacy, the uncomfortable party loses trust, respect and loyalty for the other to the point that the parties act according to their worst behaviour, with no consideration for how their behaviour affects the other party and potentially the outcome of their dispute.

The role of the mediator with Guideline 5 is to assist parties to realise that they each contributed to their current conflict. In order to move from negative intimacy to acquaintance, the relationship between them must become more formal so that they can jointly solve their problems with no assumptions, but with explicit expectations and formal courtesies, which begin during the mediation phase. In a family law matter, such explicit agreements could take the form of the parties greeting each other at a specified time at the front door of the child's home to return the child from spending time with the other parent. Going from negative intimacy to a business relationship means going from implicit agreements and assumptions to explicit agreements, as the parents organise a precise date and time for contact with their children. They move from high-risk disclosure (where everything about each other is known) to low-risk disclosure because no questions are asked about the new partner. This is easier said than done, and the parties know it. Feelings of loss run very deeply and affect the parties' capacity to

[508] Ibid 323.

think rationally.[509] Unless these feelings are addressed by normalising them, the parties will find it very difficult to move forward.

3.9 Guideline 6: Understanding The Process of Separation[510]

Guideline 6 is a summary of the work from Elizabeth Kubler-Ross on death and dying that outlines the basic stages of grief arising from the shock of loss. It offers a 'normalising benchmark'[511] to parties by informing them that the normal process for dealing with unexpected events is shock, and that shock is responded to by denial, disbelief, confusion and an initial lack of acceptance of the loss. Once parties overcome the shock that their expectations will not be met, anger arises—first at oneself and then (because the blame on oneself can be too heavy to bear) at the other party or even a third party, such as the other party's family.[512]

Although the stages of overcoming grief must be presented in sequential order for the sake of clarity,[513] the mediator reminds the parties that their specific reactions to the loss may not be as clear-cut as the stages indicate. For example, the stage following anger is sadness, but the sadness of a previous issue may still be affecting the shock of a new issue, thereby compounding the anger and grief for the losses incurred through the separation. Thus, a party could experience multiple levels of anger and sadness, depending on which issue is being dealt with at any particular time. The sadness may manifest for parties in feelings of worthlessness, withdrawal, loss of trust, low self-esteem and depression before there is a gradual acceptance of the loss in order to move

[509] Fletcher et al, above n 500, 114, 305; Paul A Boelen, Loes Keijsers and Marcel A van den Hout, 'The Role of Self-Concept Clarity in Prolonged Grief Disorder' (2012) 200 *Journal of Nervous and Mental Disorder* 56, 62.
[510] Kubler-Ross, above n 382. In this, she outlines the basic stages of grief arising from the shock of loss.
[511] For example, the inclusion of the process of separation in Guideline 6 was to reinforce the significance of readiness. It highlights the fact that certain issues may arise during the mediation process that the parties are unable to manage at that time due to shock, anger or sadness about the issues. If that is the case, the mediation is not deemed a failure, and the parties are reminded that more time is required to deal with the unexpected issues that arose. Each guideline is designed to feed into the concept of relational learning and prepare the parties to effectively cooperate during the mediation process.
[512] Kubler-Ross, above n 382. Kubler-Ross notes that phases are not always as distinct as presented, and parties may waver from moving forward to sadness to shock to moving forward again, as they attempt to accommodate the loss.
[513] See generally Worden, above n 29; Glassock, above n 15; Neimeyer and Sands, above n 233; Doka, above n 13; Kenneth J Doka (ed), *Living with Grief: After Sudden Loss, Suicide, Homicide, Accident, Heart Attack, Stroke* (Routledge, 2014).

forward to develop and cope with new roles.[514] The parties can reorganise or reconstruct their lives with a greater sense of personal growth for the parental relationship or long-term workplace project only once the feelings of grief from the loss can be normalised. Guideline 7 confirms the necessity of readiness for parties to move forward.

3.10 Guideline 7: Readiness to Move Forward

Guideline 7 demonstrates the different timing of the separation process for each party. When expectations are not met in a joint project, one party is usually more ready to move forward. The ready party has probably already passed through the many stages of shock, anger, sadness and guilt to understand the final inevitability of separation prior to announcing the request for separation to their partner. When the partner learns this, they must also move through the same stages of shock, anger, sadness and so forth, prior to being ready to move forward and reconstruct their life.[515]

Conflict arises when parties are not in the same relational space—when one is ready to move forward on a particular issue, while the other is not. This causes the chaotic emotions and feelings of loss, especially from the party left behind. Guideline 7 confirms that the only time that a dispute can be successfully resolved by mediation is when both parties are ready to move forward, even for different reasons.[516] Guideline 7 removes the pressure from parties to settle issues that come as a surprise, and offers time for these issues to be 'normalised' prior to moving forward.[517]

3.11 Guideline 8: Understanding Conflict Resolution

The need to understand the separation process is indicated by Guideline 8 which graphically illustrates how two parties previously in a situation of intimacy will, after separation, go in opposite directions, with conflict arising and with understanding, communication and trust plummeting until a point of insight for common ground occurs

[514] Neimeyer and Sands, above n 233; Doka, above n 484; Sourdin, above n 149; Brandon and Fisher, above n 81, 81.
[515] Fletcher et al, above n 500, 17; Neimeyer and Sands, above n 233; Doka, above n 484; Sourdin, above n 149; Brandon and Fisher, above n 81, 81.
[516] Fletcher et al, above n 500, 17; Neimeyer and Sands, above n 233; Doka, above n 484; Sourdin, above n 149; Brandon and Fisher, above n 81, 81.
[517] See Neimeyer and Sands, above n 233; Doka, above n 484.

between them. In family law, such a point of insight may come from the parents' understanding that their children have a right to enjoy both of them as parents.

This insight offers an opportunity to parents to de-escalate the conflict between them by increasing their understanding of each other's positions.[518] Increasing communication and trust between parties is the specific task of the NIS guideline that enables parties to function in as civil and friendly a manner as they are ready to live with, while parenting their children. Where trust is no longer possible between parties, maintaining the best interests of the children becomes a very difficult process if one parent is legitimately concerned about their own safety, which can inadvertently be transferred onto their children.[519] This lack of trust prevents a permanent space for 'business functioning' where a civil relationship can exist and where the parties can hear and accommodate each other's perspective. Time is needed to assist these parties to address their concerns.[520]

3.12 Guideline 9: Preparation for Negotiation

Guideline 9 reintroduces the parties in ongoing relationships to the need to see the dispute from the other party's perspective because each party knows the dispute from their own perspective very well. Seeing the dispute from the other side enables parties to think of a solution as if they were the other party,[521] thereby reaching some common ground or at least appreciating the constraints and boundaries within which the dispute can be resolved. Guideline 9 further enables parties not only to think of the other party's negotiating style, but also to co-create a possible solution to each issue that is at least as

[518] Sourdin, above n 149, 18; Brandon and Fisher, above n 81, 81; Spencer, above n 446, 129.
[519] Cooperative Legal Service Delivery Program Unit, Legal Aid, 'Domestic Violence AVERT Training' (Speech delivered at DV AVERT, Central Coast, August 2013); Joel Best, *Threatened Children* (University of Chicago Press, 1990); Julia Hall, *Children's Human Rights and Public Schooling in the United States* (Sense Publishers, 2013) 28.
[520] Fletcher et al, above n 500, 180.
[521] In cases where there will be ongoing relationships after separation—such as in some workplace disputes and divorce proceedings— it is easier to negotiate into the future if each party is prepared to see the dispute from the other's perspective. However, in building and other disputes where the parties no longer have any further contact, neither party is necessarily interested in seeing the dispute from the other perspective and, at best, a settlement will occur with which neither party is particularly satisfied, but with which they can live.

good as any negotiated agreement without the intervention of a third party, and is better than the worst scenario that could occur without any agreement.[522]

The location and timing of the mediation is of strategic importance.[523] For example, conducting a mediation on the workplace premises where the dispute occurred could inhibit the ability of the parties to speak freely about their issues. Similarly, not acting in response to a complaint for a long period may lead the complainant to believe that their issues are not being considered seriously. These factors constitute part of the mediator's pre-mediation preparation, and are made known to parties if needed to address any negative consequences.

3.13 Guideline 10: Questionnaire to Help Clients Prepare for Mediation

[522] The best alternative to a negotiated agreement is termed 'BATNA' and the worst alternative to a negotiated agreement is termed 'WATNA'.
[523] Moore, above n 475, 370–1.

The final guideline of the NIS is presented in the form of a questionnaire[524] in which the mediator asks the parties to answer the questions for themselves as part of their preparation to present their opening statement. The questions are read aloud to confirm the need to see the dispute from the other party's perspective (to develop sufficient empathy for the other side) and to confirm the need to be future focused (otherwise termed 'BATNA' and 'WATNA').[525] By answering the questions genuinely, parties can prepare to reconstruct their own story by reappraising their views of the dispute based on what is seen, heard and learnt at the mediation.[526] The answer to the last question, Question 10, sets the scene for relational learning and determines the readiness of the parties to genuinely engage in the next learning phase of the mediation process, or to remain positional.[527] This guideline concludes the original IS as part of the NIS.

3.14 Extending the IS by Using the DISC

In explaining the structure of the NIS, it is important to reiterate that the NIS extends the content of the IS to include a very basic model of the DISC as a framework to ask questions that make sense of loss by incorporating an understanding of differences in the negotiating styles of the parties. The version of the DISC used is a brief 'test' based on the psychological research of Myers-Briggs[528] to assess the basic thinking and feeling styles of the parties. The premise behind using the DISC is primarily to demonstrate to parties that most miscommunication in disputes is largely attributable to differences in such thinking and feeling styles. By accepting that each party did not deliberately seek, at the onset of a relationship, to make the life of the other difficult, the DISC offers parties a better understanding of the differences in style and motivation

[524] The readiness of the parties was found to be a significant factor in dealing with losses arising from divorce, and the IS was an effective means for screening and determining the readiness of the parties.
[525] The best alternative to a negotiated agreement is termed 'BATNA' and the worst alternative to a negotiated agreement is termed 'WATNA'. Sourdin, above n 149, 18; Brandon and Fisher, above n 81, 81.
[526] See generally Neimeyer and Sands, above n 233.
[527] In the Sydney Registry of the Family Court in the 90s, readiness for participation in the mediation process was assessed by accepting the invitation to remain after the information session was given. Through a questionnaire, the parties were assessed on how far along the 'shock' criteria scale they had come, and whether they were now able to move beyond the stage of negative intimacy to the business level, as outlined by Ricci's description of relationships chart, discussed in Guideline 4.
[528] See generally Myers and Myers, above n 464; Jung, above n 6; Briggs and Briggs, above n 6; Keirsey and Bates, above n 6; Eysenck, above n 6; Marston, above n 6. See Section 1.9 for an explanation of the DISC Model.

between them. Understanding style differences offers parties a better chance to be more empathic with each other, or at least to better let go of the hurt restraining them from moving forward.

Briefly, the 'D' in DISC stands for 'direct' where the personality type is an extrovert, is task focused and measures success by how many tasks have been completed. They may be somewhat unaware of any feelings of hurt caused to teammates that may have been ignored or mishandled. The 'I' stands for 'influencer', who are extroverts, but are people focused, rather than task focused, and measure success by how much they believe people like them. Influencers focus on getting the job done and make excellent marketing people. The 'S' stands for 'stabiliser', who are introverted and people focused. They are the counselling types, who are always ready to hear about someone's loss, and measure success by the level of harmony around them. Finally, the 'C' stands for 'conscientious', who are introverted, but task focused, and measure success by how much they know about a project. They make excellent accountants and solicitors because details are very important to them.[529]

The theory behind the DISC[530] is that there is a predisposition to prefer one of the four types when under severe pressure, despite the fact that people possess elements of each type. The DISC enables an enhanced understanding of collective learning as being relationally constructed and actively improvised with others, and argues for a new vocabulary of competence to which more interdisciplinary research can add further insights. With the assistance of the DISC, the NIS invites parties to use their theories grounded in their experience of loss and compare it to the interdisciplinary research of data about loss and relational learning to collectively learn how they can reconstruct their ongoing relationships. This comparison enables parties to build a new vocabulary of competence to relate with their current negotiation styles into the future.

Such collective information from the investigations of daily work and crucial incidents is placed into a relational framework during the mediation process, thereby acting as

[529] See appendix.
[530] The literature of the DISC model is extensive, as shown in footnote 499. The purpose of using the DISC in the RM is to enable participants to view the dispute based on the misunderstandings arising from differences in communication styles, rather than arising from a willingness to harm the other. However, the focus is on correcting any misinterpretations in order to move forward, not to debate any differences in functional style.

change triggers for the parties. The nature of the agreements reached through such a social constructionist approach suggests a useful bond between the theories of organisational change and development with theories of workplace learning, such that the quality of human interaction that emerges supports the concept of collective competence,[531] rather than the concept of individual competence. Thus, using the RM as a social constructionist approach to mediation helps maintain sustainable long-term resolutions through the process of imparting relational learning and acceptance of relational learning by parties. It has the potential to challenge individual and group work roles and to change organisational work practice through the concept of collective—rather than individual—competence.[532]

Thus, the NIS forms the focal point for addressing all manner of losses in disputes from a variety of different cultural workplace settings involving ongoing relationships, such as workplace grievance disputes or family law matters.[533] For the mediator, the purpose of the NIS is to enable quick access to the level of readiness of the parties, which alerts the mediator to the level of reality testing required to establish a sound resolution with sustainable long-term goals in mind. For the parties, the NIS aims to inform them sufficiently about the current psychological research regarding loss and relational learning. This helps them make informed decision about the need to change their existing relationship from one of negative intimacy (that includes the most extreme negative feelings regarding their loss) to one of a business relationship or acquaintance in order to form an agreement. In this manner, understanding the psychology around loss better enables parties to more effectively handle their dispute.

Using the NIS makes it possible to conduct the required analysis for the cultural setting for each dispute, and to determine—based on the strength of that analysis—whether to

[531] Nick Boreham, 'A Theory of Collective Competence: Challenging the Neo-Liberal Individualisation of Performance at Work' (2004) 52 *British Journal of Educational Studies* 5, 11.
[532] Ibid.
[533] Mediations that I conducted ranged culturally from commercial Farm Debt mediations under the statutory scheme to commercial national and international disputes. The former often dealt with farmers unable to fathom the full meaning of the loss, and who knew so little about their own financial circumstances that Farm Debt counsellors were required to advocate on their behalf. The latter could be private CEOs of multimillion-dollar mining companies who were well aware of the losses incurred and dangers of participating in litigation, and perfectly capable of resolving issues on a personal and structural level to improve the workings of the company on a national and international basis. It was useful to have a template of dispute resolution that could comfortably cope with both extremes—hence the need to develop the RM.

use further tools, such as the short version of the DISC (Myers-Briggs)[534] to further clarify differences between personality types and styles of relational functioning.[535] In addition, since all law is about relationships,[536] knowledge of the readiness of the parties—as defined under the 'grief and loss' parameters of the NIS—is useful for all areas of law involving mediation as a means of access to justice. For example, there is an inversely proportional close link between grief and the readiness of parties to move forward from a dispute. The more the grief, the less ready the party to move forward, whether the grief takes the form of denial, anger, sadness, depression or withdrawal.[537] The need for acknowledgement from the other party of the effect of the loss on a party's worldview must be addressed in a collective manner—by the mediator and the other party—before an enduring agreement can be reached.

This need for acknowledgement from the other party about the effect of the loss on a party's worldview is further demonstrated when disputing parties need to have 'their day in court'. In order to move forward from any dispute, both parties must collectively be ready to set aside their grief arising from the loss, especially when the original loss of reputation and loss of status are vital factors to the identity of the parties. Mutual acknowledgement is reminiscent of Eric Berne's findings about the need for what he calls 'recognition hunger'[538] in TA, as will be discussed in Chapter 4.

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[534] The 16 Myers-Briggs Personality Types (16-PF) is an instrument that tests for personality type, not for ability. Personality type indicates how individuals view their world. The DISC model is a simplified version of the 16-PF that has four categories on two axes, based on extraversion–introversion and task orientation–people orientation. See Section 1.9 for elaboration of the DISC Model.

[535] Organisations are now more specific in the use of their requirements for workplace grievances, and now stipulate how the mediator must conduct the mediation. With the permission of the parties, the mediation would be extended by an extra day or two to inform the parties about each other's functioning styles, which would assist them to move forward to a workable long-term resolution of issues. Such a resolution often entailed a complete restructuring of the floor plan of the workplace from open-floor plans to private cubicles with screens to create work centres that were more conducive to greater productivity for the personality types involved.

[536] Even if it is about the relationship between rules and a code of legislation.

[537] Based on 20 years of grounded experiences from many mediations.
Dennis Klass and Amy Y M Chow, 'Culture and Ethnicity in Experiencing, Policing and Handling Grief' in Robert Neimeyer, Darcy Harris and Howard Winokuer (eds), *Grief and Bereavement in Contemporary Society: Bridging Research and Practice* (Routledge, 2011) 341; Margaret Stroebe, 'Coping with Bereavement: A Review of the Grief Work Hypothesis' (1993) 26 J*ournal of Death and Dying* 19; Margaret Stroebe and Henk Schut, 'The Dual Process Model of Coping with Bereavement: Rationale and Description' (1999) 23 *Death Studies* 197; Margaret Stroebe and Henk Schut, 'Models of Coping with Bereavement: A Review' in Margaret Stroebe, Robert Hansson, Wolfgang Stroebe and Henk Schut (eds), *Handbook of Bereavement Research: Consequences, Coping, and Care* (American Psychological Association, 2001); see generally Margaret Stroebe et al (eds), *Handbook of Bereavement Research: Consequences, Coping, and Care* (American Psychological Association, 2001).

[538] See 4.2.4 for elaboration of 'recognition hunger' in TA.

3.15 Conclusion

Chapter 3 has demonstrated how insights from the psychological literature relating to loss [539] may be translated into methodology to deal with loss. It has used a constructionist view of knowledge as an example of the argument that theoretical ideas about dispute resolution are implemented in the RM. It began by asking: how does understanding the psychology of loss contribute to a more effective means of dispute resolution as an access-to-justice measure? To answer this question, it explored the constructionist view of knowledge as the basis on which the RM was built as the appropriate methodology to conduct mediations in a relational world to effectively deal with loss. This chapter has developed the third proposal of the thesis—that the way to move forward from a dispute is to first analyse the loss or deconstruct it from the perspective of the Observer Self.[540]

Part 1 provided a historical background to the RM. It included an introduction of how the mediation practices in the Family Court's Sydney Registry in the 1990s incorporated psychological insights as part of the substantive content of its IS, and argued that the IS can be understood as the predecessor of the NIS in the RM. It outlined the substantial differences in the way the IS was used from the way the NIS was used, and outlined the new role of the mediator as relational learner, both in the pre-mediation phase and during the course of the mediation. It ended with examples of how the RM can be used in rights-based or interests-based disputes to overcome impasse.

Part 2 further developed the arguments presented in Chapter 2—that there are parallels between grounded theory and the RM as constructionist research. It proposed that the parallels stem from a need to develop a framework to ask questions that makes sense of loss through the process of relational learning. To that effect, the practice of the NIS was analysed to illustrate the ideas of grounded theory/RM in action to demonstrate how social constructionism informs grounded theory, which subsequently informs the concept of the RM. That is, it develops an argument that the RM can be understood as a

[539] As discussed in 2.4.3.
[540] Note that the 'Observer Self' includes not only looking at the dispute from your own and the other party's perspective, but also seeing it from the perspective of everyone who may be involved, including the mediator, as if standing on a balcony observing yourself and everyone else's feelings and thoughts. Sourdin, above n 149.

method of using grounded theory to organise mediation and analyse or deconstruct the loss.

This chapter concluded with an exploration of how the 10 guidelines of the NIS can be used as an enabling device for the social constructionist mediator to work with the levels of emotional readiness, willingness and ability of the parties as they enter mediation in an attempt to move forward from their dispute. The NIS provides a tangible basis for parties to measure themselves qualitatively in multiple contexts against two distinct norm benchmarks: bereavement, through understanding the effect of loss and grief on the outcome of a dispute, and meaning reconstruction, through relational learning, to move away from the dispute. Thus, this chapter has explained how the practice of the RM turns the mediator and parties into relational learners who analyse their own reactions in thoughts and feelings regarding their losses through glimpsing the ordered pattern formations from each other's perspectives around the loss. This leads to a discussion of what constitutes relational learning, which is the topic of the following chapter.

Chapter 4: Reconstructing the Loss

> We think of conflict as a linear process requiring effective resolution. But the most important conflicts in people's lives do not end—they endure in one form or another, sometimes for many years. This presents both a major challenge and a major opportunity for conflict interveners. By restricting our goal to resolution we often fail to address the most serious struggles in people's lives.[541]
>
> Bernard Mayer

4.1 Introduction

Having seen in Chapter 3 how the practice of the RM may turn the mediator and parties into relational learners, Chapter 4 now analyses the concept of relational learning to establish that mediation conducted in this manner has a wider import than simply helping parties resolve their immediate dispute. It discusses the fourth proposal of the thesis—that moving forward from a dispute occurs best when parties accept responsibility to change their belief systems around their losses (reconstruct their loss). Chapter 4 differs from the ideas presented in Chapter 2 because it provides a theoretical basis for understanding relational learning, which is the foundation for the social constructionist model of mediation or the RM. It describes how relational learning becomes the process of meaning reconstruction around loss. To substantiate the fourth proposal, this chapter is divided into three parts.

Part 1 connects Dewey's pragmatism and Kelly's personal construct theory to deconstruct relational learning into its component parts—namely, into personal constructs, mindfulness and TA.[542] The component parts intertwine to become the ebb and flow of the process that I have termed 'relational learning'. Part 2 connects macro and micro forms of dispute resolution. This part discusses the difference between dispute resolution and problem solving, as an interplay of macro and micro forms of dispute resolution that affect and are affected by each other. It explains how both

[541] Bernard Mayer, 'Staying with Conflict: Working with Enduring Disputes in a Time-Limited Context' (Speech delivered at the LEADR 'kon gres Conference, Sydney, 8 September 2013).
[542] These component parts come from my own analysis and understanding of the concept of relational learning, derived from my practical experience as a mediator during the last 20 years.

dispute resolution and problem solving contribute to a theoretical explanation for a social constructionist model of mediation, where the justice system is itself seen as a construct.[543] It describes how the micro-elements of mediation are linked to the macro-elements of access-to-justice arguments, as exemplified in TJ, and demonstrates that the RM is attempting to do in the private sphere of ADR what TJ does in the public sphere of criminal law.[544] Part 3 applies the above theoretical insights to generic mediation scenarios in workplace and family law disputes. It focuses on two main ideas: (i) how the NIS helps and (ii) how the RM can operate as a toolkit to enable parties to become relational learners.[545]

The argument is made that accepting responsibility to change the belief systems around loss (reconstructing loss) serves to more effectively manage disputes in a relational world, especially when the parties have ongoing relationships. A theoretical explanation for a social constructionist model of mediation focuses on implementing the theories behind the readiness (maintaining workable personal constructs around loss), willingness (mindfully accepting responsibility for change) and ability (making decisions from Adult to Adult[546]) of parties to consciously engage in meaning reconstruction. In brief, it is argued that the antecedent ideas of the RM can be linked to Dewey's pragmatism, especially in relation to the practical philosophies of positivism and postmodernism. Therefore, it is necessary to outline how Dewey's pragmatism is linked to Kelly's understanding of personal constructs to analyse (or deconstruct) relational learning in its component parts.

Accepting the responsibility to consciously engage in meaning reconstruction around loss is the first step for parties to develop their own theoretical explanation or story

[543] By the parties and for the parties.
[544] See footnote 497. In mediations bound by statutory provisions, the NIS also includes information about the constraints of the legislation on the parties but is still an attempt to do in the private sphere to link the micro-elements of mediation to the macro-links to access to justice arguments as exemplified in TJ. See for example, note 24 in the Workers Compensation example.
[545] It discusses the importance of the pre-mediation confidentiality process, during which the social constructionist mediator can best ascertain each party's view of the facts that led to their losses, prior to attending the mediation process. The confidential pre-mediation session enables parties to concentrate on how best to co-create their future during the mediation process, instead of investing time and emotional energy discussing the past. It also demonstrates how the information from the benchmark NIS unfolds to assist parties during the mediation. Part 2 presents the RM as a mediation toolkit in an attempt to present a theoretical explanation that outlines how the ebb and flow of relational learning ultimately leads parties to co-construct a new reality that better endures the loss. It notes that the focus of being a mediation toolkit distinguishes the RM from other traditional models.
[546] The TA model is discussed later in this chapter.

(narrative) for their loss as their own social constructionist model of mediation. Generalising this micro process to include the macro-elements enables a theoretical explanation to be developed from a holistic perspective to enable a social constructionist model of mediation that can more effectively endure loss.[547]

4.2 Part 1: Analysing the Process of Relational Learning

Dispute resolution has been hailed during the past 10 years as an engine for innovation and economic growth.[548] However, the quotation by Bernard Mayer at the beginning of this chapter indicates a need for a more effective way forward in dispute resolution that better encompasses the long-term implications of ongoing conflict . To that effect, this thesis proposes that the need to handle grief and loss is a key factor for living more effectively with ongoing and enduring conflict.[549]

I argue that, by effectively handling the degree to which parties are ready, able and willing to reconsider the effect of their loss on their worldviews, a way to accept Mayer's challenge emerges that not only to deals with the parties' immediate concerns, but also prepares them in a meaningful way for their long-term challenges. I argue that handling grief and loss during the process of mediation (as social constructionism in action) becomes a more effective access-to-justice measure in the wider social fabric of democratic Western culture.[550] By showing that the RM has a long history of antecedents in other practical philosophies—namely, positivism, pragmatism and postmodernism—I hope that the gap between practitioners and researchers of dispute

[547] See Margaret S Archer, 'Sociology for One World: Unity and Diversity' (1991) 6 *International Sociology* 131.
[548] 'Dispute resolution' can now be included with problem solving and critical thinking as twenty-first-century skills to be incorporated into education standards and assessments. Linda Stamato, *The New Age of Negotiation* (July 2004) Ivey Business Journal: Improving the Practice of Management <http://iveybusinessjournal.com/topics/the-workplace/the-new-age-of-negotiation#.UpvutdIbCs0>.
[549] Although there is a high degree of interest in resolving disputes, the effect of loss and grief on parties' outcomes in dispute resolution and mediation in particular has been largely ignored, despite there being a great deal written about loss and grief in the psychological literature. See generally Glassock, above n 15; Doka, above n 13. Berschied argues that advances in relationship science increasingly require an integrative approach that applies frameworks models and methodologies that transcend disciplinary and theoretical boundaries. See generally Berscheid, 'The Greening', above n 127, 260; Berscheid, 'Searching for the Meaning', above n 127.
[550] Bill Warren, 'Kelly's Personal Construct Psychology and Dewey's Pragmatism: Some Direct and Some "Intellectual Context" Aspects' (2010) 7 *Personal Construct Theory and Practice* 32, 39; Albert Bandura, 'On the Functional Properties of Perceived Self-Efficacy Revisited' (2012) 38 *Journal of Management* 9-44.

resolution/conflict theory[551] will be reduced (if not closed), so that a theoretical explanation for a social constructionist model of mediation can emerge. Thus, in pursuing the fourth proposal of this thesis—that, to move forward from a dispute, the original meaning attributed to the loss must be reconstructed—I propose that Dewey's theory of pragmatism and Kelly's personal construct theory provide a response.[552]

This thesis proposes that the theories of Dewey and Kelly relate to ongoing or enduring personal conflict and to the notion of 'justice' as understood in the context of a democratic Western culture. These two theories demonstrate how micro-elements, such as relational learning and meaning reconstruction, integrate to affect and be affected by the worldviews of the parties in ongoing conflicts. However, I do not aim to enter a philosophical discussion about pragmatism. Instead, I rely on Warren's[553] analysis, which is well recognised in the literature, to extend these ideas to an analysis of dispute resolution and mediation in particular. In this manner, I argue that pragmatism can be considered the historical antecedent to the RM. I rely on Warren's analysis of the connection between Dewey and Kelly's views because he presents a concise summary of the historical background of Dewey's pragmatism and Kelly's personal construct theory.[554]

4.2.1 Kelly's Personal Construct Theory

I begin with a short detour about Warren's insight to the connection between Dewey's and Kelly's views. My proposal is that outlining the development of personal construct theory simultaneously outlines the basic component of relational learning and places it

[551] Researchers who disseminate scientific knowledge to society. See Gillath, Adams and Kunkel, above n 131, 7.
[552] Warren, above n 520, 32, 35.
[553] Ibid.
[554] Warren includes a summary of the contribution of other authors who both agree and disagree with his analysis. See, eg, Beverly M Walker and David A Winter, 'The Elaboration of Personal Construct Psychology' (2007) 58 *Annual Review of Psychology* 453, 455; Henderikus J Stam, 'Personal-Construct Theory and Social Constructionism: Difference and Dialogue' (1998) 11 *Journal of Constructivist Psychology* 187, 196; Albert Bandura, 'On the Functional Properties of Perceived Self-Efficacy Revisited' (2012) 38 *Journal of Management* 9-44. A thorough search of the literature on personal constructs has revealed very few authors who are against Warren's analysis. In fact, an analysis of the research demonstrates very little understanding of loss and trauma in relation to mediation. See, eg, George A Bonnano, Meren Westphal and Anthony D Mancini, 'Resilience to Loss and Potential Trauma' (2011) 7 *Annual Review of Clinical Psychology* 511–35; Crystal L Park, 'Making Sense of the Meaning Literature: An Integrative Review of Meaning Making and its Effects on Adjustment to Stressful Life Events' (2010) 136 *Psychological Bulletin* 257–301; Laura A Kings et al, 'Positive Affect and the Experience of Meaning in Life' (2006) 90 *Journal of Personality and Social Psychology* 179–96.

accurately in its historical perspective. This is important for my argument that relational learning occurs as a result of the interplay of mindfulness, TA and the personal constructs of the parties—a concept that has developed during my last 20 years of mediating, and that I claim is substantiated by IS theorists. I further claim that this concept is substantiated by Warren's analysis of Kelly's personal construct theory, which I explain below.[555]

In brief, Warren states that Kelly's personal construct psychology (PCP) was heavily influenced by Dewey's ideas,[556] which are as follows:

1. pragmatism is where people's ideas are grounded by the practical problems and requirements of life
2. pragmatism as instrumentalism is where the environment becomes a block to people's desire for a meaningful way forward
3. the challenges of moving forward from a dispute assist to develop personal growth
4. personal growth is a potential based on dependence and plasticity, and constitutes the principle of life
5. personal growth and the practical activities of human life are interconnected, as are the disciplines of psychology, psychiatry and education
6. progressive education should be grounded in and by the practical problems of life and living
7. the development of dispositions and fixed habits can lead to a notion of stimulus-response, where the mind is seen as separate from the body; Dewey rejects this notion of separation or the dualism of theory and practice, which he says should be removed or corrected
8. the experience of consciousness is more than just being reactive, and is heavily embedded in the notion of personal growth.

Kelly developed the idea of personal construct theory, which views individuals as 'scientists' in formulating a worldview around which they can make sense of their world.[557] In particular, Kelly was heavily influenced by Dewey's notions of pragmatism as instrumentalism. Warren notes Dewey's conclusion that because 'growth is the

[555] I discuss the IS theorists later in this chapter.
[556] Warren, above n 520, 32, 37.
[557] Kelly, above n 255.

characteristic of life, education is all one with growing; it has no end beyond itself'.[558] For Dewey, growth is the principle of life, where the past and speculation about the past must be seen as an instrument, providing knowledge to predict the future by forming hypotheses drawn from the past that must be tested for use in the future.[559]

Missing from the literature on dispute resolution is Dewey's notion of pragmatism as instrumentalism.[560] In this idea, the 'environment' is seen as an instrument blocking one's way, or as something that is not immediately or automatically yielding to one's personal needs and interests, thus forming a 'problem' or dispute. Dewey's 'idea' or 'set of ideas' is seen as something that originates in response to the environment's failure to yield to the desired outcome, which is to move forward in a meaningful manner. That is, Dewey's idea is an instrument with which, through thinking, one can work on the environment.[561] Kelly's PCP offers something to educators as a significant alternative to behaviourism (stimulus-response theory) in the classroom. Kelly's 'person as the scientist' approach to forming personal constructs or models as a tool to analyse and extend the personal process of 'sciencing' can explain and interpret one's own immediate world. His ideas could be a forerunner to the grounded theory approach to research, and have become the first component theory in the process of relational learning in the RM. I now explain how each element of the RM and Kelly's PCP interconnect.

4.2.2 Kelly's Personal Construct Theory and the RM

Kelly's PCP offered a framework against which the RM could be developed. It also offered an explanation of the relevance of relational learning to dispute resolution and to

[558] John Dewey, *Democracy and Education* (The Free Press, 1966) 53; Warren, above n 551, 32, 36.
[559] 'Anticipation is … more primary than recollection; projection than summoning of the past; the prospective than the retrospective. Given a world like that in which we live, a world in which environing changes are partly favorable and partly callously indifferent, and experience is bound to be prospective in import; for any control attainable by the living creature depends upon what is done to alter the state of things. Success and failure are the primary "categories" of life; achieving of good and averting of ill are its supreme interests; hope and anxiety (which are not self-enclosed states of feeling, but active attitudes of welcome and wariness) are dominant qualities of experience. Imaginative forecast of the future is this forerunning quality of behavior rendered available for guidance in the present.' Dewey, above n 559, 13; Warren, above n 520, 32, 36.
[560] Dewey, above n 559, 13; Warren, above n 520, 32, 37.
[561] The interaction of the organism with its world originates in the natural activity of 'seeking', which organises and coordinates what otherwise looks like entities that have been called 'stimulus' and 'response', but which Dewey sees as an idea—an instrument with which, through thinking, people 'work on the environment'.

law itself, as being the beginning of a theoretical explanation for a social constructionist model of mediation. In brief, the purpose of the RM is for parties to grow into a space that more effectively endures the loss. Speculation about the facts of a dispute can be seen, for example, as an instrument from the past providing knowledge to parties to predict their future. By forming hypotheses drawn from their past, the possible future can be reality tested against knowledge from the benchmark NIS. This dimension for predicting a future where loss can be endured and grief can be left behind is missing in most legal literature on mediation or dispute resolution.[562]

I have extrapolated Kelly's PCP to describe the nature of conflict/loss in the RM in that conflict arises when the environment is not immediately or automatically yielding to the parties' needs and interests. I have further extrapolated the concept of 'the idea' to describe a meaningful way forward from the conflict or loss. Like Dewey, Kelly rejects the dualism of theory and practice and the notion that 'pure ideas' exist in some mental realm divorced from the real world.[563] Warren explains that, for Kelly (like Dewey), the classical dualism between body and mind echoed in the stimulus-response theory[564] must be corrected so that sensory stimuli, central connections and motor responses are not seen as separate entities that can be independently measured for the sake of scientific rigour, as required by the positivist tradition. Instead, they should be seen as divisions of labour or functioning factors within a single concrete whole.[565]

As an example of this principle, Kelly agrees with Dewey, who says that the experience of 'consciousness' is more than just being 'reactive'. Instead, being conscious of a loud noise—albeit the same loud noise—will lead to a different experience, depending on the

[562] See generally Thomas W Walde, 'Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Join Loss in Litigation' (2006) 22 *Arbitration International* 205. This was the only article found that is remotely related to mediation and loss. This article discusses loss of reputation and loss of profit. There is no other mention of psychological loss.
[563] This is similar to Gergen's notion of relational being. Gergen, above n 17, 62.
[564] In its attempt to present a new, unifying scientific principle for psychology in line with the positivist beliefs of the time, the stimulus-response dualism of sensation–motor action psychology (later known as 'behaviourism') emerged. Warren, above n 520, 32.
[565] The inference here is that, for the sake of scientific rigour, research in psychology today has become very compartmentalised (following a medical model) and often does not employ a 'holistic' approach to the human psyche. Ibid; see also Stephen Joseph and Alex Linley, 'Positive Psychology Versus the Medical Model? Comment' (2006) 61 *American Psychologist* 332; Arthur W Staats, 'Unified Positivism and Unification Psychology: Fad or New Field?' (1991) 46 *American Psychologist* 899.

circumstances.[566] For example, if one is reading a book, hunting, watching the sky in a dark place on a lonely night, or performing a chemical experiment, the same noise has a very different psychical value, which is a different experience.[567] The notion by Kelly that there is no division between mind and body is very much akin to Gergen's notion that there is no such thing as the individual outside relationships, and is equivalent to the ebb and flow of interactions forming the process of relational learning in a social constructionist approach to mediation.[568] Kelly concludes that all ideas begin with something people want to do that is being 'blocked' by the world that confronts them (hence, conflict). Because of this 'block', parties estimate the import or significance of any present desire, idea or impulse by forecasting what it will amount to if carried out.[569] Thus, literally, the consequent forecast of the idea, desire or impulse defines the consequent material outcome in relation to its meaning or import if the idea is carried out.[570]

Kelly's PCP can be applied to the RM in instances where disputants face obstacles to carrying out a present desire or idea in relation to how better to live with their loss. In such instances, parties co-estimate the significance of their own desire or idea around living better with the loss by forecasting what it will amount to if carried out. The parties then compare their loss to the significance of the loss for the other side if those ideas are carried out. By finding sufficient common ground between the two sets of ideas, the parties can co-create a meaning around the loss that will jointly and severally better enable them to live with or endure their loss. In this way, their forecasts become legal outcomes. Simultaneously, they are better able to leave their grief behind to the extent that they are ready, willing and able to do so at that time.

According to Warren, both Kelly and Dewey had a shared conviction that humans must be thought of as being active in an ongoing process involving the development of capacities to move and act in and on the world, to reflect and to grow in

[566] This echoes Gergen's philosophy that there is no such thing as an 'individual' and that everything stems from relationships. Gergen, above n 17, 62.
[567] Dewey, above n 559, 101; Warren, above n 520, 32, 37.
[568] Gergen, above n 17, 62.
[569] A process that describes what occurs in a social constructionist approach to mediation.
[570] John Dewey and James Hayden Tufts, *Ethics* (Holt, 1908) 302. That is, one's thoughts can predict one's actions and outcomes.

understanding.[571] This view is central to the function of the RM. In conceptualising the RM, where disputants are drawn from various social classes that evidence a wider range of ability,[572] I argue that the essential features of progressivism[573] can equally be applied to the RM. For example, the NIS serves as a benchmark of findings from proven psychological research that similarly leads disputing parties to apply principles to teach each other and learn from each other how best to meet their individual and relational needs in relation to their losses.

Warren continues that, because the mind is seen by Kelly as the process of growth and understanding, a significant medium of that growth is the social world in which one is embedded.[574] Thus, according to Warren, Kelly was comfortable with a view of a person as a 'scientist' whose laboratory can be taken to be 'the world', which is there to be interpreted to form a worldview or personal construct.[575] These ideas have been used to conceptualise the workings of the RM, where disputants are similarly viewed as researchers or scientists interpreting their own and each other's worldviews of the dispute to conclude with a version with which both can live at that time, especially in relation to their losses. For example, a social constructionist approach to mediation, such as the RM, similarly views parties as being active in an ongoing process involving the development of their capacities to move and act in and on the world, to reflect and to grow in understanding. The mind is also seen as the process of growth and understanding with a significant medium of that growth being the social world in which the parties are embedded[576] as 'scientists' interpreting the laboratory of 'their world' during the mediation process.[577]

Thus, the RM uses personal construct theory as a fundamental part of the process of relational learning that subsequently forms a social constructionist approach to mediation. I further contend that using personal construct theory in the RM enables

[571] As stated above, this view shares similar features to Gergen's notions of social bonding and coordinated action as part of relational being.
[572] This is particularly the case in the legally aided community of disputants in family law.
[573] Lawrence Cremin, *The Transformation of the School: Progressivism in American Education 1876–1957* (Random House, 1961) viii; Warren, above n 520, 32, 35.
[574] Similarly, Gergen agrees that there is no distinction between mind and body, but that each is a social construct. Dewey and Tufts, above n 559, 37.
[575] Again, this view could be said to be the forerunner of Gergen's concept of relational being, where the individual is viewed as a construct in the process of relating.
[576] Dewey and Tufts, above n 559, 37.
[577] It is also from such notions that parties can be said to be grounded theorists and constructionists.

parties to use their own grounded research approach to work with the history of the facts comprising their dispute, making the whole mediation process an example of social constructionism in action. The parties engage in their own 'game in the making' through their own grounded research about the facts of the dispute to live meaningfully with their own losses, while assisting each other to do the same.

Kelly's later concerns[578] of the 'qualitative immediacy of perceptions' and their significance to the real, practical imperatives of here and now living not only align well with the earlier PCP,[579] but could also be a description of the social constructionist approach to mediation, such as the RM.[580] By providing 'a tool, the personal construct, for analyzing and extending the personal process of "sciencing"',[581] Warren notes that Kelly goes beyond Dewey's early philosophy. He states that, hidden between the lines of Kelly's PCP is also the need to work in a truly democratic society with an egalitarian outlook that includes the social dimensions of construing (as discussed in Dewey's later works[582]) that stress freedom, enquiry and toleration of diverse viewpoints. This analysis could equally easily apply to a social constructionist mediation, where parties use personal constructs to analyse and extend their personal process of 'sciencing'. That is, they use their own knowledge of the facts of the dispute, grounded from their own experience of the loss, with an egalitarian outlook in order to allow freedom of enquiry and toleration of diverse viewpoints that include the social and legal dimensions of construing.

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[578] J Novak, 'Personal Construct Theory and Other Perceptual Pedagogies' in J Adams-Webber & J C Mancuso (eds), *Applications of Personal Construct Theory* (Academic Press, 1983) 317, 327; Warren, above n 520, 32, 39; Albert Bandura, 'On the Functional Properties of Perceived Self-Efficacy Revisited' (2012) 38 *Journal of Management* 9-44.

[579] Warren, above n 520, 32, 34. Kelly's ideas focused on the social dimensions of education—particularly the idea that society could be restructured using schools. This was a controversial idea at the time and was not accepted by Dewey, despite his social activism and championing of academic freedom. Warren explains that, like Dewey, Kelly lamented the demise of the rural community from which he (and Dewey) originated, as the United States moved to the new urban-industrial complex and left behind the cohesiveness, sense of community and feeling of being 'closer to real life' that a rural community expressed and provided. Warren states that Dewey lamented the alienating, destructive and competitive form of individualisation that emerged in the new urban-industrialised settings. He saw that it had the potential to fracture the cohesiveness of American society, which still actively recalled the divisive and bitter civil war that occurred less than half a century earlier. This is relevant to this thesis because it provides a historical background to the effect of individualism on social change.

[580] It could be argued that this is also a possible forerunner to the basic social constructionist perspectives of Gergen. Gergen, above n 17.

[581] Novak, above n 579, 317–29, cited in Warren, above n 520, 38–9.

[582] Ibid.

However, Warren's ideas of a mind actively engaged with the world, particularly a world of others equally engaged in the same activity of making sense of that world signals caution against a trend where sameness and acquiescence seem to be imperatives. He states that 'no man is an island', and location (geographic and historical) shapes theories. Maintaining notions of individuation and agency are thus seen to be as important as the plea for mutual social and cultural understanding to deepen one's understanding and meaning making.[583] The relevance of this caution is to respect the need for individuation and automatism/agency as much as the need for social constructionism and relational being, as being opposite sides of the same coin.

To conclude, Warren states that the essential features of progressive education are best captured by Kneller,[584] who proposes that education should be centred on the learner's needs and interests, and should involve the learner cooperating, rather than competing, with others. Kneller continues that the learner should be actively involved in the process of problem solving as a joint project with the teacher, who is a mentor or guide, rather than an imparter of knowledge, and in a context (such as a school) that can function democratically, with learners having an equal voice to their guides or mentors.[585] Substituting the word 'teacher' in Kneller's description for 'mediator' and the word 'learner' for 'parties' offers a fair description of the basic principles underlying a social constructionist approach to mediation, such as the RM. In this, parties, as relational learners, cooperate to actively engage in a problem-solving project to make meaning of their losses (including loss of their assumptions or expectations that led to the dispute) and the mediator, as a mentor/guide, has an equal voice to the parties in that democratic process.

The significant issue here is that the relational learners are also actively engaged in the process of deconstructing the components of their dispute in order to reconstruct their

[583] Warren, above n 520, 32, 39.
[584] George F Kneller, *Introduction to the Philosophy of Education* (John Wiley and Sons, 2nd ed, 1971), cited in Warren, above n 520, 32, 33.
[585] Ibid. I decided to rely heavily on Warren's work because the literature on personal constructs does not criticise Warren's account of the influence of Dewey on the development of Kelly's personal construct theory. See, eg, Kevin J Pugh, 'Transformative Experience: An Integrative Construct in the Spirit of Deweyan Pragmatism' (2011) 46 *Educational Psychologist* 107; Don Bannister and Fay Fransella, *Inquiring Man: Theory of Personal Constructs* (Croom Held, 3rd ed, 1986); Albert Bandura, 'On the Functional Properties of Perceived Self-Efficacy Revisited' (2012) 38 *Journal of Management* 9-44; Raskin, above n 45, 1.

meaning around loss. Having considered how Kelly's personal construct theory relates to the RM as its philosophical/ideological antecedents, the next section discusses the second component of relational learning—mindfulness.

4.2.3 Mindfulness and its Application to a Social Constructionist Approach to Mediation

I propose that the second component of relational learning is mindfulness because there is a connection between the concept of mindfulness and personal construct theory, as discussed above. That is, I propose that when people mindfully construe their worldview, they engage in relational learning and personal growth. Although the contemporary view of mindfulness is increasingly becoming part of popular culture, there remains no single 'correct' or 'authoritative' version of mindfulness. Instead, mindfulness as a concept is often trivialised and conflated with many common interpretations. However, David Vago and David Silbersweig[586] provide an integrative theoretical framework and systems-based neurobiological model that explains the mechanisms by which mindfulness reduces biases related to self-processing, such as assumptions and expectations, and creates a sustainable healthy mind.

Vago and Silbersweig's focus on assumptions and expectations is the reason for adopting their work to explain how mindfulness, under this definition, becomes a component of relational learning. For example, they describe mindfulness through systematic mental training that develops meta-awareness (self-awareness), an ability to effectively modulate one's behaviour (self-regulation) and a positive relationship between the self and the other that transcends self-focused needs and increases pro-social characteristics (self-transcendence).[587] They claim that this framework of self-awareness, self-regulation and self-transcendence (S-ART) illustrates a method for becoming aware of the conditions that cause (and remove) distortions or biases.[588] The

[586] David R Vago and David A Silbersweig, 'Self-Awareness, Self-Regulation, and Self-Transcendence (S-ART): A Framework for Understanding the Neurobiological Mechanisms of Mindfulness' (2012) 6 *Frontiers in Human Neuroscience* 1.

[587] This S-ART model is very similar to the concept I have termed 'Observer Self' (in my various teachings of dispute resolution to graduate and undergraduate classes, and when training mediators over the last 20 years) and could very well be an analysis of the component parts that comprise the process of 'Observer Self'. See Section 2.4.3.

[588] Ibid. They also propose that the development of S-ART through meditation modulates self-specifying and narrative self-networks through an integrative frontoparietal control network. The S-ART framework

underlying premise with which the S-ART framework operates is that people's perceptions, cognitions and emotions related to their ordinary experiences can be distorted or biased to varying degrees.[589] Depending on certain dispositional factors, these biases are sometimes pathological, but exist on a spectrum and may thus be present without any clear psychopathology.[590]

This concept is akin to Dewey's concept of plasticity, in which the development of dispositions and routine habits, although helpful, can be problematic when severed from reason and intelligence. It is also akin to Toohey's concept of System 1 and System 2 thinking,[591] and to Greg Rooney's concept of 'mediating the moment'.[592] Thus, mindfulness, as used in the RM, draws its legitimacy from such works as Vago and Silbersweig, Rooney's 'mediating the moment' and Toohey's system thinking. All of these researchers would agree that mindfulness is a temporary state of non-judgemental, non-reactive, present-centred attention and awareness that is an enduring trait as a dispositional pattern of cognition, emotion or behavioural tendency in the parties and mediator.[593]

With this definition and the S-ART framework in mind, the parties and mediator can be made aware, during the NIS, of their own assumptions and expectations (self-awareness) with which they entered the mediation process. The mediator would inform the parties during the NIS that they can reduce their biases arising from the routine habits of their assumptions and expectations. This can be described as 'self-regulation' by focusing on forming a positive relationship with each other—a relationship that

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and neurobiological model is therefore based on the growing understanding of the mechanisms for neurocognition, empirical literature, and through dismantling the specific meditation practices thought to cultivate mindfulness.

[589] Again, this is very reminiscent of Toohey's work on System 1 and System 2 thinking.

[590] Vago and Silbersweig, above n 587.

[591] For a full explanation of System 1 and System 2 thinking, see the Introduction.

[592] Greg Rooney and Margaret Eleanor Ross, 'Shifting the Focus from Mediating the Problem to Mediating the Moment—Using Intuition as a Guide' (Paper presented at the Alternative Dispute Resolution Conference at the Supreme Court of Singapore, Singapore, 5 October 2012) 11. Although this is an unpublished work, it is the most current information specifically on this topic that is relevant to this thesis.

[593] Vago and Silbersweig, above n 587, 1. Vago and Silbersweig state that dispositional mindfulness is now measured by at least eight self-report scales that are often uncorrelated with each other, and that these semantic differences are problematic in the laboratory setting.

transcends the parties' self-focused needs and increases their pro-social characteristics. This is termed 'self-transcendence'.[594]

According to Vago and Silbersweig,[595] the use of mindfulness is proposed to integrate and strengthen the six neurocognitive component mechanisms that modulate networks of self-processing and reduce bias. These six mechanisms include: (i) intention and motivation (willingness), (ii) attention and emotion regulation (readiness), (iii) extinction and reconsolidation (ability), (iv) pro-sociality, (v) non-attachment and (vi) decentring (Observer Self).[596] Thus, based on the legitimacy of the S-ART model, the use of mindfulness in the RM broadens the framework of the perceptual, physiological, cognitive, emotional and behavioural component processes that are used by the participants (including the mediator) to experience the 'here and now' of the dispute in the mediation process, rather than reducing mindfulness to a unitary dimension.

Irrespective of the nature of the dispute, a social constructionist interpretation of mindfulness is encouraged when parties are found to be concentrating on their own thoughts about something stated a few minutes ago (contemplating their personal constructs), rather than focusing on what is being said in the present (mindfulness).[597] Being aware of the assumptions, expectations and values in the room is more important (or equally important) to the mediator as to parties. The key point to be noted in a social constructionist interpretation about mindfulness is that all parties, especially the

[594] Much like Dewey's concept of instrumentality and growth. Dewey and Tufts, above n 559, 37; Dewey, above n 559.
[595] Vago and Silbersweig, above n 587, 1.
[596] 'Observer Self' is a term that I developed to encompass the notion of 'functioning from Adult' from the TA theory of Berne, which is the method for studying interactions between individuals. The Observer Self goes beyond Berne's definition to include mindfulness to be fully in the present, so that a plan for the future can encompass the enduring feelings of loss. Berne describes the 'Adult' as being 'principally concerned with transforming stimuli into pieces of information, and processing and filing that information on the basis of previous experience'. The other two major transactions are 'Parent', which involves taught concepts such as morality (such as things one should and should not do) and 'Child', which involves felt concepts, such as experiencing loss and grief. Eric Berne, *Transactional Analysis in Psychotherapy: A Systematic Individual and Social Psychiatry* (Grove Press, 1961) 15.
[597] See, eg, Belinda Khong, 'Mindfulness: A Way of Cultivating Deep Respect for Emotions' (2011) 2 *Mindfulness* 27; Belinda Khong, 'Mindfulness and Therapy' (Paper presented at Mindfulness, Science and Practice: An International Conference, Melbourne, 2013). Although this is not a published work, it is the most current information about mindfulness that is relevant to this thesis. See also Vago and Silbersweig, above n 587, 1; Craig Hassed, 'Training the Mindful Health Practitioner: Why Attention Matters' in Amanda Le, Christelle T Ngnoumen, and Ellen J Langer, *The Wiley Blackwell Handbook of Mindfulness* (John Wiley & Sons, 2014).

mediator, must be aware of whether they are 'on the same page at the same time' when in each other's presence during the mediation process.[598]

The art of listening mindfully is an exhaustive and exhausting process for the parties and social constructionist mediator. The mediator is not only aware of their own thoughts and feelings about what is unfolding during the mediation, but is also aware of the nature and quality of the listening occurring between the parties. In particular, the social constructionist mediator is most mindful that the nature and quality of the listening that occurs between the parties when acknowledging the losses during issue identification sets the scene for the level of reconstruction that occurs during the rest of the mediation process.

As explained by the S-ART model, using mindfulness throughout the whole RM process further extends an opportunity to parties to use their own personal constructs or worldviews to anticipate the various meanings that can be attributed to their loss. As they engage together to the best of their ability, willingness and readiness to support each other, they reconstruct a meaning with which each can best live, moving forward to a new reality that incorporates their loss. Through mindfulness, the outcome of the entire RM process as a social constructionist approach to mediation becomes something greater than the sum of its constituent parts. As with any facilitative approach, any mindful interaction of parties can lead to a transformative experience for them, without a deliberate effort made to engage in such a transformative process.

When parties in mediation replay certain events from their stories, they are not only able to experience the emotions associated with those events, but also able to objectively discuss the events at the same time.[599] This capacity to simultaneously live in what can be described as two ego states is confirmed by the work of Berne in his theory of

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[598] 'on the same page at the same time' are my own words. King, Freiberg, Betagol and Hyams, above n 25, 14.

[599] Thomas A Harris, *I'm OK—You're OK* (HarperCollins Publishers, 1967) 12. Note that Harris was a student of Berne. See also Paul Hersey, Kenneth H Blanchard and Dewey E Johnson, *Management of Organisational Behaviour: Leading Human Resources* (Pearson International, 9th ed, 2011); Nikolas Rose, *Governing the Soul: The Shaping of the Private Self* (Routledge, 1990); Stephen W Littlejohn and Karen A Foss, *Theories of Human Communication* (Thomson Wadsworth, 9th ed, 2005); M Afzalur Rahim, 'Managing Conflict in Organisations' in Peter Fenn and Rod Gameson (eds), *Construction Conflict Management and Resolution* (E & FN Spon, 2005) 370; Ken Wilber, *The Spectrum of Consciousness* (Quest Books, 20th ed, 1993); David W Johnson, *Reaching Out: Interpersonal Effectiveness and Self-Actualisation* (Prentice-Hall, 1972).

TA[600]—the third component theory in the process of relational learning. The following section explains TA and discusses the relationship between this and the RM.

4.2.4 TA and the RM

Berne's basic premise is that there are three ego states: Child, Parent and Adult—otherwise referred to as experiences that are felt (Child), experiences from being taught (what should happen) (Parent), and experiences that are validated from learning (Adult). The proposal in this thesis is that a social constructionist mediator aware of Berne's basic theory[601] would be better able to determine from which of the three ego states (of Parent, Child or Adult) a stimulus from one party is sent, and from which ego state the other party responds. The proposal continues that the loss[602] is felt by the Child, actioned by the Parent (as outlined in the NIS) and validated by the Adult. The understanding—intellectually and emotionally—of all three states simultaneously is what I have termed 'Observer Self'. It is from the Observer Self of all parties that a social constructionist mediation attempts to take place.

Thus, the quest for meaning to make sense of loss is an attempt to reduce the existing biases of parties by bringing them into their 'Observer Selves' or at least to their 'Adult' states, where learnt concepts[603] in the mediation process can freely interact to produce transactions between the parties that are complementary.[604] When the Observer Self/Adult of one party (transactional stimulus) uses the learnt concepts to successfully

[600] The purpose of TA and the Observer Self is to demonstrate that every person has the capacity to be authentic through self-analysis, discovery and growth. Berne, above n 597, 4; Petruska Clarkson, *Transactional Analysis Psychotherapy: An Integrated Approach* (Routledge, 2013); Carl F Jeness, 'Comparative Effectiveness of Behavior Modification and Transactional Analysis' (1975) 43 *Journal of Consulting and Clinical Psychology* 758; Muriel James, *Born to Win: Transactional Analysis with Gestalt Experiments* (Da Capo Press, 1996).

[601] Berne went on to discuss other types of transactions in his book, *Games People Play*. Eric Berne, *Games People Play* (Grove Press, 1964) 29. A reasonable understanding of the three ego states and how they interact in the TA model is helpful for the social constructionist mediator to keep communication flowing. Once this understanding is achieved, the games described in *Games People Play* can be understood at a new level.

[602] The psychological theories of relationships that deal specifically with loss are meaning reconstruction, transformative learning (from transformative mediation), TA and disenfranchised grief—all of which are discussed throughout this thesis and in the NIS. Chapter 2, 74-82. See Section 3.14 for meaning reconstruction (Guideline 10) and Section 3.9 for transformative learning (Guideline 5) in the NIS. See also Neimeyer and Sands, above n 233; Bush and Folger, above n 179, 65; Doka, above n 13.

[603] Note Question 10 of the self-questionnaire of the NIS, which asks, 'Am I prepared to completely reappraise my view of the dispute based on what I hear, see and learn from this mediation?' That is, it asks the parties to be ready to reconceptualise the dispute.

[604] Berne, above n 597, 30.

transact with the Observer Self/Adult of the other (transactional response), a complementary situation exists and healthy communication follows. This allows the parties to reconceptualise their dispute to see it from the each other's perspective, as well as from the broader societal perspective.[605]

Berne states that Adult-to-Adult transactions produce the healthiest communication. When the Adult[606] of the transactional stimulus can only reach the other's Child due to the amount of grief involved, the readiness to move forward is not satisfied and a crossed transaction occurs, in which communication is no longer healthy.[607] Similarly, if the Adult from one party gains a response from the Parent in the other, locked positions are likely to unfold as the Parent insists on his or her rights because they believe that is the way the world should be. For example, cases fought on matters of principle usually demonstrate the Parent in action, as can the institution of law itself. Non-verbal cues, such as tone, delivery of words, changes in volume and so forth, indicate to a social constructionist mediator whether the transactional response derives from the Child (felt concepts), Parent [608] (taught concepts, such as morality and statements of how things should be) or Adult of the parties.

This thesis argues that the Adult of each party reaches conclusions from analysing data that they have gathered from the past (assumptions) and gather now (mindfulness), and from the data taught to the Parent (how things should be—expectations) and felt by the Child (from the loss that things are not as expected, and grief). I further argue that the Adult—in particular, the 'Observer Self'—analyses the experiences in transaction with others as they occur in order to make a decision. The entire process of transacting with others then becomes the process of social constructionism in action, as decisions are mindfully made about how to best live with the loss in a new reality (with new modified personal constructs) either together, apart or somewhat together.[609]

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[605] Ibid.
[606] I would go so far as to say that, when the 'Observer Self' of one party does not reach the 'Observer Self' of the other, difficulties in communication arise.
[607] Berne, above n 597.
[608] Ibid. Following from Berne's work, Albert Mehrabian quantitatively proves the importance of non-verbal cues in communication, noting that, when a person speaks, the listener focuses 55% of attention on the facial expression of the speaker, 38% on the way words are delivered (such as the tone and accent) and only listens to 7% of the words. Albert Mehrabian, *Non-Verbal Communication* (Transaction Publishers, 1977) 63.
[609] For example, as in divorce cases where children are involved, the parties are 'somewhat together'.

This level of conscious engagement in a holistic approach to communicate with each other enables parties to better note the very important non-verbal cues of each other, such as facial expressions. In turn, such conscious and mindful awareness fulfils an even greater need—the need for what Berne terms 'recognition hunger'[610]—otherwise described as the need for adults to receive recognition in much the same way that infants require warm handling.[611] Thus, I argue that being mindful to compliment the parties and enable them to mindfully compliment and thank each other throughout the mediation process for things each does to assist the other during the communication process fulfils their needs for 'recognition hunger'. Satisfying 'recognition hunger' builds resilience with which the parties can better function from their Adults or Observer Selves to more readily take responsibility to change their assumptions around the loss.

I further propose that the relational learning that occurs in any transaction arises from the constant interaction of all these psychological factors. Placing such psychological factors into the larger social context in order to validate what is observed/taught from the Parent and felt from the Child based on previous experience (from prior assumptions and expectations) is the constant task of the Adult. Noting the feelings and thinking of each stage, including the Adult stage, around the loss is the function of the 'Observer Self' of each participant, including the mediator, such that the concept of loss is given a new meaning.

The RM is able to synthesise all these elements to help parties resolve their dispute in a meaningful and not only formal sense. As mentioned in Chapters 1, 2 and 3,[612] the purpose of the RM is to analyse the effect of law on the psychological wellbeing of the parties—specifically to analyse the effect of the psychological processes of grief and loss on the outcome of legal matters. In addition to moving forward with acceptance of

[610] Nicolas Berne Calcaterra, *Transactional Analysis* (2013) <http://www.ericberne.com/transactional-analysis/>. Berne later elaborated to call this need a 'stroke' and Claude Steiner, a student of Berne, published many books on TA and completed pioneering work on strokes to develop what he called the 'stroke economy '. My own grounded theory research over the last 20 years has indicated that the concept of 'recognition hunger' is associated with resilience, in that, the more stroking a person received as an infant, the more resilient that person becomes, and the less their need for recognition—although there is always a need for recognition from loved ones, no matter how resilient.
[611] Mehrabian, above n 609, 63.
[612] See 1.8; 2.3.5; 4.2.3.

loss from both sides (self-transcendence in mindfulness terms), the RM focuses on the effect of law on the psychological wellbeing of the parties. This statement is elaborated in the Part 2 to further develop a theoretical explanation for a social constructionist model of mediation.

4.3 Part 2: Dispute or Problem? A Holistic Approach to the RM

Part 2 demonstrates in particular the influence of micro processes of dispute resolution on reshaping the macro processes of the justice system. For this reason, it considers the interconnectedness between personal growth and the practical activities of human life that become 'the way things are done here' as the macro system.[613] This section considers how the RM, as a private access-to-justice measure, uses a benchmark of psychological research in the NIS to inform and educate parties how best to develop a philosophy or meaning around their loss within the public legal framework of their dispute. For this, the three disciplines of philosophy (personal constructs), psychology (grief and loss) and education (relational learning/meaning reconstruction) are considered in relation to their practical application to the activities of human life as they unfold in the private process of the RM. In other words, the parties' dispute can be considered a public matter of law when a statement of claim is filed. Within such a legal framework, the process of mediation as the RM offers parties an opportunity privately to reconstruct the meaning attached to their losses so they can better endure them.

The argument is that parties can grow from their experience of loss by reassessing the practical activities of human life through problem solving (micro) and dispute resolution (macro) techniques. To begin, definitions of 'dispute resolution' and 'problem solving' are required. As mentioned earlier,[614] King et al.[615] distinguish between dispute resolution and problem solving. They claim that a dispute develops through a number of stages, and that there is a high rate of attrition of matters at each stage. In order to be defined a dispute, the first stage requires the experience to be recognised as injurious, the second stage attributes the cause of injury to the fault of another person or body (the blaming stage), and the last stage requires the injured person to make a claim against the

[613] This theme will be discussed again in the Conclusion.
[614] See page 11.
[615] King, Freiberg, Betagol and Hyams, above n 25, 14.

other and ask for a remedy. Thus, disputes form the basis of rights-based resolutions governed by the macro system of law that focuses on the dysfunction and prescribes how relations should unfold.

In contrast, King et al.[616] state that problems exist in the micro sphere of personal relations and are best solved using a holistic approach, where the whole is greater than the sum of its parts. A holistic approach encourages pursuing a healthy life following such examples as the 'good lives'[617] model used in rehabilitation processes[618] in criminal law. In contrast, the reductionist mode (of dealing with disputes) concentrates on the dysfunction, and ignores other dimensions of the problem that may have engendered the legal dispute. A reductionist approach (a dispute) reduces law to mechanical functioning, where it is no longer able to deal with the resolution of disputes in the wider context of society.[619]

These distinctions enable a legal problem to be seen in the RM as one aspect of a life problem, and a life problem can be seen from multiple perspectives,[620] including health, where a lack of wellbeing—such as unresolved grief, trauma or mental health issues—can affect or even determine the outcome of a legal matter.[621] Any agreement of the parties in the RM embeds in it aspects of what the parties perceive as their own truth in their attempts to create their own justice. The RM extends the traditional forms of non-adversarial justice that focus primarily on the autonomy and self-determination of the parties to include a concern for the effect of the legal processes on the wellbeing of the parties. In this way, there are parallels between the RM and TJ—the latter of which similarly includes a concern for the effect of legal processes on the wellbeing of the parties through a framework for asking questions. Like the RM, TJ is an example of non-adversarial justice that aims at truth finding (as opposed to determination of a dispute), and I argue that aspects of TJ, like the entire RM, are forms of social constructionism in action.

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[616] Ibid 14.
[617] Tony Ward, 'Good Lives and the Rehabilitation of Offenders: Promises and Problems' (2002) 7 *Aggression and Violent Behaviour* 513.
[618] Ibid; Tony Ward, 'The Management of Risk and the Design of Good Lives' (2002) 37 *Australian Psychologist* 172, cited in King, Freiberg, Betagol and Hyams, above n 25, 82–3.
[619] King, Freiberg, Betagol and Hyams, above n 25, 82.
[620] That is, through interdisciplinarity, where the disciplines of education, psychology and law interrelate in the mediation process to become social constructionism in action.
[621] King, Freiberg, Betagol and Hyams, above n 25, 82.

The following section presents the nature and history of TJ[622] as an example of a non-adversarial justice process in the public sphere that has changed the Australian legal system through the interplay of the three disciplines of psychiatry, psychology and law, in relation to their practical application to the activities of human life. This history is then compared to the development of the RM as a non-adversarial process in the private sphere that similarly uses an interdisciplinary approach—that is, in Dewey's words, 'an interconnectedness between personal growth and the practical activities of human life in which learning is, and education should be, grounded'.[623] The argument here is that the use of the RM illustrates Dewey's beliefs that the three disciplines of philosophy, psychology and education are as intimately connected[624] in the RM as the disciplines of psychiatry, psychology and law are connected in TJ.

4.3.1 TJ as an Interdisciplinary Approach to Non-adversarial Justice

The effectiveness of an interdisciplinary approach to resolving complex issues in law is best illustrated by the success of TJ.[625] This section briefly establishes the context by tracing the history of the development of TJ to demonstrate the interconnectedness between personal growth and practical activities of human life in which learning is grounded. As part of the realist[626] tradition, TJ grew from studies in mental health law, such as in relation to the civil and criminal commitment of intellectually disabled people, and developed from looking at the relationship between law *and* therapy to

[622] Like transformative mediation, the RM does not focus on resolution, but on mindful changes in individual and group dynamics that can lead to social change for parties. Unlike transformative mediation, which sees the role of the mediator as a guide through the process of transformation for parties, the RM adds a further dimension to the role of the mediator and parties—one of relational learners. As educators/relational learners, the mediator predominantly uses a facilitative approach to offer parties an opportunity as fellow relational learners/educators to learn from each other and from the mediator, and to grow from their experience of the loss, to the extent that they are ready, able and willing to do so at that time.

[623] Warren, above n 520, 32, 35.

[624] Dewey is quoted by Warren as saying, 'If we are willing to conceive of education as the process of forming fundamental dispositions, intellectual and emotional, toward nature and fellow men, philosophy may even be defined as the general theory of education'. Dewey, above n 559, 328; Warren, above n 520, 32, 35.

[625] A deeper discussion about interdisciplinarity occurs in 5.2 Part 1.

[626] Arie Freiberg, 'Psychiatry, Psychology and Non-Adversarial Justice: From Integration to Transformation' (2011) 18 *Psychiatry, Psychology and Law* 297, 299. The realist movement of the 1930s adopted a more scientific approach to the law, looking beyond what was written in the statute and text to how the law operated in practice. It was more interested in the effects of the law on the community, rather than only its internal logic and meaning. It was interested in policy outcomes, rather than providing sterile critiques of doctrine.

regarding law *as* therapy, and therapy through law.[627] Thus, TJ can be defined as an approach to the study of law as a therapeutic agent, focusing on the effect of the law on the emotional life and psychological wellbeing not only of offenders, but also of all of participants in the justice system.[628] The founders of TJ—Bruce Winick and David Wexler—maintained that they were not creating a rigid theoretical framework, but a flexible tool to explore the effect of law and legal processes on participants.[629]

TJ views the law as a potential therapeutic agent. Legal rules, procedures and the role of legal actors may produce therapeutic or anti-therapeutic results, and the law may improve therapeutic outcomes without sacrificing the interests of justice. TJ critiques the traditional doctrinal approach to mental health law and argues for a new interdisciplinary approach.[630] The following discussion is about the relative success of TJ as a framework for asking questions, as discussed in Chapter 1. Freiberg claims that, since the late 1980s, TJ has been profoundly influential in theory and practice. Freiberg proposes that one explanation for the success of TJ in the public legal arena is that psychiatry, psychology and law tended to seek to focus the perspectives of different disciplines onto a problem, such as the treatment of offenders. In contrast, TJ and non-adversarial justice can lead to institutional transformation—not to make courts work better, but to change the justice system itself.[631] One example of this is how the drug court in Sydney has developed its practices to deal with young drug offenders.[632] The justice system has changed because TJ prompted the emergence of problem-solving courts and has changed the criminal justice system.[633]

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[627] Ibid.

[628] Bruce Winick and David B Wexler, 'The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic' (2006) 13 *Clinical Law Review* 605, cited in King et al, above n 96, 5–6, 19.

[629] Bruce Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 *Psychology, Public Policy and Law* 184; David Wexler, 'Therapeutic Jurisprudence: Developments and Applications in Australia and New Zealand' (2003) 20 *Law in Context* 1.

[630] David B Wexler, 'Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence' (1992) 16 *Law and Human Behavior* 27; David B Wexler and Bruce J Winick, 'Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research' (1991) 45 *University of Miami Law Review* 979; David B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Caroline Academic Press, 1990).

[631] Freiberg, above n 595, 297, 299, 313.

[632] Astrid Birgden, '*Serious Sex Offenders Monitoring Act 2005* (Vic): A Therapeutic Jurisprudence Analysis' (2007) 14 *Psychiatry, Psychology and Law* 78.

[633] Ibid; Birgden, above n 441, 180; Birgden and Grant, above n 113, 341; Pamela Casey and David B Rottman, 'Therapeutic Jurisprudence in the Courts' (2000) 18 *Behavioral Sciences and the Law* 445; Peggy Fulton Hora, William G Schma and John T A Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) 74 *Notre Dame Law Review* 439.

TJ proposes exploring ways in which the knowledge, theories and insights of mental health and related disciplines can help shape the law in ways consistent with the principles of justice. The selection of a therapeutic option promotes health and does not conflict with other normative values of the legal system. TJ claims that attending to the individual, as well as the issues involved in the case, leads to more effective dispositions. It can be practised by judges when interacting with individuals involved in a particular case. It may also be practised at an organisational level (the court) by devising new procedures, information systems and sentencing options to establish links to social service providers for therapeutic outcomes.[634]

Winick[635]and Wexler[636] claim that the strong interdisciplinary focus of TJ made it most conducive to the generation of research questions and constructive answers. Moreover, the conjunction of TJ with the drug court transformed court practices both in the drug court and in other problem-oriented courts—such as family violence courts and mental health courts—and spawned new theories about the nature of justice.[637] One example is to involve community collaboration to change the justice system. Through problem solving at both the community and individual case level, the court can engage the community in programmes designed to reduce the frequency of domestic violence, drug use and juvenile delinquency. Such community-wide problems can be addressed through expansive collaboration and ongoing dialogue between the court and community.[638]

During personal communication with Freiberg,[639] Wexler suggested that TJ has had a greater effect than psychiatry, psychology and law because it is more precisely focused and grounded in the rules and procedures of law and roles played in the procedures of law than the more generalised and less focused approach of psychiatry, psychology and law.[640] Wexler [641] states that TJ could readily be adopted by judges, magistrates and

[634] David Rottman and Pamela Casey, 'Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts' (July 1999) *National Institute of Justice Journal* 12.
[635] See generally Winick, above n 598, 184.
[636] See generally Wexler, above n 598, 1.
[637] Ibid.
[638] Rottman and Casey, above n 603, 12; Casey and Rottman, above n 602, 445; Hora, Schma and Rosenthal, above n 602, 439.
[639] Email from Arie Freiberg to Katherine Johnson, 15 August 2010.
[640] Freiberg, above n 595, 297, 313.

lawyers because it had practical relevance to the work of courts and its principles resonated with the daily problems presented in courts and practice. This made it possible for the judiciary and legal profession to feed into the theoretical development of TJ because it provided a way to solve problems by experimentation, and stimulated interest to further discover knowledge and experiment.[642]

Freiberg [643] offers a further reason for the success of TJ in the public domain, which derives from TJ placing equal emphasis on the active participation of the person/offender and the process, as well as on the need for the process to do no harm. Non-adversarial approaches, such as TJ, primarily promote the values of autonomy and self-determination, whereas a rights-based approach, such as litigation, does not consider its primary concern to be the level of harm caused by the legal system to the psychological wellbeing of the parties, nor does a rights-based court approach promote autonomy or self-determination.[644] In addition, as aforementioned, TJ is concerned with the effect of the legal process not only on the psychological wellbeing of the offender, but also on the staff and other court personnel dealing with the offender.

TJ functions in the public sphere of criminal law and aims to empower parties with autonomy and self-determination. TJ is not only concerned with measuring the therapeutic effect of legal rules and procedures, but also with the way they are applied by various legal actors, such as judges, lawyers, police officers and expert witnesses testifying in court, among others. These legal actors are themselves therapeutic agents, affecting the mental health and psychological wellbeing of the people they encounter in the legal system. For example, lawyers dealing with clients—in the law office and courtroom—can have a significant effect on the client's emotional wellbeing. The way judges treat the people appearing before them similarly affects their wellbeing. TJ uses insight from psychology and behavioural sciences to critique legal and judicial practices and suggest how they can be reshaped to increase their therapeutic potential and avoid the risk of psychological harm. Problem-solving courts are a vector of the justice system that share common aims with TJ. Problem-solving courts, such as the drug court in

[641] Wexler, above n 598, 1.
[642] Ibid; Freiberg, above n 595, 297, 299.
[643] Freiberg, above n 595, 297, 306–7.
[644] Freiberg, above n 595, 297, 306–7; see also Laurence Boulle, 'Predictable Irrationality in Mediation: Insights from Behavioural Economics' (2013) 24 *Australasian Dispute Resolution Journal* 8-17.

NSW, often use principles of TJ to enhance their functioning, such as integrating treatment services with judicial case processing, maintaining ongoing judicial intervention, and closely monitoring and immediately responding to offender behaviour.

In summary, Freiberg states that the problem-solving TJ non-adversarial justice approach has transformed the process of what justice means, so that the sum of the marriage between the various disciplines of psychology, psychiatry, law and education is greater than its parts. He continues that the approach is not just about dealing with an offender through multiple disciplines, but also reconceptualises the problem itself as one that concerns both the offender and the system in which that offender lives and operates.[645] This is an important point and must be emphasised as these approaches are transforming the wider legal system.

ADR processes have also influenced procedures in the courts, and the philosophy of TJ has changed the mainstream courts' approach to issues of justice. These points will be discussed more fully in Chapter 5 to link what may otherwise seem to be disconnected developments in various parts of the legal system. The main point to note here is that the interconnectedness between personal growth and the practical activities of life in which learning is grounded occurs best through an educative system based on an interdisciplinary approach. This has been established by Dewey's influence on Kelly and particularly by the claims of Dewey and Kelly that the interdisciplinarity of psychiatry, psychology and law affect the everyday events of life.[646] It has also been established by the concepts of TJ itself, as presented by Winick and Wexler.[647] The next section further discusses the connections between psychology and law, as manifested in the development of TJ and the RM.

4.3.2 Comparisons of TJ and the RM as Agents for Social Change: Public and Private Means of Non-adversarial Justice

The central similarity with TJ is that the RM aims to reconceptualise the problem for the parties, so that it concerns not only the players, but also the process and other systems

[645] Ibid 306.
[646] Dewey, above n 559, 328; Warren, above n 520, 32.
[647] Wexler, above n 598, 1; Wexler, above n 599, 27; Wexler and Winick, above n 600, 979; Wexler, above n 599.

within which all players—parties, mediator, support people and so forth—operate. The RM functions in the private sphere of dispute resolution (within the broader framework of the law) and aims to empower parties with relational learning that goes beyond autonomy and self-determination to use relational responsibility for their losses. Through relational learning, parties accommodate the effect of the systems/processes in which the problem exists and accommodate the way they interact with each other within those processes. By reconceptualising their own problem as one that concerns how their counterpart lives and operates, they not only reconstruct their original meaning attributed to their loss and to their counterpart's loss, but also co-create a story/narrative with which both parties can live, while simultaneously fulfilling their legal obligations within the larger framework of the law.

Thus, the RM extends the traditional process of other mediation models that focus on outcome (settlement) and/or transformation alone to reconceptualise the problem or dispute as one that involves redefining the construct of justice to include a relational responsibility around loss. A main similarity between the RM and TJ is that neither is purely scientific and neutral about the effects of law, but are normative insofar as the positive effects of law on the psychological wellbeing of the parties are preferred.[648] A normative framework[649] better enables parties to assess the degree to which their level of readiness allows them to proceed with their own grounded theories to fulfil their legal obligations for the dispute.[650] As a result, a more effective ongoing relationship develops between parties that can better accommodate and anticipate ongoing conflict. The most important proviso is that the parties are not burdened with adversarial solicitors focused only on rights. The need for a holistic approach to problem solving in the RM includes consideration by the legal representatives of what is in the parties' best long-term interests.

I propose that using a micro grounded theory approach in conjunction with a macro psycho-education approach in the form of the NIS allows parties to assess and activate their innovative thoughts and behaviour for meaning reconstruction around the loss when resolving their dispute. By providing a comprehensive guide to dealing with loss

[648] Winick and Wexler, above n 597.
[649] In the RM, the benchmark is the use of the NIS. For TJ, it is the 'good lives' model.
[650] For example, outcomes for mediation must remain within the legal framework, and agreements that go outside the law are not permissible.

and grief, which includes opportunities for improvement[651] and recommended resources for future functioning,[652] the NIS benchmark enables parties to make better informed decisions with which they can better hear each other.[653]

The fact that the RM functions in a confidential private system better enables parties to focus their readiness to learn on how best to develop their own version of justice. This differs from the broader framework of legal precedents, as has been the case with TJ. Yet, despite the differences, the TJ and the RM not only focus on resolution as agents for social change, but also on changes in the individual and group dynamics when dealing with the interplay of macro and micro issues. As stated previously, the focus of the RM on relational responsibility extends the traditional concepts of autonomy and self-determination of parties by extending the notion of personal responsibility to include the effect of the psychological components of the dispute from both sides. The argument is that relational responsibility enables parties to consider the influence of the psychological effect on their legal obligations required to resolve the dispute. In this way, the macro-elements of the legal structure can be said to affect the micro-elements of decision making, and vice versa, when accessing a means of justice.[654]

In addition, the RM offers a different conception to the idea of justice by offering a further dimension to the role of the mediator as fellow educator/relational learner—not only as a guide, advisor, evaluator and expert determiner, but as all of these or none of these, when and if required. This additional role of the mediator as relational learner in itself changes the traditional notion of justice as being something the courts offer, to being something that the parties co-create. As all the players in a social constructionist mediation are educators/relational learners, each has an opportunity to grow from their

[651] Such as what is learnt from the mediation as part of the option-generation, private-caucus and issue-exploration sessions.
[652] This includes information from the DISC and so forth. In family law, these recommended resources include 'co-parenting after separation' courses, which are usually offered in family relations centres.
[653] This is a major point of difference of the RM from other mediation processes—not only in using a benchmark of psychological research to better inform parties of how best to live with their loss, but also to consciously pursue their level of readiness to better accommodate and anticipate any ongoing conflict between them.
[654] The point is simply that institutional changes to the justice system can and have resulted from using interdisciplinary approaches to solving problems and disputes in law. Although the players (legal representatives, disputants, mediators and so forth) bring their own agenda to the mediation, they too can only function within the framework of the law, and their outcome (successful or otherwise) is also grounded in their own experience, on a personal and systemic level, in the rules of law. The point here is that any resolution of any dispute is grounded in the experiences of the participants involved, and limited by social constraints (legal and otherwise) within which the dispute must be resolved.

experience with the loss, when they are ready to do so, by co-constructing their own version of what is fair regarding the loss in their current circumstances.[655] This includes the social constructionist mediator as a fellow relational learner/educator around the loss to serve as an agent for social change as a means of access to justice.

If these arguments are accepted, the RM becomes a means to empower parties to solve their disputes in a truly meaningful and conscious manner that allows them to holistically accommodate their loss from a macro and micro perspective. This in in contrast to other mediation processes, where parties may or may not consciously address their own levels of readiness to deal with their loss. The next part of the chapter demonstrates that the theoretical arguments developed in the preceding discussion can be and are 'applied' in real life. This is done by offering a generic example of how a social constructionist mediation in a typical workplace grievance/family law dispute differs from other mediation processes, and can work better as a way of actually resolving disputes from a social constructionist perspective.

4.4 Part 3: Using the NIS as an Education Tool

4.4.1 The Confidential Pre-mediation Questionnaire

As discussed in Chapter 2,[656] the main difference in the RM to other mediation processes is the use of psycho-education in the form of the NIS as a benchmark of psychological research to inform parties about their responses to their loss. I now describe the actual practice used to describe how things must proceed. Using the NIS during the mediation process is preceded by using the confidential pre-mediation questionnaire to elicit the responses of the parties grounded from their experiences around their loss. That is, the pre-mediation questionnaire elicits the parties' stories around their relationship that led to their loss. The answers to the generic questions from the pre-mediation questionnaire about how the relationship began, what were the expectations from the relationship and what assumptions led to the breakdown of the

[655] See generally Sourdin, above n 149.
[656] See 2.4.

relationship outline the parameters in which the parties engage in relational learning and meaning reconstruction around their loss once the mediation begins.[657]

The NIS serves as a macro framework of psycho-education around relational responses to loss and grief to inform parties how their responses to their losses compare to those considered 'normal' reactions by research.[658] Being better informed to make decisions about their responses to their loss from the information in the NIS predisposes parties to think about alternative responses they can choose to implement during the mediation process. The pre-mediation questionnaire combined with the NIS demonstrates what was noted above—that every participant in the mediation process contributes significantly to the outcome of the agreement, whether they are aware of their level of influence or not. For example, in a typical family law or workplace grievance matter, the mediator's opening statement covers the first, second and third areas of thought in relation to the NIS benchmark, where the cooperative nature of mediation and role of the mediator is explained.[659] In this manner, the social constructionist mediator (referred to as the 'mediator' in the following discussion) provides a collaborative, safe environment, in which the parties share relevant information to mutually decide in a confidential setting what is best for their own future needs (whether in workplace or family disputes) and, in family law matters, the needs of their children.

When inviting parties to give their opening statements, the parties cover the NIS benchmark for thought areas four and five,[660] where they identify the issues according to their own needs and fears and according to the needs and fears they perceive for the other parties, especially when children are involved. The sixth[661] area of thought in the NIS benchmark is introduced indirectly in the pre-mediation questionnaire, when parties are asked to tell the story of their relationship—whether in the workplace or family.

[657] 'How the relationship began' includes the time the parties met, their ages at that time, their assumptions about the agreement into which they were entering, their expectations from that agreement, when the agreement broke down, and the reason for the breakdown in one generic statement, such as 'he/she was unfaithful'. The parties' responses to these questions inform the social constructionist mediator about the level of insight of each party into their own and the other's loss, which can be used to move forward from the dispute.
[658] Ricci, *Mom's House, Dad's House*: *A Complete Guide*, above n 165; Ricci, *Mom's House, Dad's House for Kids*, above n 165; Ricci, *The Co-Parenting Toolkit*, above n 165; Kubler-Ross, above n 382, 51–123; Doka, above n 72, 223, 234.
[659] See 3.2.4 for details on these areas of thought.
[660] See 3.7; 3.8.
[661] 3.9.

This is again introduced in the issue-exploration and option-generation phases in a typical family law or workplace grievance matter, when the mediator feeds back to the parties the level of relationship that currently exists between them in relation to Ricci's relationship chart in the NIS benchmark of psychological research.[662] During the sixth phase of thought, the mediator helps the parties focus on making no assumptions when exploring issues, remaining explicit in their agreements, establishing public structured meetings for mandatory contact (such as the changeover for children in family law or staff meetings in workplace disputes), and maintaining low-risk disclosure by discussing only issues that directly affect their ongoing working relationship or their children.[663]

The mediator encourages parties to maintain high personal privacy in relation to their private life and to remain courteous to each other at all times—to remain in a 'business relationship'.[664] This is also emphasised in the mediator's opening statement and the pre-mediation questionnaire. The mediator is constantly mindful that most parties enter the mediation process during their maximum intensity of feelings of insecurity, where they deeply mistrust each other and disclose facts or rumours to hurt the other. According to the relationship chart by Ricci[665] in the NIS, the acquaintance or 'business relationship' best helps parties to co-create a new ongoing relationship in which they can either better co-parent their children in family law matters, or cowork in workplace grievance disputes. The requirement for parties to make no assumptions during the issue-exploration and option-generation phases is essential to move the parties from the phase of negative intimacy—where the intensity, investment and involvement of their feelings are at their most intimate and hurtful—to the phase of acquaintance or a business relationship.

During the phase of 'business relationship', the intensity, investment and involvement of the parties' feelings are at their most formal, and parties can leave behind the loss and grief to move forward with a new start, as business co-parents or business coworkers. They are encouraged to leave their negative feelings behind and start again with no

[662] Ricci's relationship chart at 3.10. See appendix.
[663] Parties who have difficulty communicating directly often have a 'communication book' in which they inform each other of the daily good moments with their children to keep the other parent involved in the children's daily activity.
[664] Ricci's relationship chart. See appendix.
[665] See appendix.

assumptions or expectations about how to behave with each other, but with explicit agreements about how to interact with each other in public and structured ways to meet their own (and their children's) needs and alleviate their own (and their children's) fears in the future. However, this is much easier said than done.

The seventh[666] area of thought in the NIS benchmark—that the process of separation occurs for one party usually before the other is aware of it[667]—is essential information in understanding the readiness of parties to move forward. That is, if either one of the parties is in shock over a particular issue, there will be no agreement on that issue and the entire mediation process may be derailed if that issue is not somehow 'laid to rest' during the mediation process—even if the agreement is to not handle that issue at that time.[668] For example, in family law matters, partial agreements or no agreement can occur in cases where one party has an unrealistic interpretation of the needs of their children, as indicated by statements saying, for example, that an 18-month child does not want to visit his or her father. Here, the benchmark information of the NIS is of great assistance to mediators because they can call on what current research states regarding the thinking capacity of 18-month children to make decisions about seeing their fathers. The acceptable psychological research serves as a 'normalising' process to better inform the parties. Similarly, in cases where one party is still in shock over a sudden relocation of the children, making it impossible to regularly see them, the shock can affect the readiness of that party to move forward, and ultimately affect their ability and willingness to implement any prior agreements.

The eighth[669] area thought in the normalising process of the NIS[670] enables parties to feel a sense of relief following an incident of shock that the situation has finally exploded, whether in a family law or workplace dispute.[671] When both parties have

[666] 3.10.
[667] See appendix.
[668] A partial agreement may occur on other issues, leaving the issue of 'shock' to be handled in the future.
[669] 3.11.
[670] See the appendix on thought areas seven and eight in the NIS, as evidenced by Ricci's relationship chart and Kubler-Ross's stages of grief and anger over loss.
[671] The unleashed anger is first directed to blaming oneself for having allowed the situation to reach that point. Being unable to sustain the constant blame of oneself, the anger is then directed to the other side and anyone else involved. This constant emission of anger leaves the 'shocked' party depressed, sad, unable to trust, feeling worthless, with low self-esteem and wanting to withdraw from life, before there is a gradual acceptance of the loss with which to move forward. Kubler-Ross, above n 382, 51–123; Doka, above n 72, 223, 234; Worden, above n 29; Neimeyer, above n 210; Neimeyer and Sands, above n 233.

overcome the shock of any issue and are ready to move forward, an agreement can not only be reached, but also implemented. The parties can then reorganise their lives to cope with their new parental/work roles enabled by their personal growth from their relational learning and meaning reconstruction when co-creating their agreement in their 'game in the making'. Being informed by the research in the NIS enables the parties and mediator not to feel the pressure to settle, but to determine that, if they do not settle on a particular issue, then they are simply not ready to do so at that time.

The ninth[672] area of thought from the NIS explains that the shock over an issue is actually the 'trigger' that breaches the intimacy between the parties, causing separation and causing conflict to escalate, while understanding, communication and trust plummet. The role of the mediator is to assist parties to recognise that this trend does not allow for adequate coworking in the workplace or co-parenting of children. The mediator encourages parties to recognise that they are better served if they engage together to reconstruct a way of life that increases communication, trust and understanding between them in relation to their roles at work (in workplace grievance disputes) or in relation to their children (in family law disputes) so that a business relationship between the parties eventuates that can better endure the loss.

The ninth area of thought attempts to inform the parties to decrease the conflict between them to a level where a civil business arrangement can be maintained with explicit agreements. By ensuring that any assumption made by either side can be voiced between them, parties are better able to maintain resolution of any possible conflict that may arise or that they can anticipate in the future.[673]

The final area of thought from the NIS is the NIS questionnaire,[674] which is different to, but still a part of, the NIS pre-mediation preparation to help parties prepare for mediation. As stated above, the pre-mediation content of the NIS encompasses the research about relational responses to loss and grief[675] specifically designed to focus the

[672] 3.12.
[673] To assist the parties to maintain a level of trust and communication that can serve them into the future the parties are strongly recommended to attend 'parenting after separation' courses run by family relation centres. It is generally believed that the Family Court looks favourably on parties who have completed these courses and who demonstrate a willingness to better communicate with the other party.
[674] 3.13.
[675] See appendix.

parties' attention on what they are hoping to achieve by coming to the mediation. As such, the pre-mediation session forms the parameters in which the relational learning occurs. In contrast, the NIS questionnaire of 10 questions helps parties consider what are their own areas of concern and how they rank them in importance, and what might be the other party's areas of concern and how might they rank them in importance.[676]

Most importantly, the NIS 10-question questionnaire asks parties for a commitment to be prepared to reappraise their view of the dispute (their personal constructs) based on what they see, hear and learn at the mediation. These questions prepare the parties to maintain a collaborative frame and mind throughout the mediation process, and suggest that the only issues that will not settle are those that the parties are genuinely not ready to handle in a meaningful manner at that time. This presupposes that all parties have the ability to mediate, provided that they are ready to do so; however, my experience grounded in mediation practice suggests otherwise. Although it is possible to conduct mediations with parties who have psychological difficulties—such as difficulty coping with change—it is imperative to explain explicitly at the outset that there is a need for each party to both see the dispute from the other's perspective and accommodate the other's version of the dispute when moving forward.

In instances where parties are given many opportunities to accept responsibility for their part played in the dispute, but still blame all other factors, it is likely that the mediator is dealing with one or more of the three following scenarios:

1. a party who has a marked psychological disorder of some kind that prevents the acceptance of responsibility for their part played in the dispute—a problem with the ability to move forward
2. a party who has an ulterior motive that cannot be openly discussed—a problem with willingness to move forward
3. a party who is not ready to participate, let alone move forward, due to shock—a problem with readiness to move forward.

In this case, the mediator needs to structure the mediation to include measures to counteract the inability of one party to validly accommodate the other party's

[676] The parties are then asked what possible options for settlement satisfy their own needs and priorities, and what possible options might satisfy the other party's needs and priorities. The parties are finally asked to consider the best and worst alternatives if they do not settle the dispute during mediation.

perspective when attempting to move forward. The implementation of such measures to structure the mediation effectively arises from examples of the parties' past attempts to resolve the matter, as outlined in their responses to the pre-mediation preparation, which sets the parameters for the relational learning that may or may not occur.

Thus, the level of pre-mediation preparation to structure a mediation so that the rights, needs and interests of the parties can be effectively accommodated includes the attendance of appropriate representatives to accommodate the rights of both sides (legal representatives) and the needs of both sides (such as a human resource manager in workplace grievance matters), and the authority to accommodate the best interests of both sides. Any lesser involvement does not allow for the intense and significant reality testing that must occur during the mediation process for an enduring, ongoing dispute to unravel—a dispute that, in many workplace and family law matters, can last for many years. Therefore, a social constructionist approach to the mediation process is subject both to the macro structure in which the mediation is set,[677] and to micro instances where the parties are not ready, able or willing[678] to accommodate the dispute from either their own or the other party's perspective—whether in a rights-based or interest-based setting.

The discussion thus far has shown that the micro-elements of personal constructs/worldviews, mindfulness and TA interact to become relational learning. Relational learning constantly interacts with meaning reconstruction to contribute to the forms of action, described as social constructionism in action. This is illustrated below by the use of the RM as a mediation toolkit.[679] This chapter now demonstrates how the micro-elements of relational learning and meaning reconstruction contribute to the macro notions of justice to further develop a theoretical explanation for a social constructionist model of mediation, as proposed below.

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[677] Such as the statutory or regulatory requirements under a particular Act of law.
[678] See 4.2.2.
[679] Kenneth J Gergen, 'Psychological Science in a Postmodern Context' (2001) 56 *American Psychologist* 803, 803. Gergen considers postmodern scholarship to pose significant challenges to pivotal assumptions of the individual's knowledge objectivity and truth. He places communal construction of knowledge and objectivity as a relational achievement. He sees language as a pragmatic medium through which local truths are constituted. Gergen's view invites a new range of questions about the potentials of traditional research. More importantly, increasing manifestations of movement in the communal directions suggests the possibility of profound change in the profession. These ideas of Gergen are relevant here as a theoretical foundation for the RM from which relational learning through using TA, and the DISC becomes a toolkit for dispute resolution.

A theory for a social constructionist model of mediation is described as follows: the assumptions and expectations of parties that form the personal constructs with which they enter the mediation can be acknowledged by both parties through mindfulness and the process of TA in such a way as to affect the quality of their current and ongoing relationship, if any. In addition, the relational learning between the parties from the benchmark information in the NIS can contribute to changing their personal constructs around their losses. This occurs when the feelings of the Child and the strategies of the Parent are validated by the learning of the Adult to reconstruct a meaning through the 'Observer Self' with which both parties can better live in relation to the constructs around their respective losses. Such a process[680] occurs not only for each party, but also between each party, to reach as close a relationship as possible of Adult transacting with Adult[681] within the mediation process. The use of the DISC model[682] as a further benchmark in the NIS that can be used by parties further enables them to note the differences in their communication styles as simply being different, instead of being yet another source of dispute.

Thus, the RM uses the NIS as a benchmark framework to ask questions about the relational process of the parties—both current and preferred. Kelly's personal construct theory, Vago and Silbersweig's theory of mindfulness, Berne's TA theory and Dewey's theory on the 'qualitative immediacy of perceptions' are all core components of the process of relational learning. These components arise both from using the NIS[683] and from the constant interaction of the component parts during the rest of the mediation process within the framework of Gergen's theory of relational being.[684] In this way, the

[680] See the section on TA in 4.2.3.
[681] Otherwise referred to as the 'Observer Self' functioning with the 'Observer Self'.
[682] See 1.9.
[683] This also includes the theories of Ricci and Kubler Ross—see 2.1.
[684] Thus, the aim of a social constructionist mediation is for parties to use the data from their dispute that can best generate a theory/meaning with which each can move forward with an enduring sense of the loss, either together in a multitude of forms or permanently apart. In this sense, the mediation process itself becomes a grounded theory research exercise for the parties, as they use their own experience/grounded theories to report their opening statements as data that are then used to ground their analyses of how their relationship can now function, given their losses. This process is consistent with the 'thick description' characteristic of a qualitative approach. Although the results of a social constructionist approach may not be statistically generalisable beyond the particular disputes and their specific features, they become a catalyst in the wider context of the parties' quest for meaning to make sense of their losses. This occurs by developing models of living that can specifically accommodate their losses and are still perceived by them as a model of living that is fair under the circumstances. This information is relevant here because it forms the details of the theory behind a social constructionist approach to mediation.

RM becomes a 'toolkit' of resources that demonstrates the process of social constructionism in action.

The RM 'toolkit' can accommodate a range of ways of working, including engaging in preliminary meetings, single block substantive sessions, a series of meetings, separate caucuses and joint meetings, virtual meetings, email and other forms of communication—depending in what is required at that moment.[685] Henry Brown's suggestion that mediation is a process of establishing a toolkit to accommodate varying situations[686] best describes the reason for developing the RM in the first place.[687] However, constructionism is not only about what occurs during the mediation itself. It also affects the larger social framework in which the dispute occurs. Thus, being mindful of the larger structural picture of the law in which the RM sits is just as important as the inner emotional and psychological factors that interact to comprise the relational learning process—almost like a hologram, as discussed in Part 2, which considered how the RM fits into the Australian legal framework with its notions of justice.[688]

The aim of a social constructionist approach to mediation is for parties to come away enriched from their own practice in the process. There is no attempt to establish universal ethics or politics, but there is simultaneously nothing in constructionism that argues against taking a moral stance or criticising injustice. In particular, the point being emphasised is that justice can be reconceptualised as two parties being able to move forward in their lives through a social constructionist process, such as the RM. It is in this sense that the RM becomes an access-to-justice measure.[689] This is a major reworking of the meaning of the phrase 'access to justice'. In many ways, ADR was

[685] Henry Brown, 'Alternative Dispute Resolution and Mediation' (1995) 4 *Quality in Health Care* 151.
[686] Gunn and Richbell's identification of trust as the key skill of an effective mediator implies that mediation itself is a process where trust is essential. The concept of relational learning inherent in the RM similarly implies that trust is an essential component of the mediation process and a significant skill for both the parties and mediator. Jane Gunn and David Richbell, 'From Mastery to Incompetence' (Speech delivered at the 2013 MII Conference, United Kingdom, October 2013).
[687] A social constructionist approach enhances parties' awareness of both the effect of their own losses on their businesses, and the personal effect of the losses on each other and the community in which their business is based. If the two business enterprises are to engage in future ventures, an understanding of the effect of their losses is vital to the quality of the relationships that follow, which demonstrates the significance of the relational learning that occurs through a social constructionist approach around loss during the mediation process.
[688] See 4.2.3.
[689] See the earlier argument of RM as an access-to-justice measure in 2.4.3.

supposed to address the shortcomings of the litigation model of justice, which is constrained by its own rules and procedures, and can easily fall victim to its bureaucratic 'tick-box' approach from the systemic court procedures, if a holistic approach is not engaged. However, as has been shown, ADR needs to go much further in order to fulfil its promise of justice.[690]

Thus, constructionism in the mediation process aims to remove monologue as the only grounds for dialogue, and replaces any monologue in the mediation process with the many voices of the parties that are otherwise silenced. By hearing these many voices, I argue that a more effective means of dispute resolution occurs, as the parties attain an outcome that is considered fair by both of them to live with,[691] and that can anticipate any future conflict in a way that each feels safe to address at that time, but leaves room for further discussion in the future.

4.5 Conclusion

This chapter has addressed the idea that relational learning occurs as a result of the interplay of mindfulness, TA and the personal constructs of the parties—an idea grounded from my experience as a mediator using the RM during the last 20 years. It has proposed that the combination of relational learning and meaning reconstruction becomes the process of social constructionism in action, and that both meaning reconstruction and relational learning are required to 'unblock' the obstacles causing people to act on the ideas or decisions[692] with which they can move forward from the loss or dispute. This aligns with Kelly's personal construct theory influenced by

[690] Richard Delgado et al, 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' (1985) *Wisconsin Law Review* 1359; Deborah R Hensler, 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-shaping Our Legal System' (2004) 108 *Penn State Law Review* 165; Jethro K Lieberman and James F Henry, 'Lessons from the Alternative Dispute Resolution Movement' (1986) 53 *The University of Chicago Law Review* 424; A Leo Levin and Deirdre Golash, 'Alternative Dispute Resolution in Federal District Courts' (1985) 37 *Florida Law Review* 29; Dwight Golann, 'Making Alternative Dispute Resolution Mandatory: The Constitutional Issues' (1989) 68 *Oregon Law Review* 487; Frank E A Sander, 'Alternative Methods of Dispute Resolution: An Overview' (1985) 37 *Florida Law Review* 1; Sharona Hoffman, 'Mandatory Arbitration: Alternative Dispute Resolution of Coercive Dispute Suppression' (1996) 17 *Berkeley Journal of Employment and Labor Law* 131; Jack M Sabatino, 'ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution' (1998) 47 *Emory Law Journal* 1289.

[691] Sheila McNamee and Kenneth J Gergen (eds), *Relational Responsibility: Resources for Sustainable Dialogue* (Sage Publications, 1999) xi.

[692] Compared to Dewey's notion of ideas—hence the relevance for the RM, where the two concepts are almost identical in intent and purpose.

Dewey's concept of instrumentalism and notion of 'ideas' as a means of moving forward.[693]

Although meaning reconstruction has been presented as a practical theory by Neimeyer and Sands,[694] as stated in Chapter 2, the proposal here is that it is also a practical process for a social constructionist interpretation of mediation. The argument is that the need to reconstruct meaning around loss occurs when parties accept the responsibility to analyse or deconstruct the components that form their dispute. One of the primary proposals developed in this chapter is that, if any one of the micro-elements of readiness, ability or willingness is missing from either party, there will be no long-term solution to the dispute, despite any macro structures in place authorising the resolution.[695] Alternatively, this proposal suggests that any dispute can be resolved if both parties are ready, willing and able to simultaneously accommodate each other's and their own view to understand the bigger picture that incorporates both perspectives. In a social constructionist mediation, the term 'accommodate'[696] implies not only intellectually understanding the other party's perspective, but also accepting the validity of that perspective, and moving forward with the other's perspective in mind, while simultaneously doing what is best from one's own perspective. Again, this is easier said than done.

Thus, a social constructionist mediator elicits the current research from psychology about grief and loss to use with the parties within a given legal framework in a way that never loses sight of the parties' ability, readiness and willingness to deal with their losses, jointly and severally. The more the parties attempt to understand their dispute, the more they are able to move forward with that understanding. By being better informed by the psychological research in the NIS, the parties engage a path that leads to a more workable long-term arrangement to fulfil their legal obligations under the

[693] Warren, above n 520, 32, 35.
[694] See generally Neimeyer and Sands, above n 233.
[695] For example, in the Workers Compensation Commission, the mediator is authorised under the Act to speak with the applicant alone, if deemed appropriate; however, most often, the mediator is discouraged by legal representatives from speaking to 'their client' alone.
[696] See, eg, Jean Piaget and Margaret Cook, *The Origins of Intelligence in Children* (W W Norton & Co, 1952); Barry J Wadsworth, *Piaget's Theory of Cognitive and Affective Development: Foundations of Constructivism* (Longman, 5th ed, 1996).

given Act (in which their dispute occurs).[697] The level at which the parties accept responsibility to reconstruct their loss determines their flexibility to move forward from their dispute.[698]

In conclusion, this chapter has substantiated the fourth proposal of the thesis—that, in order to move forward from the loss and dispute, the original meaning and feeling of devastation arising from the loss require reconstruction. That is, parties must accept responsibility to change their belief systems and personal constructs around their losses. Thus, I argue that accepting responsibility to change the belief systems around loss (reconstructing loss) more effectively manages disputes in a relational world, especially where parties have ongoing relationships. As stated at the beginning of this chapter, I propose that a theoretical explanation for a social constructionist model of mediation would implement the theories behind the readiness (maintaining workable personal constructs around loss),[699] willingness (mindfully accepting responsibility for change)[700] and ability (making decisions from Adult to Adult and Observer Self to Observer Self)[701] of the parties to consciously engage in meaning reconstruction.

The fundamental premise underlying a theoretical explanation for a social constructionist model of mediation, as proposed in this thesis, is that the interplay of mindfulness (demonstrated through the level of willingness of the parties), TA (demonstrated through the ability of the parties to make decisions from the Observer Self) and personal constructs (demonstrated by the readiness of the parties to reconsider the meaning attributed to their loss) of the parties results in relational learning. Relational learning consciously becomes meaning reconstruction once parties accept the responsibility to change the original meaning of devastation attributed to their loss. The ebb and flow of the continual process of deconstruction and reconstruction is termed 'social constructionism in action'.

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[697] For example, whether it is under the *Family Law Act*, *Workers Compensation Act 1987* (NSW), Franchising Code and so forth.
[698] For example, the rights-based disputes of the Workers Compensation Commission do not lend themselves to using a facilitative mediation process or social constructionist approach, primarily as a determination about the law is required in matters that do not settle the damages sought.
[699] Warren, above n 520, 32, 35. That is, applying Kelly's personal construct theory.
[700] See generally Vago and Silbersweig, above n 587, 1. Applying the theory of mindfulness.
[701] Berne, above n 597, 15. The TA model.

The next chapter examines how relational responsibility leads parties to a better way of enduring loss, from an institutional and personal perspective. It discusses how the current notion in law of the individual being the sole source of blame for any loss is ineffective from a social constructionist perspective, and it offers alternatives in the quest for meaning to make sense of loss in a relational world.

Chapter 5: Enduring the Loss—The RM of Mediation as a More Effective Measure to Access Social Justice

The intuitive mind is a sacred gift and the rational mind is a faithful servant.
Albert Einstein[702]

5.1 Introduction

This thesis proposes a theoretical basis to the process of mediation as being social constructionism in action that leads from a transformative model of empowerment and recognition to a social constructionist model of relational learning. A social constructionist approach is presented as a means of making sense of loss by placing the dispute in the wider social context. In the preceding chapters, the main claims of the thesis were substantiated—that effective mediation requires parties to be able to move forward psychologically from their dispute or loss by reconceptualising their own meaning of 'justice' around the loss so that the loss can be better endured.

This thesis aims to develop a theoretical explanation for a social constructionist model of mediation. It does so by relying on the relevant interdisciplinary ideas in a number of disciplines, including psychology and law. It addresses the need to conceptualise mediation as a genuine method of dispute resolution that can manage the effect of loss on the psychological wellbeing of the parties when engaging with the profession of law.[703] To explain how this happens, this chapter is divided into three parts.

[702] Robin Kelly, *The Human Hologram: Living Your Life in Harmony with the Unified Field* (Energy Psychology Press, 2011) 132.

[703] Chapter 5 traces how the collective acknowledgement and addressing of loss (otherwise termed the 'collective consciousness' around loss) affects both the outcome of parties' disputes and the quality of any ongoing relationship between parties, including the structure of the macro systems in which the loss endures. The focus here is to consider the effect of the legal process on the psychological wellbeing of parties, and to care about what happens as a result of loss to the individual's sense of being wronged. The argument is that such a focus enables parties to develop their own socially constructive and individually meaningful versions of justice by being better able to overcome their grief in relation to their losses.

5.1.1 Overview of Part 1

Part 1 discusses how law can benefit by further expanding its conception of the mediation process if it includes an interdisciplinary approach to mediation around the effect of loss both on the psychological wellbeing of the parties and on the outcome of the dispute. It demonstrates that engaging a holistic approach to mediation (as in the RM) makes it possible to consider what happens to each party's loss and sense of being wronged. It affirms that the process of going from innovation to generate options around the meaning of loss to implementing the parties' agreement as an 'institution' (otherwise termed the process of 'bisociation') is a social constructionist process that assists parties to more effectively co-create their own sense of justice around their feelings of being wronged. That is, this section develops the argument that the legal outcome of the parties' dispute (their agreement) becomes a catalyst that changes the social fabric in which the parties co-relate as the parties 'institutionalise' their agreement in the wider social community.

The first section of Part 1 develops the claim that a grounded theory/social constructionist approach affects the way the justice system is perceived by parties. It first addresses some of the disadvantages of traditional systems in favour of using a more holistic approach, such as the RM. It then relies on Frieberg's[704] definition of bisociation to argue that bisociation, as applied in the private system of the RM, enables parties to recombine innovative thoughts and practices around their losses. This occurs in much the same way that bisociation in the public system of TJ[705] recombines innovative thoughts and processes to enable joint relational responsibility among the interdisciplinary professionals engaged in the case management of the offender.[706]

Following this, Part 1 develops the argument that grassroots social change arises from the safe place of confidential arrangements formed from collectively acknowledging and addressing the losses by parties in dealing with their feelings of being wronged. It addresses how the mediator, as a relational learner, can shift the focus from neutrality

[704] Arie Freiberg, 'Psychiatry, Psychology and Non-Adversarial Justice: From Integration to Transformation' (Paper presented at RG MYERS Memorial Lecture, Monash University, Melbourne) 6–7; see 5.2.1.
[705] That is, non-adversarial justice.
[706] As forming the more holistic 'institutions' of TJ and non-adversarial justice. Winick and Wexler, above n 597.

and individual responsibility, which is so prevalent in the traditional models of mediation, to that of relational responsibility.

5.1.2 Overview of Part 2

Part 2 addresses the issue of power that arises from collectively acknowledging the losses. It explores the redistribution of power within a social constructionist model to describe how the three traditional concepts of power, mediator neutrality and party self-determination interrelate. It claims that, more than any traditional model, a social constructionist model enables joint relational learning to occur between the parties and mediator. This allows power to be shared and changes the social contexts in which the parties live to better endure the losses within a more supportive and protective social context that minimises any feelings of being wronged.

5.1.3 Overview of Part 3

Part 3 argues that the notion of individual responsibility to accept blame for loss is insufficient, and discusses how accepting relational responsibility for loss ultimately becomes the process of social inclusion for institutional/social change. It further develops the claim that a social constructionist/grounded theory approach can fundamentally change both the effect of the legal process on the psychological wellbeing of parties and the way the legal system and justice is perceived and operates.[707]

It introduces the idea that the micro world of joint decision making in the mediation process is like a hologram of the macro world of forming relational/social institutions from a grassroots level. This is in contrast to the way traditional mediation processes deliver justice in the Australian legal system[708] because traditional processes do not focus on the psychological effect of loss in relation to the outcome of a dispute. At best, they may only vicariously consider such an effect as part of the 'settlement' process, if at all.

[707] Freiberg, above n 673, 4.
[708] Note the linear explanations in the literature to that effect (as opposed to explanations using a social constructionist perspective) that lead to non-adversarial systems, such as the TJ or mental health courts.

Part 3 substantiates the fifth claim of the thesis—that collectively acknowledging the effect of grief from loss on the legal outcome of the dispute and quality of any ongoing relationship between parties helps parties form macro structures that can better endure loss. It describes how mediation, as social constructionism in action, can be a more effective means of dispute resolution in a relational world, where parties become agents of social change in their quest for meaning and justice to make sense of their loss.

5.2 Part 1: Delivering Justice in the Australian Legal System

The aim of this part of the thesis is to draw attention to the interaction between the macro and micro facets of dispute resolution and problem solving. It is not feasible or necessary to provide an in-depth literature review of traditional ADR. Rather, the aim is to question how a reconceptualisation of mediation as the RM may better deliver 'justice'.[709] With this in mind, the distinction between the RM and traditional legal understanding of ADR is that the RM is more than a formal resolution of disputes. The conventional ways of understanding ADR suffer from the same problems as litigation in that they do not really consider the effect of the legal process on the psychological wellbeing of the parties, nor do they really consider what happens to the individual's sense of being wronged. Thus, the resolution of a dispute, if it happens at all, usually occurs at a formal level and not necessarily at a psychological or emotional level.[710]

The RM can counteract the traditional criticisms against mediation by performing as an agent for social change and social justice because it focuses the parties' attention specifically on their quest for meaning to make sense of their loss. This requires a collective acknowledgment (and effective addressing of issues) around the way parties deal with the grief connected to the loss. The argument is that the way parties individually handle their grief affects their collective readiness to overcome the pain

[709] Instead, as discussed in Section 2.4.1, this thesis uses a multidisciplinary framework and mixed-methods approach to explain the 'flow of perceptions' from a psychological perspective (micro issues) of parties during a social constructionist mediation, and the interaction between the macro and micro facets of dispute resolution and problem solving, for which there is very little literature available—hence the need for this thesis. Gubrium and Holstein, above n 7, 7; Creswell and Clark, above n 298, 5; Lichtenthal et al, above n 272, 791.

[710] See Moore, above n 475; Brandon and Fisher, above n 81; King, Freiberg, Betagol and Hyams, above n 25; Spencer, above n 446.

associated with the loss, which affects their collective ability to move forward to fulfil their social and legal obligations connected to the dispute.

As stated previously,[711] if a party is overwhelmed by the pain of loss, they cannot think clearly to take responsibility for their part played in the loss. They are also unable to see the loss from the other party's perspective and cannot function from the Observer Self.[712] The overwhelming pain affects their ability to move forward from the dispute on an individual and collective basis ('collective' refers to seeing things from their own and the other party's perspective, as well as the perspective of everyone involved in the wider social context). [713] This argument requires acknowledgement of the interdisciplinary nature of loss[714] and relational learning around grief,[715] and makes a strong case for the law's understanding of mediation to be further supplemented with an interdisciplinary view of how disputes may be resolved from the perspective of incorporating such knowledge around loss. However, before developing this argument, it is first necessary to consider briefly the purpose of any justice system from a social constructionist perspective. In doing so, the idea is to understand 'justice' in a wider and more inclusive sense, rather than in a legalistic manner.

This chapter does not provide a full literature review on the role of justice in the Australian legal system or role of social constructionism in interpreting the concept of justice. However, it notes King et al.'s[716] summary that states that the purpose of any justice system in the form of institutions is to serve its community.[717] If this definition

[711] This was acknowledged in the Introduction.
[712] See earlier discussion in Chapter 2.4.3.
[713] For example, in a family law matter, 'collective acknowledgment' could include seeing the dispute or loss through the eyes of the children, grandparents and anyone else involved in a relationship with the parties. In organisational psychology literature, this 'collective acknowledgement' can occur through using instruments such as the Conflict Dynamics Profile 360 Instrument, which was developed as a multi-rater to provide information on constructive and destructive behavioural responses to conflict, including feedback from bosses and peers, as well as self-reports. Such ratings provide insight to possible gaps between an individual's own view of their behaviour and that of others at different times in a conflict, and which behaviours are particularly damaging to forming a joint narrative with which to move away from the dispute. Mark H Davis, Sal Capobianco and Linda A Kraus, 'Measuring Conflict-Related Behaviors: Reliability and Validity Evidence Regarding the Conflict Dynamics Profile' (2004) 64 *Educational and Psychological Measurement* 707; Brown, above n 654, 151.
[714] This was acknowledged in the Introduction.
[715] This was discussed generally in Chapters 1 to 4, and more specifically p. 13-14, 18, 26, 34-35, 41, 46-49, 54-55, 69-71, 74, 83-4, 126, 141, 165-6, 168, 170.
[716] King, Freiberg, Betagol and Hyams, above n 25, 244.
[717] Ibid 13. King et al. define 'justice' as 'an attempt to describe a loosely connected set of institutions and practices that encompasses the legislature, departments of government, courts, tribunals, the legal profession (judicial officers, barristers and solicitors, legal aid and prosecution authorities) community

of institutional justice is accepted, the institutional justice system must retain the confidence of the community to administer both the rule of law and what is perceived by the public as 'moral justice' within the rule of law. Here, the perception of the public may differ from what the law can actually offer as 'justice'.[718] I argue that the RM can offer an opportunity to parties (mainly through a confidential process) to reconceptualise their own means of justice that endures beyond the legal framework. It is important to reiterate that the RM is not going outside the legal framework, which it acknowledges and accepts.[719]

King et al.[720] emphasise that the central constitutional role of the courts in a political system built on the separation of powers (as are Western legal systems) is crucial to the development of any concept of justice, especially in connection to the role of courts in stating broad principles to give direction for the future conduct of cases. They state that, in regulating the adjudication of disputes, the role of courts to give force to private agreements and publicly expose and denounce unacceptable or anti-social conduct should never be replaced.[721] With this in mind, I consider the shortcomings of the traditional mediation processes as measures for social justice.

5.2.1 Shortcomings of the Traditional Mediation Processes as Social Justice Measures

It is important here to avoid entering the debates in the literature regarding the disadvantages of using traditional mediation processes as forms of dispute resolution.[722]

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legal centres, dispute resolution agencies, police corrections and the community. It covers civil, criminal and administrative processes'.

[718] Ibid.

[719] The RM is an example of how confidentiality in a private dispute resolution system can be accommodated to engage the public structural changes required from using an open holistic approach. For example, family relation centres provide public structural changes to offer parties information privately related to the effect of divorce on their children and each other.

[720] King, Freiberg, Betagol and Hyams, above n 25, 13.

[721] Ibid 12.

[722] This is also to ensure that such private processes should occupy space alongside the public legal system. King, Freiberg, Betagol and Hyams, above n 25, 13. The NSW Workers Compensation Commission is such a forum, where private dispute resolution occurs alongside the district court system to ensure protection of the public's rights and entitlements following an injury at work. NSW Legal Aid Mediation Services for Family Law is another government-funded service offering private dispute resolution that works alongside the Family Court. If not settled during mediation, workplace grievance matters are heard in the Government and Related Employees Appeals Tribunal or the various professional tribunals. This thesis argues that the RM can enhance mediation procedures in workers compensation, workplace grievance and family law matters as they occupy their space alongside the public legal system,

This discussion instead seeks to acknowledge the validity of these issues and note that most of the literature is about dispute resolution through courts, versus dispute resolution through facilitative or the other traditional models of mediation.[723] In considering the shortcomings of the traditional mediation processes as measures for social justice, my focus is to ensure that the individual is protected within any social justice system. I claim that the RM, as constructionist research, can offer more protection to parties than traditional mediation processes because it offers parties a safe way for them to jointly co-create their own means of social justice.

For example, the original concept of empowerment often used in early mediation literature[724] stressed that mediation is a 'self-empowering process'. This conception lacked the explicitly political approach to practice required from social conflict theories.[725] Instead, earlier critics[726] claimed (and still claim) that mediation is apolitical and conservative, and that it ignores the structural and social causes of conflict that compromise its capacity to be empowering.[727] This confirms Cloke's view that traditional mediation processes seldom look beyond settlement, despite their capacity to do more to contribute to the formation of a just society.[728]

As early as 1984, Owen Fiss claimed that mediation places compromise ahead of justice,[729] and, in 1994, Resnik lamented the loss of developments in the law that may accompany less litigation and an increased number of settlements.[730] Mediation has been criticised for neutralising conflict, thereby giving disputants the illusion that something is being done about their grievances, while also reducing the chance for the

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by focusing on the effect of the legal process on the psychological wellbeing of parties, and empowering parties to more effectively manage their loss.

[723] Boulle, above n 21, 61.

[724] Folberg and Taylor, above n 166, 7.

[725] See Bagshaw, above n 124; Owen Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073, 1075, 1085.

[726] See Bagshaw, above n 124; Owen Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073, 1075, 1085.

[727] Thus, the change that occurred in 2008 to define mediation as a process that supports parties to make their own decisions, rather than focusing on achieving a consensual outcome, has been retained in the current MSB proposals.

[728] Cloke, above n 236.

[729] Ibid. Fiss, above n 694, 1073.

[730] Judith Resnik, 'Whose Judgement? Vacating Judgements, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century' (1994) 41 *UCLA Law Review* 1471, 1477; Delgado et al, above n 659, 1359; Hensler, above n 659, 165; Lieberman and Henry, above n 659, 424; Levin and Golash, above n 659, 29; Golann, above n 659, 487; Sander, above n 659, 1; Hoffman, above n 659, 131; Sabatino, above n 659, 1289.

needed public reforms.[731] This argument states that mediation in particular, and ADR in general, expand state control over disputes, with few due process protections, and, by so doing, enables greater state intervention in the participants' lives. King et al. note that private dispute resolution systems can reduce corporate and governmental accountability, create a multiplicity of standards or rules within the various dispute resolution bodies[732] and exacerbate existing power imbalances between the wealthy and poor.[733] Following such arguments, Professor Dame Hazel Genn was reported (albeit in a different context) to have said that, 'mediation is not about just settlement, it is just about settlement'.[734]

If mediation is to be an effective means of access to justice alongside adjudicatory processes, including litigation, the reasons behind such concerns must be addressed. Suggestions for doing so come from Brown,[735] who claims that litigation and mediation are symbiotic dispute resolution processes, yet the concerns and reservations of litigators about mediation must be better understood if mediation is to proceed to mastery[736] in rights-based cultures.[737] Mediators must show that the process of mediation is effective and responsive to the needs of all parties, lawyers included, and

[731] As discussed in Chapters 1 to 4, the RM addresses the concerns and reservations of parties in a rights-based culture as they unfold in the constructionist process as part of their concerns/exploration of the issues. In very rights-based cultures, such as that of workers compensation, parties are given the illusion that something is being done in response to their grievances. In the statutory framework of the *Workplace Injury Management Act*, limited though it may be, the chance for needed public reforms to protect workers has been taken seriously, although reforms have been reduced for financial reasons. In response to the argument that mediation can expand state control over disputes and provide few due process protections, mediated matters (such as those of James Hardy on mesothelioma) may have expanded state control in creating reforms, such as the Dust Diseases Tribunal. However, such tribunals have provided due process protections that have politically and organisationally affected company policies and actions and continued government policy. Greater state intervention in participants' lives in this form may be considered a welcome intervention to protect the public, but it must be noted that such responses only resulted from an initial grassroots action of the parties involved.

[732] King, Freiberg, Betagol and Hyams, above n 25, 14. Although the first step to standardising mediation processes was taken in 2010 with the formation of the MSB, the notion of a peak group to represent mediators is still in question and enables the development of standards to be affected by the open market. The notion of a complaints handling system for the entire mediation profession is also in question, thereby resulting in the multitude of processes for complaints handling as they exist in the various dispute resolution bodies, such as the Australian Dispute Resolution Association, LEADR and Institute of Arbitrators and Mediators Australia.

[733] Ibid 12.

[734] Nadja Alexander, 'Minding the Mediation Gaps: Stories about Confidence and Confusion in the World of Mediation' (Paper presented at the Charter Institute of Arbitrators' Mediation Symposium: Creating Confidence in Mediators, London, 27 October 2010) 21. Nadja cites Genn's comment that Genn can often be misunderstood as being non-supportive of mediation, when she is actually very supportive of the mediation process.

[735] See 1.5.

[736] Brown, above n 654, 151.

[737] Such as the NSW Workers Compensation Commission.

responsive in such a way that vulnerable parties should receive the same protection of the law and as fair an outcome as they would through the court system. This is an argument espoused by Mnookin and Kornhauser in the concept of the 'shadow of the law', which is as significant today as it was 30 years ago.[738]

King et al. state that the role of justice institutions in applying the law is to resolve disputes fairly—with no discrimination, fear or favour.[739] They claim that the aim of non-adversarial justice in the private system is truth finding or problem solving, rather than dispute determination, which occurs in the public system. Buck[740] similarly defines non-adversarial justice as truth finding in its approach to criminal and civil justice. He states that it focuses on non-court processes, where the basic premises are prevention, rather than post-conflict solutions; cooperation, rather than conflict; and problem solving, rather than solely dispute resolution.

It is noteworthy that the concept of dispute resolution functioning in the 'shadow of the law' presupposes that the 'law' is a singular concept with an authoritative interpretation that is understood by everybody in the same manner—which it is not.[741] Thus, the consequence of private bargaining in any field of the law varies according to the interpretation of parties regarding what constitutes the law and the circumstances of the negotiating parties, including the power relationship between them, their prior experience in the justice system, and how they view their dispute.[742] According to Buck, non-adversarial justice adopts a holistic approach to problem solving and regards the law as only one of the means to deal with issues[743]—the other means including the roles of tribunals and public and private ombudsmen.[744]

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[738] Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950, 988; Liz Trinder, 'Contact after Divorce: What Has the Law to Offer?' in J Gareth Miller (ed), *Frontiers of Family Law* (Ashgate, 2003) 23; John Dewar and Stephen Parker, 'The Impact of the New Part VII Family Law Act 1975' (1999) 13 *Australian Journal of Family Law* 96, 110; Austin Sarat and William L F Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford University Press, 1995) 5, 10; Herbert Jacob, 'The Elusive Shadow of the Law' (1992) 26 *Law & Society Review* 565, 568; Richard Ingleby, 'Matrimonial Breakdown and the Legal Process: The Limitations of No-Fault Divorce' (1989) 11 *Law and Policy* 1, 14.
[739] King, Freiberg, Betagol and Hyams, above n 25, 14.
[740] Trevor Buck, 'Administrative Justice and Alternative Dispute Resolution: The Australian Experience' in *Research Series No 8/05* (Department for Constitutional Affairs, 2005) 49.
[741] Mnookin and Kornhauser, above n 739, 950, 988.
[742] King, Freiberg, Betagol and Hyams, above n 25, 13.
[743] Ibid.
[744] Ibid.

Further examples of non-adversarial justice can be found in the court system, such as 'managerial justice', or alongside the court system, such as restorative justice programmes—the latter expanding notions of team building.[745] Non-adversarial justice adopts a multidisciplinary, rather than legal monopoly, approach that focuses on process, rather than outcomes. It emphasises pro-active lawyering and planning and maintaining ongoing relationships, such as those between clients or between lawyers and clients.[746]

It can be argued that mediation under any model can deliver justice like the courts, provided that the protections of the court are also available. However, Cloke states that traditional processes are able to deliver a form of 'justice', but seldom go beyond settlement.[747] Thus, the issue is not to replace the court system by non-adversarial procedures, but to ensure protections are available to those who use private processes. The argument I propose is that the RM, as constructionist research, attempts to consciously deliver 'justice' by addressing the economic and social inequities (macro factors of dispute resolution) that are experienced as personal conflict (micro factors of problem solving)[748] to the best ability, readiness and willingness of the parties at that time.

The RM, as constructionist mediation, specifically attempts to maximise protection to parties by offering them a chance to reconceptualise the nature of their dispute around the meaning attributed to their loss, to the extent that they are willing, ready and able to do together at that time. In this manner, the RM accommodates both the macro system of dispute resolution and the micro system[749] of problem solving by collectively acknowledging the losses of both parties in meaningful ways that can be endured beyond their legal obligations to resolve their dispute, but not outside the legal framework.[750]

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[745] Similarly, the NIS of the RM began as the IS of the mediation unit in the Sydney Registry of the Family Court system. When the mediation unit was disbanded, the seeds were sown for the formation of the family relations centres, which now work alongside the Family Court.
[746] Winick and Wexler, above n 597, 605, 608.
[747] See 2.4.3.
[748] 5.4 Part 2.
[749] Grassroots up and legislation down.
[750] Brown, above n 654, 151. As an aside, I argue that such a constructionist process of the RM aligns with Brown's notion that mediation should be recognised as a partner of litigation, not as a competitor.

Cloke[751] confirms that, by affirming and creatively combining complex, contradictory, paradoxical truths, it is possible to identify complex, higher order, synergistic solutions. He states that a living organism, like a social movement, cannot exempt itself from the cumulative effects of its decisions regarding process. Eventually, these effects begin showing as burnout, fatigue, in-fighting, destructive relationships, apathy, cynicism and a loss of effectiveness and unity. Cloke's analogy of a living organism to a social movement is similar to my analogy comparing social relationships to chaos theory in the natural sciences (discussed in Chapter 1) to explain the workings of the RM. I agree with Cloke that enduring conflict begins a cycle of blame and recrimination that leaves parties presenting a hardened, adversarial exterior to those who remain, and with bitterness and enmity towards those who leave.[752] I further agree that enduring conflict leads to a predictable decline in the valuable contributions made by parties in their time and effort towards a cause. For example, the benchmark information of the NIS[753] makes it easier for parties to at least acknowledge the other party's input to resolution during the RM, even if appreciating each other's efforts is still not possible.

The RM more closely follows Cloke's description of mediation in contributing to a just society because it enables relational responsibility for parties to accommodate their losses in a more meaningful way by affirming and creatively combining complex, contradictory, paradoxical truths in order to identify complex, higher order, synergistic solutions. Although all processes of mediation encourage empathy and mutual understanding between parties to support their purposes/goals, I argue that the RM better facilitates goal sharing between parties than do traditional models of mediation because it focuses on unravelling the assumptions about loss that were initially brought to the mediation by the parties.

Like any other form of mediation, the RM uses consensus, rather than coercion, to further the goals of peace through dispute resolution. However, I argue that the RM also enhances the goals of equality, democracy and justice through the collaboration, respect, honesty, fairness and empathy it encourages from parties as integral parts of its constructionist research, where parties engage in practical problem solving, negotiation

[751] Ibid.
[752] Ibid.
[753] See Guideline 5 in the relationship chart by Ricci, discussed in Section 3.9.

and conflict resolution procedures.[754] Sharing a grounded theory approach in the RM better enables parties to implement an agreement in which they can participate in diverse communities that can unite and coexist, thus going beyond their existing legal obligations to resolve their dispute, to reach a point where they can better protect their future.

In this way, the RM, as mediation, affords parties the opportunity for adequate due processes to be co-created as protection against further disputes. As constructionist research, I propose that the RM offers more protection to parties than do traditional mediation processes by encouraging parties to recognise their own power to become agents of social change, incorporating agreements in which they feel better protected.

As agents for grassroots social change, parties expand their concept of justice to overcome feelings of being wronged. In so doing, the concept of justice is not only invoked in abstract political theory within the RM, but pragmatically by allowing parties to naturally move wherever they are ready to move, within their willingness and ability, to ensure the long-term protection of their agreements against any future loss. It is for these reasons that there is a benefit to law in further expanding its conception of the mediation process, if it includes an interdisciplinary approach to mediation that includes an understanding of the effect of loss.

Nonetheless, an undeniable trend in the Australian legal system is to impose an obligation on parties to engage in ADR.[755] Rather than engaging in the prevailing debates about this trend, I accept it as a given reality. My argument is that simply imposing this obligation is not enough, and that there is a benefit to the law in further expanding its conception of the mediation process to include an interdisciplinary approach to mediation around the effect of loss. However, to include the effect of loss, it is important to first consider the benefits of interdisciplinarity.

[754] See Chapter 4, 165-174 for definitions of problem solving, conflict resolution and negotiations.
[755] For example, there is an obligation now to attend mediation before an FDRP prior to engaging in court procedures, particularly in children's matters. *Family Law Act 1975* (Cth) s 60I. Similarly, there is an obligation to attend mediation in work-related personal injury matters prior to attending court. *Workplace Injury and Workers Compensation Act 1998* (NSW).

5.2.2 Social Constructionist Mediation as a Response to the Law's Conception of ADR

In relation to the development of the mainstream legal system[756] that underpins the broader Australian legal framework, the contribution of interdisciplinarity is well acknowledged. King et al.[757] emphasise that the cross-disciplinary enrichment that has occurred through the collaboration of psychiatry, psychology and law does not only occur in the legal system—practices from the legal system have similarly extended to other disciplines. They cite an example where the transformational and motivating role of problem-solving court judicial officers was compared and extended to the role of transformational leaders in business, educational and government settings—all influenced by psychological concepts, such as promoting autonomy, motivation and self-efficacy.

In arguing for a synthesis between the disciplines of law and psychology, Frieberg[758] states that, although interdisciplinarity is a necessary condition for major change in developing mastery in a discipline or profession, it is insufficient to do so without a coherent intellectual framework, theory or meta-narrative that will fundamentally change the way the legal system is perceived and operates.[759] Thus, he suggests a process that he terms 'bisociation' as being one means to consider a meta-narrative that can change the way the justice system is perceived and operates. Before going further, Frieberg's term of 'bisociation' requires explanation.

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[756] Freiberg, above n 595, 297.
[757] King, Freiberg, Betagol and Hyams, above n 25.
[758] Freiberg, above n 595, 297, 299. Frieberg states that legal realism saw the law as a social force that masks the all-important play between political, social and economic forces, such as the effects of law on the community. He notes that the establishment and further development of the highly productive collaboration between psychiatry, psychology and law has produced significant advances in knowledge and practice in each of them, far beyond that produced in the decades before the development of such interdisciplinarity. Frieberg states that the relationship between psychiatry, psychology and law is relatively new, being partly the product of the 1960s anti-establishment social movements, and partly the product of the American realist movement of the 1930s. The latter adopted a more scientific approach to law that looked beyond what was written in the statutes, judgements and texts to consider how the law operated in practice. Freiberg asserts that the realists, as empiricists, were more interested in the policy outcomes of their research, rather than in providing arid and sterile critiques of doctrine, as the formalists were prone to do.
[758] Winick, above n 598, 194, 187; Freiberg, above n 673, 7; King, Freiberg, Betagol and Hyams, above n 25, 26.
[758] Ian Freckelton, 'Psychiatry, Psychology and Law and ANZAPPL' (2008) 15 *Psychiatry, Psychology and Law* 1, 6.
[759] Freiberg, above n 673, 4.

5.2.3 Bisociation: The Process of Innovation to Institutionalisation

Freiberg[760] explains how individual disciplines can merge or coalesce to form new fields of learning, such as TJ and non-adversarial justice. He asserts that innovation springs from many sources: dissatisfaction with existing practices, philosophical and technological changes, and creativity that derives from the juxtaposition of fusing disparate conceptual systems.[761] The phases of such transitions extend from innovation to institutionalisation in organisational structures. He cites Koestler,[762] who describes bisociation as a process that occurs when two or more apparently incompatible frames of thought are brought together by an ingenious mind, so that connections can be made between different ideas, worldviews or disciplines in an innovative manner. These connections or innovations can lead to stronger, more vibrant forms that flourish better than those that become too insular, as in the case of disciplines that are heavily regulated. [763] Koestler does not view interdisciplinarity as a process of creating something out of nothing, but as a recombination of existing components or ideas that require multiple influences, divergent schemas and an open mind to allow new connections to emerge.[764]

This is an important idea for expanding the law's conception of ADR and I argue that it is also an important idea for reconceptualising mediation (and ADR) as the process of bisociation that becomes social constructionism (the RM) in action.[765] I argue that the RM is an example of how such interdisciplinarity can be used in the private system to similarly assist in developing a fairer legal system.[766] For example, Frieberg notes that,

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[760] In outlining the history of interaction between psychiatry, psychology and law.
[761] Freiberg, above n 595, 297, 299.
[762] Arthur Koestler, *The Act of Creation* (Dell, 1967), cited in Freiberg, above n 673, 2.
[763] Ibid.
[764] Koestler, above n 763 cited in Freiberg, above n 673, 2.
[765] In other words, bisociation is the process of going from innovation to institutionalisation in the fields of psychiatry, psychology and law. See 4.3 Part 2.
[766] Frieberg states that there are no accepted definitions of the terms 'interdisciplinary', 'multidisciplinary', 'cross-disciplinary' or 'trans-disciplinary', nor any clear distinctions between them. He states that the terms all imply some level of synthesis between bodies of knowledge. Freiberg, above n 595, 297.

in holistic non-adversarial courts,[767] two or more apparently incompatible/adversarial frames of thought (the participants' viewpoints) can meet so that connections can be made between different ideas, worldviews or disciplines in an innovative manner. He claims that the transition of such innovations to more vibrant and engaging forms of communication can ultimately lead to new ways of perceiving justice. Such innovations consider the structural and social causes of conflict that comprise the capacity for conflict to be empowering.[768]

Frieberg states that the difference between the disciplines of psychiatry, psychology and law and bisociation is that the disciplines tend to focus on focusing their respective perspectives on a problem,[769] whereas bisociation, such as TJ and non-adversarial justice,[770] can lead to institutional transformation.[771] Such a recombination of existing components or ideas to institutional transformation suggests the far-reaching effect of non-adversarial justice as a process of bisociation.[772] I argue that such a process of bisociation is similarly required to implement a holistic approach to the private process of seeking justice through a social constructionist approach to mediation, such as the RM. I argue that, by so doing, the process of bisociation broadens the law's conception of ADR to include a common understanding around loss between the parties, with which they can access their own means of justice.

King et al.[773] highlight that, although non-adversarial processes and initiatives have proliferated in Australia[774]—producing wide-ranging political and institutional change in the legal system—broad-based political support for non-adversarial processes that include a far-reaching vision of how the justice system may appear may still take longer

[767] For example, TJ uses the good lives model to assist inmates to take responsibility and develop autonomy around their behaviour.
[768] Transformative mediation is itself a process that allows an open mind by recognising the validity of parties' positions and empowering them to deal creatively with the dispute. Alexander, above n 8.
[769] Such as the treatment of offenders.
[770] I argue that the RM, as a social constructionist form of mediation, can similarly lead to institutional change for parties by establishing new arrangements of the 'way we now behave', like a marriage institution.
[771] Freiberg, above n 673, 4.
[772] For example, TJ is an example of non-adversarial justice in the public realm. Michael S King, 'Problem-Solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership' (2008) 17 *Journal of Judicial Administration* 155, cited in King, Freiberg, Betagol and Hyams, above n 25, 17.
[773] King, Freiberg, Betagol and Hyams, above n 25.
[774] Ibid. For example, the long-standing Coroners Court in NSW and the almost-mainstream ADR processes, such as those in NSW Legal Aid for Family Law and the NSW Workers Compensation Commission.

to emerge. I suggest that a possible reason for this is the apparent incongruities between the potential of traditional forms of mediation to serve as measures for accessing social justice, and the practical realities of them doing so. For example, although any mediation has the potential to be a framework to ask questions about the theories/narratives of the parties grounded in their experience of loss, and any agreement[775] has the potential to become a bisociation from the merging of parties' ideas, the reality is that the traditional models of mediation do not consciously consider the effect of grief on the legal outcome of a dispute. In addition, they do not consider the consequent social changes that such an oversight may produce, let alone consider the effect on the psychological wellbeing of the parties.

Therefore, my argument is that a conscious incorporation of interdisciplinary ideas regarding the effect of grief and loss is needed if parties are to develop a meaning around their loss that can be better endured in the future. It is also needed to develop the social support structures required to endure the losses and overcome the grief. The RM offers parties the opportunity to engage in such a process of bisociation (from innovation to institutionalisation) by bringing together their two or more apparently incompatible frames of thought regarding loss (the participants' viewpoints) by an ingenious process of mind (the collective consciousness [acknowledgement] of the mediator and parties' worldviews) so that connections can be made between different ideas, worldviews or disciplines around the losses in an innovative way.[776]

Such a process might lead to more vibrant and engaging forms of communication between parties,[777] which might help them better understand their own and the other's grief around the loss. I argue that the need to endure loss triggers the need for innovation to recognise the effect of grief on parties' abilities to move forward with the loss. In turn, this process of creative innovation is a recombination of existing components or ideas that require multiple influences, divergent schemas and an open

[775] Warren Brookbanks, 'Narrative Medical Competence and Therapeutic Jurisprudence: Moving Towards Synthesis' in Marilyn McMahon and David Wexler (eds), *Therapeutic Jurisprudence* (The Federation Press, 2003) 74, 75. Brookbanks describes narrative knowledge as what people use to understand the meaning and significance of stories through cognitive, symbolic and affective means.
[776] Transformative mediation is such a process that allows an open mind by recognising the validity of the parties' positions and empowering them to deal creatively with the dispute.
[777] King, Freiberg, Betagol and Hyams, above n 25, 105.

mind to allow new connections to emerge.[778] Such new connections emerge in the form of 'institutions' as the 'the new way we now relate'. That is, by understanding their own and the other's grief around the loss,[779] I argue that parties are better able to move forward jointly with a meaning that enables each of them, individually and collectively, to better endure their losses into the future.

Thus, the main difference of the RM from other traditional mediation models is that, in a legal framework, the RM offers a benchmark of societal norms, in the form of the NIS, to merge knowledge around relationships and loss from the disciplines of psychology and education to use in the mediation process. The specific function of the NIS is to promote a conscious collective awareness of the effect of loss both on the psychological wellbeing of each of the parties and on the legal outcome of the dispute. The norms of the NIS are formed as a guide to promote the skill processes of parties. I argue that parties continually draw data from their grounded experience of the loss to compare to the benchmark NIS data. Thus, they can determine not only their own and the other side's readiness to move forward, but also can compare their own experiences with those of the other party in relation to the effect of the loss on their functional styles, as determined by the DISC,[780] and on their personal constructs/worldviews.

The NIS also enables parties to compare how each of their experiences fits into the wider societal norms in relation to their readiness, willingness and ability to leave their grief behind. I argue that the relational learning that emerges from the NIS helps parties jointly accept responsibility for the ongoing quality of their relationship, and that doing so enables parties to ultimately transform/change their foundations for co-relating into the future. For example, those who are emotionally ready and have reconstructed their own meaning around their losses can further construct sufficient change in their social circumstances to better endure those losses and protect themselves from further losses, thereby creating social change from a grassroots, organic level.[781]

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[778] Koestler, above n 733.

[779] I argue that the RM focuses on helping parties recognise that such changes—social and personal—result from using their existing skills to function from Adult (as if viewing their circumstances, including themselves, from a balcony) and using their own mindfulness to function from the Observer Self in order to empathise with everyone involved. Berne, above n 597.

[780] As determined by the DISC.

[781] For example, I argue that the ideas that emerge around loss are the catalysts for any change in the parties' ongoing relationships.

Thus, applying the process of 'bisociation' in the private sphere of the RM enables parties to focus on how best they can reconceptualise their loss (innovation) to co-create their own 'institutions', in which they can better live with their loss in their changed wider social context.[782] In this manner, the far-reaching effect of non-adversarial justice, as a process of bisociation in the public arena, can also be demonstrated to have a far-reaching effect in the private arena.[783] Expanding the law's conception of mediation to incorporate the interdisciplinary understandings of grief and loss would better enable mediation to be seen as a process of social constructionism in action through using bisociation.

I anticipate the objection that it is a long-accepted fact that the hallmark of the traditional facilitative mediation process has been party autonomy or self-determination, where parties determine the outcome of their own dispute.[784] In response, I argue that, unless a conscious incorporation of interdisciplinary ideas occurs, the claim that mediation allows autonomy for parties may not be true,[785] as explained below. That is, I argue that parties are constrained (and not freed) by their own personal constructs, that fixed values can change, and that collective acknowledgement of loss is necessary for social change to occur from a grassroots level.

The literature of self-determination from the traditional models of mediation[786] assumes that each party is likely to be a free agent. However, I argue that this assumption is challenged with the concept of personal constructs, and that each party is not necessarily a free agent who is able to make the most efficient choices. I claim that the autonomy of parties is actually compromised by their own assumptions and expectations regarding loss that form their worldviews that they bring to the mediation process. In the traditional mediation processes, these assumptions and expectations are usually ignored.

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[782] That is, their new way of being.
[783] Koestler, above n 733.
[784] See 2.4.2, pp. 55-68 for an explanation of models of mediation.
[785] If only because the parties find themselves at the beginning of the mediation process in positional stances from which they do not have the skills to move forward—hence restricting their autonomy.
[786] See, eg, Timothy Hedeen, 'Coercion and Self-determination in Court-Connected Mediation: All Mediations are Voluntary, but Some Are More Voluntary than Others' (2005) 26 *The Justice System Journal* 273, 274; Nancy A Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization' (2001) 6 *Harvard Negotiation Law Review* 1, 85; Love, above n 184, 937, 940; Laurence Boulle, 'Predictable Irrationality in Mediation: Insights from Behavioural Economics' (2013) 24 *Australasian Dispute Resolution Journal* 8-17.

However, in the RM, the use of meaning reconstruction and bisociation enables alternatives to arise to the binary positional stance of the parties' either/or dilemma.

I argue that a social constructionist approach to mediation allows for movement within the parties' personal constructs/worldviews so that the boundaries can be extended to incorporate new perspectives with which the parties can better endure their loss and more easily overcome their grief. That is, the fixed values that form the boundaries of opinions and beliefs can be better understood in terms of a flow of perceptions, which allows them to change.[787] Similarly, an analysis of the expectations and/or assumptions that led to the dispute can 'mutate' when the parties focus on their differences in interpreting their perceived agreed terms to understand the constantly changing ordered set of pattern formations that constitute each party's values and personal constructs. Thus, what may otherwise appear as being simply the self-determination of the parties is actually a 'flow of perceptions', where new forms of action constantly evolve to expand the fixed set of parameters determined by the values/personal constructs of the parties—a process that I have termed 'social constructionism in action'.[788]

I further argue that the skill of both sides being aware[789] of such a 'flow of perceptions' through the process of relational learning and meaning reconstruction around the losses becomes the process of relational being,[790] which is experienced from the 'Observer Self' as a process that is in constant, fluid motion. The process of being aware of one's

[787] As an analogy, I further argue that the apparent incongruence between what appears to be the potential for unconstrained freedom from self-determination and the realistic fixed restrictions of the unquestioned assumptions and expectations that form the fixed values and personal constructs of parties can be explained as the 'flow of perceptions' that exists in chaos theory, as described in Section 1.5.1. That is, the flow of perceptions between parties in social sciences can be likened to the flow of movement from a flickering flame when a zoom lens is applied to highlight the constantly changing fixed pattern formations formed by the flame. See Stephen H Kellert, *In the Wake of Chaos: Unpredictable Order in Dynamical Systems* (University of Chicago Press, 1993) 32; Edward Thorndike, *The Principles of Teaching: Based on Psychology* (The Mason Press, 2013) 147; Peter Kinderman, John Read, Joanna Moncrieff and Richard P Bentall, 'Drop the Language of Disorder' (2013) 16 *Evidence Based Mental Health* 2-3. In chaos theory, the freedom to constantly evolve new forms of action occurs in a set of fixed parameters determined by genes in constant interaction with the environment to form the circuitous fabric of life. When the process of that constant flow of interactions, where everything is a form of relational being in constant fluid motion, is applied to social interactions, it is termed 'social constructionism in action'. Just as genes can mutate in chaos theory, so can personal constructs, where such 'mutations' occur through the process of relational learning and meaning reconstruction to change the direction for decisions that might otherwise appear to arise from the freedom of parties to self-determine their legal obligations in their own dispute. See also Gregersen and Saller, above n 66, 777, 780; see generally Wheatley, above n 66.

[788] See Gergen, above n 17.

[789] That is, the skill of functioning from the Adult and Observer Self, as explained in 2.4.3, p. 92.

[790] See Gergen, above n 17.

own state of 'relational being' and that of all others involved in the wider social context of the dispute constitutes the collective consciousness of the parties, which can then be collectively addressed as relational responsibility.[791] A social constructionist approach to mediation becomes a more effective means of dispute resolution because the parties are better able to understand the effect of their grief from the loss on the legal outcome of their dispute.[792] That is, the collective acknowledgement and addressing of the losses[793] can be seen as the prior step for a holistic revolution in social change to take place regarding the way the justice is perceived by the parties as they reconstruct their meanings attributed to their loss.

I argue that the process of considering the structural and social causes of conflict between parties contributes to a new perception for parties of the justice system itself as it develops a new level of trust to emerge between the parties as business acquaintances.[794] That is, an effective resolution requires parties to trust the system used for resolution. Before discussing the parties' expanded perception of the justice system, a brief description is required of the elements that are essential to develop such trust in any system of justice. King et al. note four elements that are essential for parties to trust the justice system, including the court system: neutrality, respect, participation and trustworthiness.[795] They state that, for the public to view the application of law as fair and open, these four elements must be satisfied to increase public confidence in the system.[796] Specifically, they claim that all these elements are present in the open court system and that the need for a holistic approach to problem solving—as occurs in the

[791] I argue that collective consciousness is the complementary meeting of each party's Observer Self, from which relational responsibility can occur.
[792] Where parties are not emotionally ready to leave the grief behind, enhancing their skill level of awareness is rarely possible. Even when a settlement is reached, when grief is strongly felt, the grieving party will attack the process or mediator who enabled the shift from the loss, misinterpreting that shift as a denigration of the level of hurt and pain felt by the grieving party. At worst, a settlement may not be reached if this party has their own reason to remain grieving. Thus, being mindful of the level of grief and readiness of the parties to move forward is crucial for engaging a social constructionist approach to mediation. In TA terms, the grieving party is functioning more or exclusively from Child (the felt experiences). They will call on the Parent (the moral position of what should happen in an ideal world) to receive justice if they do not believe that their sense of hurt is suitably addressed and acknowledged by the mediator—irrespective of whether the mediator has made all attempts to be appropriately sensitive and considerate towards the grieving party.
[793] By both parties and the mediator.
[794] See Guideline 5 of Ricci's relationship chart, in Section 3.9.
[795] King, Freiberg, Betagol and Hyams, above n 25, 14.
[796] Edgar Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988) 170, cited in King, Freiberg, Betagol and Hyams, above n 25, 14.

court system—is now widely recognised, especially in the therapeutic courts.[797] For example, Winick claims that the element of 'participation' in the open court system translates into dialogues that are meaningful, in that they are acknowledged (heard) and taken into account. Equally, the elements of trustworthiness and respect translate into court officers who manifest an ethic of care.[798] King et al. strongly argue that, for parties to trust any non-adversarial dispute resolution process, the four elements are equally essential criteria in those private processes.[799]

Extending this to the RM, I argue that it incorporates three of the four elements—respect, participation and trustworthiness—as equally essential criteria. The element of participation in the RM translates into dialogues that are meaningful because they are acknowledged (heard) and taken into account. The elements of trustworthiness and respect translate into basic ground rules of engagement to manifest an ethic of care from the mediator and parties towards each other as relational learners. However, the element of neutrality varies from the traditional models of mediation under a social constructionist approach, which leads to two further problems:

- how the confidentiality of a private dispute resolution system can be accommodated to engage the public structural changes required to implement an agreement
- how the concept of neutrality can be managed in the RM, where the mediator is also a relational learner.[800]

These questions are important if parties are to trust a non-adversarial dispute resolution process, such as the RM. It is especially important if the RM is to provide the necessary process for a holistic approach to problem solving and to expand the parties' notions of justice. The first of these two problems is now discussed, and the second forms Part 2 of this chapter.

5.3 Part 1: Confidentiality and a Holistic System of Dispute Resolution

[797] Such as the drug court, mental health courts and so forth.
[798] Bruce J Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1056, 1077
[799] The dispute resolution literature confirms that these four elements are met in the mediation processes. Similarly, I argue in Chapters 1 to 4 that the RM has strong capacity to meet the elements of respect, participation and trustworthiness in a way that aligns with the culture of the open court system. King, Freiberg, Betagol and Hyams, above n 25, 14.
[800] In traditional processes, 'neutrality' presupposes no mediator involvement in the outcome of a dispute.

The emphasis here is not to engage in a comprehensive discussion of confidentiality or a debate about the merits of public/private dispute resolution, as claimed by social analysts. Instead, the focus is to consider whether the private, confidential[801] provisions of any mediation process actually prevent public policy being openly developed, as is often claimed by social policy analysts.[802] The mainstream or conventional argument is that the Australian legal system has been able to promote traditional dispute resolution processes partly because facilitative mediation is conceptualised as a neutral and confidential process. That is, the parties are assured that they—and not the mediator or law—are in charge of the content for dispute settlement, and that their process of reaching an agreement is not open to public scrutiny.[803]

It is understandable that the confidentiality of the private caucus in any mediation model provides an opportunity for parties to feel safe in exchanging their opinions to reach long-lasting decisions that engender trust and collaboration between the parties. My argument is that the RM would better enable a recombination of existing components or ideas to occur because parties could access and use the NIS, where their experiences around loss could be jointly and severally assessed to create more meaningful ways to endure the loss in new arrangements for the 'way we are' in the future.[804] That is, feeling safe[805] is not only a crucial factor to healing, but is the prime purpose of the

[801] The Family Court has tried to enable confidentiality, but has been criticised and led to change its practices. The argument against confidentiality, especially in family law, is that confidentiality prevents the court system accessing all the information about the wellbeing of a child in the care of either parent. This makes it difficult for the court to determine with which parent the child is safest to live. Although attempts at sharing all information are preferred, as per the principles of natural justice, the readiness of parties to share all relevant information sometimes makes this impossible, hence the need for confidentiality. See Tom Altobelli and Diana Bryant, 'Has Confidentiality in Family Dispute Resolution Reached its Use-By-Date?' in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 195; Phillip A Swain, 'A Camel's Nose Under the Tent? Some Australian Perspectives on Confidentiality and Social Work Practice' (2006) 36 *British Journal of Social Work* 91; Richard Ingleby, 'Court Sponsored Mediation: The Case Against Mandatory Participation' (1993) 56 *The Modern Law Review* 441.

[802] I argue that the parties' agreements constitute the basis for indirect social change from the grassroots up, instead of public policy change coming from legislation down. See, eg, Dale Bagshaw, 'Mediating Family Disputes in Statutory Settings' (1995) 48 *Australian Social Work* 3, 4.

[803] Moreover, parties are informed that the whole process of mediation is confidential, except the agreement, which becomes a document that is shared publicly for implementation. Within the confidential mediation process, parties are assured that there is another confidential private session where each of the parties can discuss anything of significance privately with the mediator, without fear that this information will be revealed to the other side during the ensuing joint sessions.

[804] Freiberg, above n 673, 2.

[805] Note that when parties feel safe, they are better able to move from Child or Parent to Adult and/or Observer Self, which highlights the significance of maintaining confidentiality during the process.

private confidential caucus in the RM to incorporate the learning from the NIS,[806] which better enables parties to understand each other's views around the loss.

Although I argue that relational learning continuously unfolds throughout the whole RM process, it is during the private caucus that the mediator, as a fellow relational learner, can fearlessly explore with each party individually which options are likely to become probable outcomes that can effectively be reality tested to become agreed outcomes. The possible arrangements that can lead to the parties' probable agreements in the RM[807] are thoroughly reality tested in the private confidential sessions and become the catalysts for any ongoing arrangements or relationships between the parties. Such arrangements manifest in the form of 'the new way we now relate'—otherwise termed an 'institution', much like the marriage institution. I argue that, through the RM, these 'institutions' can organically evolve as social changes that eventually result in the development of public policy and legislative changes from a grassroots level.

For instance, the recent gay marriage law is an example of an organic evolution from a grassroots level that can be said to have arisen from agreements where confidential processes enabled the open discussion and acceptance of alternate ways of being between parties. Such arrangements demonstrate how the ongoing relationships of same-sex couples in a given community have set the scene for the public to accept a significant social change that ultimately led to some legislative changes for same-sex marriage in some Australian states.[808] Such instances of gay marriage demonstrate that

[806] This includes insights from the DISC.

[807] It can be argued that such outcomes for confidentiality apply to any mediation process. The difference for the RM is that it consciously does so through a deliberate focus on managing the loss of the parties to move forward from the dispute. The entire process of mediation is confidential, except the agreement, which becomes a document that is shared publicly for implementation.

[808] There were several attempts from August 2009 to July 2014 to legalise same-sex marriage via approval from both houses of the Federal Parliament. Australian states and territories have long had the ability to create laws regarding relationships, but these were complicated when the Liberal Party, under John Howard, amended the *Marriage Act 1961* (Cth) in 2004 to define marriage as 'the exclusive union of one man and one woman to the exclusion of all others'. As a result, the only possible method for same-sex marriage registration is via legislation passed into law by the Federal Parliament. Currently, only the Australian Capital Territory (ACT) provides same-sex couples with the right to a civil union. Under federal laws, these unions are treated as de facto unions. In August 2012, the ACT's *Civil Union Bill* passed after legal advice demonstrated that the Federal Government had removed its ability to legislate for territorial and state same-sex marriage. The *Civil Union Act 2012* grants many of the same rights to same-sex couples as to people married under the *Marriage Act*. The Act was to be repealed and civil unions were no longer to be accessible to same-sex couples upon commencement of the *Marriage Equality (Same Sex) Act 2013*, which if not struck down by the High Court, would have permanently legalised same-sex marriage. The repeal of the civil union in 2013 had no effect due to the High Court's ruling striking down the ACT's same-sex marriage law as invalid. As a result, civil unions can still occur

private, confidential, holistic problem-solving processes can lead to public, open legislative changes[809] that interrelate with and complement each other.

I argue that the RM as mediation can provide private confidential processes for such instances of grassroots justice to more easily occur. The confidential caucus in the RM can provide information on constructive and destructive behavioural responses to the parties' conflict, including direct reports from others involved in the conflict. Such reports provide insight to possible gaps between a party's own version of their behaviour and the views of others. As stated earlier,[810] additional views regarding these gaps provide rich data for parties to reflect on and discuss during the joint sessions. This is especially in relation to information about how each party is viewed by the other at different times in their conflict. Recognising the richness that comes from juxtaposing the other's rating of each party's behaviour with those receiving the data enables each party to better appreciate the difference between their intent and the effect of their behaviour on the other. Such feedback is useful because it helps each party recognise which types of behaviours are negatively perceived by the other in order to determine which of their behaviours might be viewed as being particularly adverse.

The confidential caucus enables more comprehensive feedback about how each party's behaviour is viewed by the other, and goes beyond only recognising the style of functioning of the other as presented by the DISC model discussed earlier.[811] This is because the mediator and each party can focus specifically on the behaviours conducive to developing specific action plans in the private caucus. Thus, the parties become better equipped in their joint sessions to apply the action plans to collectively implement whatever agreement better enables their losses to be more effectively endured, being mindful of the strengths and weaknesses of each party's functional style. Implementing the agreements that arise from such insights better enables parties to co-create social contexts that better accommodate each other's behaviours, thus creating grassroots social change.

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in the ACT. 'Assembly Passes Civil Unions Reforms', *The Canberra Times* (online), 23 August 2012 <http://www.canberratimes.com.au/act-news/assembly-passes-civil-unions-reforms-20120822-24n0u.html>; Mary Anne Neilsen, *Same-Sex Marriage* (10 February 2012) Law and Bills Digest <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/Marriage>.

[809] Such as gay marriage legislation.

[810] See 2.4.3.

[811] See 3.14.

I further claim that collectively acknowledging the effect of the loss on each other's psychological wellbeing makes the social constructionist approach to mediation a more effective means of dispute resolution.[812] This is because collectively acknowledging the extent of the grief, on a confidential, private basis, better prepares parties to be more ready, able and willing to develop systems that work in the best interests of all involved and that can later be publicly shared as implemented agreements in the wider social context.[813] Thus, the confidential caucus of the RM enables change during all legal matters, where knowledge of the structural and social causes of conflict, as presented in the psychological and educational information of the NIS,[814] intertwines with the parties' readiness, ability and willingness to support each other to make better sense of their losses.

It is for this reason that I argue that confidentiality in a social constructionist approach to mediation does not restrict the development of organic social change, but can actually enhance it. It also follows that the law would benefit from adopting an interdisciplinary approach to further structure the mediation process to incorporate information about loss as an effective means of dispute resolution. This is because a social constructionist approach would democratically engage parties to collaborate with respect, honesty, fairness and empathy in ways that allow diverse ideas and communities to unite and coexist. In this manner, parties would invoke the concept of justice by engaging in the abstract political theory manifested by their involvement in the macro institutions of the law, and by engaging as integral parts of their own practical problem solving and conflict resolution. Thus, the parties would contribute to their own new perception of the justice system[815] by considering the structural and social causes of the conflict that empowered them to move forward from their loss.[816]

[812] Following this reasoning, I argue that effective resolution is constrained in the courtroom by the need for one party to win and one to lose, where the best outcome is the development of legal principle. Although this is a useful guide, it may not consider the facts holistically. See Chapter 3.
[813] Without such readiness, any agreement is likely to be short lived at best.
[814] Refer to Chapters 2 and 3 for a more thorough description of the NIS.
[815] Freiberg, above n 673, 4.
[816] For example, the structural and social causes of conflict in matters of aged care can focus on ineffective service provision for which payment still must be made as if provision were effective. The intention of legislation in such matters can often be tempered by the need to restrain costs for aged care.

Thus, I propose that the RM as mediation not only provides a holistic approach to problem solving,[817] but also answers the question of how the confidentiality of a private dispute resolution system can be accommodated alongside the public structural changes required to implement the parties' agreement. Although the confidential caucus and process of confidentiality in the RM is a powerful tool for all parties, including the mediator, this is not to promote the self-determination of the parties—as in traditional literature—but to promote the concept of relational responsibility and its link as an agent for grassroots, organic social change.[818] The point I wish to make is that confidentiality and social change are not mutually exclusive.

Before moving on, I reiterate that the law has markedly moved to using traditional ADR, but traditional ADR has been criticised for depoliticising conflict. I have argued that ADR can be remodelled as the RM by presenting a holistic approach to problem solving in the larger legislative framework of structural dispute resolution. I argue that engaging parties to understand the dispute in reference to wider structural and social causes through using the NIS constitutes relational learning. In turn, relational learning may move parties from their initial perceptions of loss to a more meaningful interpretation with which they can better endure their loss while overcoming their grief. However, this raises the issue of the role of the mediator—is the mediator too powerful in this model of mediation?

The following discussion explores how power is redistributed in the RM.[819] This discussion about the distribution of power in a social constructionist mediation is to describe how the three traditional concepts of power, mediator neutrality and party self-determination (as used in the facilitative model) can interrelate in social constructionist terms. The argument is that the social constructionist mediator and parties together reconceptualise the dispute as an exercise in grounded theory research, where their collective relational responsibility enables them to find ways to endure their losses as a process of grassroots social change.

[817] As demonstrated above and throughout Chapters 1 to 4.
[818] See, eg, Timothy Hedeen, 'Coercion and Self-determination in Court-Connected Mediation: All Mediations are Voluntary, but Some Are More Voluntary than Others' (2005) 26 *The Justice System Journal* 273, 274; Nancy A Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization' (2001) 6 *Harvard Negotiation Law Review* 1, 85; Love, above n 184, 937, 940; Laurence Boulle, 'Predictable Irrationality in Mediation: Insights from Behavioural Economics' (2013) 24 *Australasian Dispute Resolution Journal* 8-17.
[819] The topic of mediator neutrality is discussed in 2.2.3.

5.4 Part 2: Meaning Making and Power Distribution in the RM

I now use an example from family law to demonstrate the power of relational learning that occurs in the RM, and how this relates to the traditional concepts of mediator neutrality and impartiality. It is well known that the *Family Law Act 1975* (Cth) originally provided for mediation in the Family Court, and that, over time, the in-house services moved to the outside institutions of family relation centres;[820] however, that is not my focus. Instead, it is more relevant to explain that the changes in legislation and institutional practices emphasise the need for divorcing parties, especially parents, to reach agreements outside court.[821]

For example, since 1975, no-fault divorce laws—as outlined in the *Family Law Act 1975* (Cth) and the attendant procedures under this Act—have diverted parties from legal to therapeutic intervention by counsellors, psychologists and social workers who represent themselves as best equipped to determine the 'best interests'[822] of children.[823] Dickey[824] states that the need for an interdisciplinary approach to 'the best interest of the child' principle is obvious if judges are to be mindful of the effect of social changes, legal requirements and their own values on the outcome of a matter.[825]

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[820] Nor is it my purpose to discuss the more recent changes to the legislation for pre-trial action processes, especially in child-related matters. See *Family Law Act 1975* (Cth) pt II, div 2-4.

[821] More than 70% of cases settle on the day of court, and less than 10% resolve before trial. Only 14 to 20% do not settle during mediation. Patricia Bergin, 'Objectives, Scope and Focus of Mediation Legislation in Australia' (Speech delivered at the Mediate First Conference, Hong Kong, 11 May 2012); Campbell Bridge, 'Comparative ADR in the Asia-Pacific—Developments in Mediation in Australia' (Speech delivered at The 5Cs of ADR—Alternative Dispute Resolution Conference, Singapore, 4–5 October 2012). My search for a published version or source statistics from other places was unsuccessful.

[822] 'Best interest of the child' principle. See Richard L Wiener and Eve M Brank (eds), *Problem Solving Courts: Social Science and Legal Perspectives* (Springer, 2013) 25.

[823] Family mediation was introduced to Australia in the 1980s via training by social workers from CDR Associates from Boulder, Colorado, United States. The interdisciplinarity required to ascertain the 'best interests of the child' principle occurs informally and confidentially from the private dispute resolution system, which is engaged prior to a public determination of remaining matters (if any), where a formal resolution occurs on a prescriptive basis in the 'best interests of the child'. Both public and private systems of dispute resolution are required when parties are unable, unwilling or not ready to resolve confidentially all issues relating to their children. This observation is based on my own experiences as a mediator in the field. For more information about CDR Associates, see http://www.mediate.org/.

[824] Dickey, above n 378, 241.

[825] Ibid. See literature on the indeterminate concepts of the 'best interest of the child' standard. Stephen Parker, 'The Best Interests of the Child Principles and Problems' (1994) 8 *International Journal of Law, Policy and Family* 26; Robert Emery and Melissa Wyer, 'Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents' (1987) 55 *Journal of Consulting and Clinical Psychology* 179; Annette R Appell and Bruce A Boyer, 'Parental Rights vs Best Interests of the Child: A False Dichotomy in the Context of Adoption' (1995) 2 *Duke Journal of Gender, Law and Policy* 63; Janet

Dickey[826] asserts that, if procedural changes to the 'best interests of the child' policy in family dispute resolution are applied strictly in the confines of the law, they have the capacity to conceal substantive social change and mask significant changes both in the values applied by judges when making decisions, and the subsequent substantive outcomes of matters. He states that the intent of implementing an interdisciplinary approach in family law was an attempt to address the effect of the legal process on the outcome of family law matters in a more humane manner.[827] Extending Dickey's argument, I argue that the assumptions and expectations of the parties that led to the losses in divorce proceedings are often misinterpreted by the parties and/or the traditional mediator/lawyers as being facts, if they are considered at all.

The assumption underlying such legislative changes (regarding shared parental responsibility)[828] in family law is that effective resolution demands that both parties work together. However, the reality under the traditional models of mediation is far from being achieved.[829] The point in relation to the *Family Law Act 1975* (Cth) is that simply legislating for shared parenting will not change anything. Instead, serious attention to the matter of joint responsibility—otherwise termed 'relational responsibility'—can be made part of the mediation process, such as in the RM. I argue

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Weinstein, 'And Never Twain Shall Meet: The Best Interests of Children and the Adversary System' (1998) 52 *University of Miami Law Review* 79; Daniel B Griffith, 'The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients' (1992) 7 *Issues on Law and Medicine* 283; Melvin Aron Eisenberg, 'Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking' (1976) 89 *Harvard Law Review* 637; Elizabeth S Scott and Robert Emery, 'Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard' in *Working Paper No 9200* (Colombia Public Law and Legal Theory, 2013); Robert H Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminancy' (1975) 39 *Law and Contemporary Problems* 226; Jon Elster, 'Solomonic Judgements: Against the Best Interest of the Child' (1987) 54 *The University of Chicago Law Review* 1.

[826] Dickey, above n 378, 241.

[827] Following from Dickey's argument. Ibid.

[828] *Family Law Act 1975* (Cth) s 61DA.

[829] For an in-depth discussion, see Robert E Emery et al, 'Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution' (2001) 69 *Journal of Consulting and Clinical Psychology* 323; Joan B Kelly, 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice' (2003) 10 *Virginia Journal of Social Policy and the Law* 129; Peter A Dillon and Robert E Emery, 'Divorce Mediation and Resolution of Child Custody Disputes: Long-term Effects' (1996) 66 *American Journal of Orthopsychiatry* 131; Joyce A Arditti and Michaelena Kelly, 'Fathers' Perspectives of Their Co-Parental Relationships Postdivorce: Implications for Family Practice and Legal Reform' (1994) 42 *Family Relations* 61; Emery and Wyer, above n 794, 179; McIntosh et al, above n 449, 105; Joan B Kelly, 'Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes' (1991) 9 *Behavioural Sciences and the Law* 387; Robert E Emery, David Sbarra and Tara Grover, 'Divorce Mediation: Research and Reflections' (2005) 43 *Family Court Review* 22.

that the assumptions underlying the legislative changes and institutional practices in family law come together in the way that the mediation is handled.[830] I contend that the RM distinguishes itself from other mediation and court processes by using a social constructionist/interdisciplinary approach to unveil any assumptions and specific expectations, and segregate these assumptions/expectations from the facts. It also enables parties to collectively acknowledge that there are structural and social causes of conflict [831] (that comprise the dispute) that must be addressed at a personal, psychological and systemic level.[832]

Addressing the structural and social causes of conflict, as grounded theorists, through the process of relational responsibility empowers parties to move forward from their dispute with an enduring sense of their loss, confidently and without fear of public scrutiny.[833] In so doing, the parties can better co-create social structures to support and protect their agreement, thus forming their own version of justice at that time. As stated earlier, [834] confidentiality and social change are not mutually exclusive factors to

[830] That is, I claim that interdisciplinarity is essential for interpreting legislation, such as the 'best interests of the child' principle, if effective resolution is sought.

[831] Michael Benjamin and Howard H Irving, 'Research in Family Mediation: Review and Implications' (1995) 13 *Mediation Quarterly* 53; Robert A Hahn and David M Kleist, 'Divorce Mediation: Research and Implications for Family Couples Counseling' (2000) 8 *The Family Journal* 165; Nadja Alexander, 'What's Law Got to do with it? Mapping Modern Mediation Movements in Civil and Common Law Jurisdiction' (2001) 13 *Bond Law Review* 1; Joan B Kelly, 'Family Mediation Research: Is There Empirical Support for the Field?' (2004) 22 *Conflict Resolution Quarterly* 3; Nola Webb and Lawrie Moloney, 'Child-Focused Development Programs for Family Dispute Professionals: Recent Steps in the Evolution of Family Dispute Resolution Strategies in Australia' (2003) 9 *Journal of Family Studies* 23; John Wade, 'Four Evaluation Studies of Family Mediation Services in Australia' (January 1997) *Bond University ePublications* <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1106&context=law_pubs>; Anthony Love et al, *Federally-funded Family Mediation in Melbourne: Outcome, Costs and Client Satisfaction* (National Centre for Socio-Legal Studies, 1995); Marie Delaney and Ted Wright, *Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-trial Conference and Mediation* (Law Foundation of New South Wales, 1997); Joan B Kelly, 'A Decade of Divorce Mediation Research' (1996) 34 *Family Court Review* 373.

[832] These observations arise from my professional experience as a mediator during the last 20 years. The nature of any 'agreement' in dispute resolution is that it must be publicly functional and personally satisfactory. For example, in a workers compensation matter, collective acknowledgement means understanding the case from the insurers' and applicants' perspective and that their dispute can only be resolved in the structural constraints of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). The personal injury of the applicant is the social cause of the parties' conflict. Likewise, in any other dispute, collective acknowledgement means understanding the dispute from the perspectives of all involved in the dispute. The structural constraints are the relevant legislative provisions under which the dispute occurs, and the social cause of the conflict is the cause of the loss.

[833] The point here is that the parties can determine their own social structures with which to move forward to accommodate their losses without fear of public scrutiny. It is not intended to assume that accountability via public scrutiny is not required.

[834] See 5.4, pp. 212-218.

resolution and, through using the NIS, can be mutually beneficial. I further argue that, in interpreting the legislation around the 'best interests of the child' principle, the concepts of mediator self-reflexivity and party self-determination are inadequate to explain effective resolution because the mediator cannot be completely neutral – a fact that has been widely acknowledged for many years. In addition, parties are not truly self-determining, as previously discussed.[835] The idea of mediator neutrality arises from the idea of judicial neutrality, and functions to legitimise the authority of the mediator, which becomes an extension of the authority of the law itself. Thus, the following discussion aims to show that a social constructionist mediation process, such as the RM, can enable a different conception of power distribution, mediator neutrality and party self-determination.

I claim that, in any dispute, parties—whose characters are products of contexts outside mediation—come together in the mediation because their expectations or assumptions about their relationship have not been met. Their expectations or assumptions have led to a loss, which results in a dispute forming the central plot of their story, individually and collectively. In conventional practices of mediation, the mediator facilitates the resolution of their dispute, the parties remain self-determining and the mediator remains 'neutral'. However, I have argued before that the mediator is not completely neutral and the parties are not truly self-determining.[836] I argue that effective resolution through using the RM is possible because it reconceptualises the roles of the parties and mediator as relational learners.

As relational learners, the power of parties is understood and exercised as a shared task in the process of meaning making around loss, which is grounded in the parties' experiences. That is, the issue of power is conceptualised differently by the parties, including the mediator, so that the parties experience 'power with' each other and through each other, which results in relational learning, rather than 'power over' each other, which results (directly or indirectly) in the submission of one party to the other.[837]

[835] 4.2.3, p. 158.
[836] See the detailed discussion on this issue in 4.2.3, 158; for detailed discussion on neutrality, see 2.2.3.
[837] See, eg, Michel Foucault, *Power* (New Press, 2000); Michel Foucault, *Power, Truth, Strategy* (Feral Publications, 1979); Pirkko Markula and Richard Pringle, 'Power, Knowledge and Transforming the Self' in Richard Pringle (ed), *Foucault, Sport and Exercise* (Routledge, 2006); Barbara Townley, 'Foucault, Power/Knowledge, and its Relevance for Human Resource Management' (1993) 18 *The Academy of Management Review* 518. Note Foucault's work on the reconceptualisation of power. It is not my main

The argument here is that the concept of 'self-reflexivity' on behalf of the mediator—that is so often presented in the facilitative model—can be supplemented by the concept of the Observer Self.[838] The Observer Self recognises not only their own Adult, Parent and Child responses to the loss, but also those of the other side, everyone else in the room (such as the mediator) and everyone else affected by the dispute in a wider social context. The aim is to effect complementary transactions so that the Observer Selves of both parties interact and communicate with each other.[839]

I argue that, when both parties acknowledge each other via their Observer Selves, they engage in their 'game in the making' as social constructionists and grounded theorists researching their experiences of loss to minimise future loss and better endure the ongoing loss with which they entered the mediation process. Similarly, I argue that the RM can supplement the concept of self-determination for parties to that of relational responsibility, as illustrated below, by reconceptualising the concept of power distribution between the mediator's so-called 'neutrality' and the parties' so-called 'self-determination' to that of relational learners. That is, a social constructionist mediator and the parties together reconceptualise the dispute as an exercise in grounded theory research where their collective relational responsibility enables them to find ways to endure their losses as a process of grassroots social change.

5.4.1 The Concepts of Mediator Neutrality and Party Self-determination

As stated earlier,[840] in family law, the values of the interdisciplinary professions with regard to the 'best interest' principles have led to the questioning of neutrality as a key criterion for the mediator's role, and resulted in a preference for the concept of mediator reflexivity. [841] The argument behind self-reflexive mediation recognises that it is impossible for any person, including a mediator, to be 'neutral', and recognises the influence of characteristics such as gender, ethnicity, social class, age and sexuality on

task to analyse Foucault's work, but I acknowledge the immense importance of his thoughts and the resultant literature that has informed my ideas on power.

[838] See 2.4.3, 92.

[839] Ibid.

[840] 5.4.1, p. 218.

[841] Dickey, above n 378; Lilie Chouliaraki and Shani Orgad, 'Proper Distance: Mediation, Ethics, Otherness' (2011) 14 *International Journal of Cultural Studies* 341; Astor, above n 188, 221; Dale Bagshaw, 'Self-Reflexivity and the Reflective Question: Broadening Perspectives in Mediation' (2005) 24 *Arbitrator and Mediator, 30th Anniversary Special Edition* 1.

the mediator's relationship with the participants. Self-reflexivity in practice demands awareness and control of one's own professional, personal and cultural biases in order to hear and understand the standpoint of the 'other'.[842] To this extent, self-reflexivity equally applies to the RM mediator.

However, I argue that the concept of self-reflexivity can be supplemented in the RM to the level of Observer Self, where the context of the relationship between the mediator and parties can be observed and constructed by both sides as a mediating force between the so-called 'neutrality' of the mediator and 'self-determination' of the parties.[843] Thus, the distinction between process and content that is so central to the traditional teaching of the facilitative model of mediation[844] (that the mediator is in charge of the process, but not the content) becomes inadequate in determining the boundaries of the mediator's role in a social constructionist approach, such as the RM.

The argument continues that, instead of conceptualising 'neutrality' as an attribute of the mediator and 'self-determination' as an attribute of the parties, as in the facilitative model,[845] the RM, as a social constructionist approach, grounds both concepts in the relationship between the mediator and parties, so that both concepts gain meaning in the context of that relationship. That is, an intertwining of all aspects of process and content occurs as one whole that is broken down for analysis, then seen in its entirety again through the Observer Self. This occurs until the synthesis of process and content plays out as the 'game in the making' through the 'flow of perceptions' of the parties, and ultimately reaches an agreed or other outcome.

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[842] Self-reflexivity is a key component of the RM model, and the need to understand the perspective of the other was the reason for developing the RM. The needs of parties involved in workplace disputes are so complex that the mediator must be aware of and control not only their own professional, personal and cultural biases during the mediation process, but also those of the parties. The mediator must control all those criteria during interactions—a task easier said than done. This notion is similar to the concept of the Adult in TA, as discussed in 4.2.4.

[843] NADRAC, *The Development of Standards for ADR* (Commonwealth of Australia, 2000) 29–32. In the new practice standards, mediation is described as 'essentially a process that maximizes the self determination of the participants'.

[844] Susan Douglas, 'Neutrality in Mediation: A Study of Mediator Perceptions' (2008) 8 *Queensland University of Technology Law and Justice Journal* 140, 150; Spencer and Hardy, above n 30, 156; Bagshaw, above n 124; Bush, above n 152, 67; see also Mills, above n 152, 5; Sourdin, above n 149, 19; Folberg and Taylor, above n 166, 7; Boulle, above n 21, 13.

[845] MSB, *Practice Standards: For Mediators Operating Under the National Mediator Accreditation System* (Author, 2007) cl 2(5). 'The principle of self-determination requires that mediation processes be non-directive as to content'.

The legitimate scope of the effect of mediator involvement raises issues regarding the proper exercise of mediator power—a notion that has traditionally rested on the idea that power is something measurable and inherently coercive, and is a view consistent with structuralist perspectives of social processes.[846] However, this view of power is not consistent with a social constructionist or postmodernist approach. Power in the social constructionist framework is seen as a more complex shifting and nuanced concept that is contextual and contingent, rather than as a 'tool wielded by one person against another'.[847] In a social constructionist framework, power can be properly used or abused. Being localised, it may 'congeal' to manifest strongly and may give rise to points of resistance.[848]

In agreement with Susan Douglas,[849] I argue that the use of power between the parties in the RM is constructed according to recognised community standards in a regulatory context.[850] If neutrality is not constructed as an absolute concept, it can represent a proper exercise of mediator power. That is, the intrusion of some measure of the mediator's values and preferences is inevitable, so that absolute neutrality is not possible. In addition, the absolute self-determination of parties is not possible. It makes sense only when seen 'in context'—the context of a relationship between the mediator and each of the parties, the mediator and the parties together, and the parties themselves.[851]

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[846] Astor, above n 187, 30, 32; see, generally, Bernard Mayer, 'The Dynamics of Power in Mediation' (1987) 16 *Mediation Quarterly* 75.

[847] Astor and Chinkin, above n 188, 148–9. See also Foucault, *Power*, above n 805; Foucault, *Power, Truth, Strategy*, above n 805; Markula and Pringle, above n 805;Townley, above n 805, 518.

[848] Davina Cooper, 'Productive, Relational and Everywhere? Conceptualising Power and Resistance within Foucauldian Feminism' (1994) 28 *Sociology* 435; Stewart Clegg, David Courpasson and Nelson Phillips, *Power and Organisations* (Sage, 2006); Bob Pease, 'Rethinking Empowerment: A Postmodern Reappraisal for Emancipatory Practice' (2000) 32 *British Journal of Social Work* 135; Kim McKee, 'Post-Foucauldian Governmentality: What Does it Offer Critical Social Policy Analysis' (2009) 29 *Critical Social Policy* 465; Peter Kinderman, John Read, Joanna Moncrieff and Richard P Bentall, 'Drop the Language of Disorder' (2013) 16 *Evidence Based Mental Health* 2-3; Astor, above n 187, 30, 32; Douglas, above n 812, 140, 154; Bagshaw, above n 25; Brigg, above n 169, 287; Sarat and Felstiner, above n 706, 5.

[849] Douglas, above n 812, 140, 151

[850] The Australian Mediation Association, 'Practice standards', cl2(2) states: 'Some mediation processes may involve participants seeking expert information from a mediator which will not infringe upon participant self-determination'. Clause 2 (7) of the Practice Standards and Clause 2 (4) of the Approval Standards also refer to processes where the mediator may be required to give expert information and advice in order to enhance the decision making of parties. Particular practice models, context and organisational cultures may also identify the provision of expert information and advice from the mediator as consistent with a proper exercise of mediator power and self-determination of the parties.

[851] Douglas, above n 812, 140, 151.

The social constructionist mediator in the RM exercises power in relation to the parties, both individually and collectively. The sources of power arise from their standing as mediators and their location in wider organisational and societal structures, and from the players' capacities to interact. In the course of a mediation, such as the RM, power may harden or crystallise around one player in relation to another, and then subside, melting into the play of interweaving characters in the mediation to form the 'game in the making'.[852] Thus, the neutrality of the social constructionist mediator can be constructed to depict limits to the mediator's exercise of power, while the self-determination of the parties can be constructed to depict optimal exercise of the parties' power, both individually and collectively. In either case, the limits are contextual, situated in character and being constantly constructed as fluid and changing.[853] Thus, in social constructionist terms, neutrality and self-determination are not seen as absolutes, but as open concepts[854] whose character is determined by the intersection of a number of contexts in any given mediation session.

Thus, the traditional notion of neutrality for the mediator that is so deeply entrenched in the binary language of early mediation literature [855] is inappropriate in the context of the RM as a social constructionist approach to mediation.[856] Instead, the focus of a social constructionist mediator is to be a catalyst (and relational learner) who enables the parties' apparent self-determination to unfold as the legal outcome of their dispute. In turn, the parties' apparent self-determination is a concept that is extended to include the relational learning and relational responsibility around loss, which I argue occurs by engaging each party's Observer Self.[857] This is also the case in rights-based disputes, where the focus is on determining the level of responsibility of the parties in the past.[858]

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[852] Ibid 155.
[853] Ibid.
[854] Much like the flow of perceptions in chaos theory, as discussed in 1.5.2, p. 30.
[855] For example, either mediators are neutral or they are not, leaving no room for an intermediate approach. Such dualistic thinking provides a dominant frame of reference for much of the understanding of many social processes, and is a view that is challenged by a postmodern perspective, such as social constructionism. Charmaz, above n 299; Gubrium and Holstein, above n 5; Gergen, above n 17; Strauss and Glaser, above n 299; Lock and Strong, above n 41.
[856] Douglas, above n 812, 140, 149.
[857] Through relational learning, from comparing their own responses to loss to that of the benchmark responses in the NIS and to each other's responses, parties can accept responsibility to create their own future in a relational/social context and not in isolation, as appears to be the case when the focus is on self-determination alone.
[858] Even in commercial matters—such as franchise disputes where parties are seasoned practitioners who are ready, willing and able to participate in the risk management of their enterprises—a balance between the parties' rights and best long-term interests is reached through a social constructionist approach, when

Reframing the limitations of existing ideas about neutrality in terms of issues of power enables a more flexible and open examination of appropriate practice responses. Moreover, it demonstrates that such reframing need not be limited by the previous process/content or legal outcome distinction, which could still be a useful analytical tool, but should not be the sole consideration when discussing neutrality.[859]

Douglas[860] states that a social constructionist/postmodern conception of mediator neutrality and party self-determination offers a generic conceptualisation that enables characteristics of neutrality and party self-determination to be developed according to key indicators common across differing models for practice, and to vary across key indicators of differing models. For example, where the behaviour of one party can be seen by the mediator as impeding the self-determination of the other, as a relational learner, one response of the RM mediator can be to mirror back to both parties (via role-play) how each may view the other in order to remove that impediment. This would represent a proper exercise of mediator power as a relational learner, and avoid the absolutism of previous conceptions.[861] That is, the RM mediator constantly role-plays what is heard, seen and learnt during the mediation process from the parties, thereby

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the content of the past becomes the narrative with which the parties work in the present as the 'game in the making'. This is used to create a new reality with which both can live into the future, while being mindful that the new reality also encompasses an enduring sense of the losses and leaves the grief behind.

[859] Douglas, above n 812, 140, 155.

[860] Ibid.

[861] Providing information such as the content of the NIS in the RM or about legislative standards when working in a clear regulatory context and assisting in generating options consistent with those standards need not represent a lack of neutrality. What appears to be the self-determination of parties in the facilitative model does not make sense in any given social context because parties are clearly influenced by the input of the mediator and by each other. This is a fact accepted by the transformative and narrative models that choose to ground their approaches in a post-modernist approach to the nature of being. Della Noce, Bush and Folger, above n 194, 39, 49; John Winslade and Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (Jossey-Bass, 2000). Boulle states that, although mediators are trained to maintain the content/process distinction, in practice, facilitative mediators do affect the content and outcome of mediations. See, eg, David Greatbatch and Robert Dingwall, 'Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators' (1989) 23 *Law & Society Review* 613–4, 618; Boulle, above n 21; see Astor, above n 187, 30; Astor and Chinkin, above n 188, 154; Gary Aylesworth, 'Postmodernism' in Edward N Zalta, Uri Nodelman, Colin Allen and John Perry (eds), *Stanford Encyclopedia of Philosophy* (Centre for the Study of Language and Information, 2005); Charles Arthur Willard, *Liberalism and the Problem of Knowledge: A New Rhetoric for Modern Democracy* (University of Chicago Press, 1996); John Deely, 'Quid sit Postmodernismus?' in Roman Ciapalo (ed) *Postmodernism and Christian Philosophy* (Catholic University of America Press, 1997) 68–96; Laurence Boulle, 'Predictable Irrationality in Mediation: Insights from Behavioural Economics' (2013) 24 *Australasian Dispute Resolution Journal* 8-17. See 2.4.2.

prompting them as a catalyst and role model to also learn from each other about their differences (from the DISC and NIS) in order to avoid feeling abused by the other.[862]

Thus, I propose that the element of neutrality for the mediator in the RM becomes the process of relational learning, where the mediator and parties are reduced to a democratic level playing field, with the common aim of addressing the parties' losses, individually and collectively. That is, the responsibility of the RM mediator is to become a catalyst that enables the free flow of information from the NIS[863] and DISC[864] to interact with the levels of willingness, readiness and ability with which the parties can collaborate over any given issue.[865] The parties' perceptions and personal constructs of loss are crucial to the outcome of a matter. Their sense of being wronged can be collectively addressed by noting the effect of the losses on the personal constructs of both sides, and by noting and addressing the effect of their legal process on each other's psychological wellbeing.

I further argue that collectively empowering parties to endure their losses in the future redistributes the power so that, as relational learners, the parties and mediator become mindful that the best outcome under the circumstances has been achieved. Such attempts at procedural fairness (as in the court system) increase the probability that the parties will accept the outcome of their 'game in the making' as they would any adverse decision by the court.[866] I claim that the concepts of mediator neutrality and self-determination of parties, as they appear in traditional mediation literature, must be reinterpreted so that the mediator becomes a relational learner/catalyst alongside the parties.[867] This means that the focus from individual responsibility can be replaced with

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[862] Note that the RM mediator has no vested interest in the outcome of the matter—not even for a 'settlement'. Instead, the RM mediator allows the interactions in the traditional process of mediation to flow, without judging the way the parties conducted their lives in the past or choose to conduct their lives in the future, encouraging respect and without abusing power between the parties.

[863] See 3.14, p. 142.

[864] Ibid.

[865] I further claim that respect and trustworthiness in the RM similarly translate to the parties maintaining an ethic of care with each other, and that participation translates into meaningful dialogues, especially regarding the effect of the losses that are both acknowledged and collectively taken into account and addressed by accepting their relational responsibility.

[866] Michael King, 'Applying Therapeutic Jurisprudence from the Bench: Challenges and Opportunities' (2003) 28 *Alternative Law Journal* 172; Winick, above n 767, 1056; Tony Makkai and John Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20 *Law and Human Behaviour* 83.

[867] The criticism that the social constructionist mediator is too involved is addressed by reconceptualising the dispute as an exercise in grounded theory research around relational responsibility. This enables the mediator to act as a sounding board for parties to better hear each other, and enables the mediator and

relational responsibility, and a 'power with' approach is engendered through the process of relational learning. In this manner, the RM can be one means of social transformation from an organic, grassroots level.[868]

The RM varies from the transformative and narrative approaches because the mediator, as a catalyst and fellow relational learner, offers parties an opportunity to use the content of the NIS as an educational tool to assess their own personal constructs/worldviews of their loss, individually and collectively. This is done to jointly reconstruct a protective future to enable them to individually better endure their losses.[869] A social constructionist approach questions the traditional concepts of individual responsibility understood in legal scholarship. For this reason, Part 3 discusses how the traditional concept of individual responsibility is inadequate when viewed through the lens of social constructionism.

5.5 Part 3: Social Justice and Individual Responsibility

This final part argues that the RM is the process of social constructionism in action, and thus can become an agent for wider social change. To make this argument, I discuss whether the shortcomings of the discourse around individual responsibility can explain how relational responsibility can replace it. I propose that accepting relational responsibility for loss ultimately becomes the process of social inclusion for institutional/social change. I claim that a social constructionist/grounded theory approach can fundamentally change not only the effect of the legal process on the

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parties to find ways together for the parties to endure their loss as a grassroots process. Note the argument about 'mediator neutrality' in 1.8, p. 49.

[868] See generally Charmaz, above n 299. Charmaz states that, in addition to psychology, sociology (particularly the Chicago school) also assumes dynamic reciprocal relationships between interpretation and action, in which social life is interactive, emergent and somewhat indeterminate. She continues that the Chicago school ethnography fosters openness to and curiosity about the world, whereas symbolic interactionism fosters developing an empathetic understanding of research participants and their worlds.

[869] I agree with King that a natural justice process in the court system (otherwise termed 'procedural fairness') requires a structuralist approach that outlines the four elements—neutrality, respect, participation and trustworthiness—that interact to become public disclosure of all the facts. I further agree with King that, in that open, public process, the element of neutrality is perceived by parties as processes that are courteous and allow a person to present their case to an attentive tribunal. The element of participation translates into dialogues that are meaningful because they are acknowledged (heard) and taken into account. The elements of trustworthiness and respect translate into court officers who manifest an ethic of care. See 5.2.3, p. 200; King, above n 834, 172; Winick, above n 767, 1056, 1077; Makkai and Braithwaite, above n 834, 83.

psychological wellbeing of parties, but also the way parties view how the legal system and 'justice' operate.[870]

To discuss the shortcomings of the discourse around individual responsibility and explain how relational responsibility can replace it, I introduce the idea that the micro world of joint decision making in the RM is a hologram of the macro world of forming relational/social institutions from a grassroots level. Again, this idea is in contrast to the way that traditional mediation processes deliver justice in the Australian legal system.[871] For example, I note that both law and dispute resolution focus on individual responsibility to make amends for losses incurred, or to prevent further loss. That is, the common law system focuses on ascertaining the cause of the problem from which people gain rationale for action. Once responsibility is assigned, people can admonish, coerce and punish through legal processes. As stated above,[872] the philosophy for doing this is that the individual serves as the critical terminus to whom society applies devices of correction and restoration.[873] I argue that the same notion of individual responsibility applies to traditional practices of dispute resolution, and particularly to the traditional practices of mediation. For this reason, it is important to expand the law's conception of ADR to include the concept of relational responsibility.[874]

To do this, I rely on the edited works of McNamee and Gergen as foremost researchers in the field of relational responsibility.[875] They note that the tradition of individual responsibility is close to the heart of Western ethical and legal codes, and informs many contemporary practices of therapy, education and organisational life. They state that subjective agency is held to be the essence of being human, and is the basis of both individuals' identity and distinct values, where individuals deliberate, morally evaluate

[870] Freiberg, above n 673, 4.
[871] Note the linear explanations in the literature to that effect (as opposed to explanations using a social constructionist perspective) that lead to non-adversarial systems, such as in TJ or the mental health courts.
[872] McNamee and Gergen, above n 660, xii.
[873] Ibid.
[874] Introduction, Part 2, p. 9.
[875] Dian Marie Hosking and Bettine Pluut, '(Re)constructing Reflexivity: A Relational Constructionist Approach' (2010) 15 *The Qualitative Report* 59; Inga-Britt Lindh, Elisabeth Severinsson and Agnetha Berg, 'Moral Responsibility: A Relational Way of Being' (2007) 14 *Nursing Ethics* 129; Kenneth J Gergen, Sheila McNamee and Frank J Barret, 'Toward Transformative Dialogue' (2001) 24 *International Journal of Public Administration* 679; Peter Kinderman, John Read, Joanna Moncrieff and Richard P Bentall, 'Drop the Language of Disorder' (2013) 16 *Evidence Based Mental Health* 2-3; John Lannamann, 'On Being Relational in an Accountable Way' in McNamee and Gergen, above n 660.

and then decide on a course of action to take control.[876] That is, it is precisely because of this capacity for subjective agency that society can hold individuals responsible for their actions, both in daily affairs and courts of law.[877] However, McNamee and Gergen contend that, from an intellectual, ideological and pragmatic perspective, social constructionism proposes that the discourse of individual responsibility (and its outcomes in action) is severely limited, and they propose a process of relational responsibility to augment the existing tradition.[878]

Research on relationship science during the last few decades has shown that meaning making (or making meaning from life experience) is an essential process for humans' mental and physical wellbeing, and that no factor is more meaningful or essential to human wellbeing as the factor of close relationships.[879] Taking account of the findings from the research of relationship science, I argue that there is a need for a better understanding of the theoretical integration and practical interdisciplinarity of the relationships[880] that unfold during any mediation process, despite the challenges posed by interdisciplinary studies.[881] Research findings in the field of relationship science support an interdisciplinary approach because many phenomena (such as caring and close relationships) do not lend themselves to neat distinct disciplinary boundaries, but refer instead to the integration of knowledge and practice from different disciplinary

[876] McNamee and Gergen, above n 660, xii.
[877] Ibid 5.
[878] Ibid, xii. Gergen differentiates social constructivism from social constructionism by stating that the former is a narrow term that fits into postmodernism as part of the radical reconsideration of long-standing traditions of truth and beliefs in objective knowledge and beliefs about the self. That is, social constructivism is about ways of understanding who individuals are and what they are about, which is changing due to the technological achievements of the past century that have produced a radical shift in people's exposure to each other. Thus, traditional assumptions about the nature of identity are now in jeopardy. Gergen claims that beliefs in the true and good depend on a reliable and homogeneous group of supporters who define what is 'there'. He defines the postmodern condition in a culture as largely the by-product of the century's technologies of social saturation, where coherent circles of accord are demolished and all beliefs are questioned by exposure to multiple points of view.
[879] Gillath, Adams and Kunkel, above n 131, 39.
[880] From the field of dispute resolution, the latest research from Mayer discusses the forms of sustenance that can be offered to disputants engaged in enduring conflict in order to shift the narrative of their dispute, thus demonstrating the interdisciplinarity of the process needed to move forward. Sourdin discusses principles from gaming that may be applied to the mediation process by analysing what motivates the desire to play the game, hence again learning from interdisciplinary means. Toohey discusses the significance of neuroscience in explaining how the two systems of the brain—the automatic (System 1) and conscious thought (System 2)—affect decision-making capacity in mediations. See 1.8 for an elaboration.
[881] For a comprehensive discussion of the issues of interdisciplinary studies, see Liora Salter and Alison Hearn, *Outside the Lines: Issues in Interdisciplinary Research* (McGill-Queen's University Press, 1996).

perspectives.[882] If the effect of loss on the psychological wellbeing of parties and subsequent outcome of a dispute is to be considered in any mediation process as part of the process of relational responsibility, I argue that an interdisciplinary approach to making meaning from the loss, to form a new basis for close relationships, can gain support from the field of relationship science. [883] For example, McNamee and Gergen[884] propose that concepts of the individual are significantly limited to actions, both informal and institutional. They attempt to transform the concept of individual responsibility in such a way that the relational process replaces the individual as the central concern. In confronting what is problematic in life, McNamee and Gergen reinforce that what matters is how one responds.

In agreement with McNamee and Gergen, I propose that what is typically sought through any dispute resolution process, and particularly through any mediation process, is some form of restoration for losses incurred, including the loss of expectations about what was believed should have happened. However, more significantly, as stated before,[885] I propose that what is sought through mediation is how one responds to give meaning to the loss that can be better endured into the future. To consider how one responds, I have adopted Gergen's definition of social constructionism—a theoretical perspective that assumes that people create social realities through individual and collective actions.[886] That is, constructionists ask, 'how is it accomplished?', rather than seeing the world as given. Thus, instead of assuming realities in an external world—including global structures and local cultures—social constructionists study what people

[882] For an elaboration of interdisciplinarity studies, see 1.8, pp. 46-50; 2.4.2, pp. 69, 74, 83-4; 3.4.2, pp. 126, 141; 4.3.1, pp. 166-8. Gillath, Adams and Kunkel, above n 131, 5. See, also, 1.8, p. 45. Frieberg calls this process 'bisociation'. See 5.1, pp. 186-7, 196. Freiberg, above n 595, 297, 299.
[883] For a greater explanation of relationship science, see argument in 1.8, p. 46.
[884] McNamee and Gergen, above n 660, xii.
[885] See 5.4, p. 219.
[886] Gergen, above n 17; McNamee and Gergen, above n 660, xi. McNamee and Gergen cite the writings of Ludwig Wittgenstein as being the roots of social constructionist theory. Wittgenstein proposes that words are the by-products of social interchange and their meanings are secured by participating in specific games of language, so that all theoretical work has been subject to verification or falsification—potentially true or false—with its utility to society depending on its veracity. The idea is that, from accurate theory, researchers can derive effective forms of action, improved relationships, better therapy, efficacious public policy and so forth. However, if theory is neither true nor false, except through social interchange, as social constructionism proposes, and if there is no application of theory, except through the processes of negotiating meaning, then the traditional view that accurate theory may guide action is disqualified. Instead, a theory is seen in social constructionist terms as a language resource that permits particular forms of action and suppresses others. Thus, social constructionism invites one to think of theory in terms of its potential uses as a resource of the culture, not as a prescription for social life that is derived from more knowledgeable and objective sources.

at a particular time and place consider real;[887] how they construct their views and actions; and, when different constructions arise, whose constructions become taken as definitive, and how that process unfolds.[888]

According to McNamee and Gergen, the concept of relational responsibility derives from generating meaningful language within the processes of relationships.[889] In effect, what is proposed to be real (ontology) and good (morality) is born of human interchange, so there can be no moral beliefs, no sense of right and wrong and no vision of society worth struggling for without some basis in a relational process.[890] McNamee and Gergen state that the tradition of individual responsibility in which individuals are held to blame for untoward events has a chilling effect on relationships. Thus, what is instead proposed by social constructionism is to use the word 'responsibility' as a term that may sustain and support the process of constructing meaning, as opposed to terminating it.[891]

In agreement with this proposal, I claim that the aim of the RM is not closure—as in the traditional mediation models of settlement—but to sustain and support the process of constructing meaning that requires dialogue from the self-reflexive position of Adult to Adult and Observer Self to Observer Self to remain forever open.[892] As aforementioned,[893] I argue that parties are constrained (and not freed) by their personal constructs/worldviews, that fixed values can change, and that collectively acknowledging loss is necessary for social change to occur from a grassroots level. In applying the first of these arguments, I claim that the very fact that parties are in dispute illustrates that parties are constrained by their personal constructs which are bound by their assumptions and expectations.

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[887] Creswell, above n 289, 5. Mixed-methods research has been called the 'third research paradigm', following the development of first quantitative and then qualitative research because it is an intuitive way of undertaking research that is constantly being displayed through everyday life via multiple ways of seeing and hearing. At the same time, mixed-methods research is defined as a combination of qualitative and quantitative approaches in the methodology of a study—mixing all phases of the research process—to become a methodological orientation with its own worldview, vocabulary and technique.
[888] Gergen, above n 17.
[889] Ibid.
[890] This may be viewed as a first premise of social constructionism. McNamee and Gergen, above n 660, xi.
[891] Ibid.
[892] This is particularly the case for separated or divorced parents where an ongoing relationship continues. Ibid, xii.
[893] See 5.4, p. 209.

Thus, I propose that, through the NIS, the RM better releases parties from their assumptions and expectations by becoming the process of how the parties jointly and severally decide whose constructions of events become definitive, or are considered definitive at any point in time. I argue that the process of engaging in relational responsibility supplements each party's individual mode of dialogue[894] that arises initially from their personal constructs formed by their Parent (how things should be, and that justice needs to be done) and/or their Child (how the losses are felt) during their opening statements.

Through learning from the NIS, parties attain new modes of dialogue during the issues-exploration phase and private sessions that focus on how to relate from the self–reflexive position of Adult to Adult (how things are jointly categorised from learning that has already been validated) to enable fixed values to change. The parties can then focus on moving outwards during the reality-testing and decision-making phases to engage their Observer Selves, with which they can conjointly reality test the implementation of their agreement, noting the emotional, social, financial, logistical and practical/pragmatic implications for and from both sides. By engaging their Observer Selves, through relational responsibility, both parties conjointly make real or manifest within their wider social context their individual thoughts around minimising the effect of their current loss and protecting themselves against any future loss.

Thus, the RM supplements the space—no matter how small—to alter the landscape of relationship between the parties, so that engaging their Observer Selves[895] enables the parties to test whether their values are still needed, or whether there is room for change. I claim that collectively acknowledging losses through engaging the Observer Self is necessary for social change to occur from a grassroots level. The RM mediator, as a catalyst and relational learner, attempts to transform the concept of individual responsibility for parties in such a way that the relational process replaces the individual as the central concern. The mediator notes that each party's 'individual mode of

[894] Note too that each party's 'individual mode of dialogue' not only includes recognising the functioning from either Parent, Child or Adult, but also includes recognising the style of dialogue in relation to the DISC—whether each party is functioning primarily from the direct, influencer, stabiliser or conscientious mode when severely stressed.

[895] The Observer Self of the parties is a higher order self-reflexivity process that sees the 'self' in its wider social, emotional and financial contexts.

dialogue' includes their personal constructs formed by the Parent, Child or Adult (TA), and recognises the style of dialogue in relation to their functional style from the DISC—whether each party is functioning primarily from the direct, influencer, stabiliser or conscientious mode when severely stressed. For example, an extroverted party who is functioning from task mode (a direct style) who is also extremely hurt over their losses (Child) is likely to protect the hurt feelings of their Child by engaging an angry Parent to demand justice. Such a party may appear as if they are disregarding the other party's feelings to protect their own needs by implementing their own version of 'justice'.

Unlike most traditional mediators, the RM mediator is encouraged to be more aware that each party has a unique relationship with the other side (loving, ambivalent or challenging) and brings a unique personality and coping mechanism to the mediation situation. The RM mediator acknowledges that each party has ongoing relationships that may or may not be helpful in dealing effectively with the losses and feelings of being wronged, and acknowledges that each party approaches their particular loss with a unique history of dealing with earlier losses.[896] Thus, the mediator attempts, through the pre-mediation sessions, to acknowledge the coping mechanisms of each party from those earlier losses, and acknowledges that each party's grief is unique and that each party has a particular worldview that will affect how they enter the mediation process.[897]

The RM mediator addresses the fact that each party has particular expectations about what dealing with the loss involves, and each party wonders how dealing with the loss 'should' proceed. The RM mediator acknowledges that assumptions and expectations act as filters for the way parties interpret the world and their place in it. The aim of the RM is to note that parties have common examples of differing dysfunctional thoughts relating to their loss, and that the deconstruction and reconstruction of parties' assumptions and expectations through the grounded research method of social constructionism generates a rational response to such dysfunctional thoughts.

The aim of relational responsibility is to enable parties to recognise that each other's style of functioning (DISC and TA) can inhibit communication and blur what is happening between their Parent and Child or other TA interactions that are engaged. By

[896] Doka, above n 233; Worden, above n 29; Neimeyer, above n 210.
[897] Ibid.

engaging their Adults, parties are able to understand that the other is not deliberately seeking to make their life difficult. They can categorise their learning about where each other is located, conjointly, so that they can ultimately engage their Observer Selves with which to reality test and implement any agreement in their wider social contexts. Social constructionist research addresses the concept of relational responsibility as being a dialogic process with two transformative functions:

1. to understand the actions in question from a broader perspective, such as from the other party's perspective, or from the legal, social and political constraints of the system
2. to alter the relationships between parties.[898]

Applying this theory to the RM, the 'direct' party with an angry Parent is probably not ready to empathise with the other party. By being made aware of their lack of readiness, the parties can agree to adjourn the matter or engage another issue about which they are both ready to move forward. Dealing with an easier issue may loosen their positional grip over a difficult issue where anger is still felt. If the parties are in an ongoing relationship, their relational interactions of readiness and willingness (resilience) constantly affect their styles of communicating (DISC and TA) to affect the level of trust with which they can engage in the future as business acquaintances.[899]

I argue that, in the practice of mediation, such as the RM, the concept of relational responsibility poses a challenge to parties to consider as the central issue which kinds of social worlds are made possible by their different theories/worldviews to expand their possible ways of moving forward together. In doing so, relational responsibility in the RM can be understood as an attempt to play out the postmodern erasure of the self with its sense of security, moral certitude and truth, and to replace it with a focus on the relationship that emerges from the stories of the parties. The RM model views relational responsibility to be not solely about blame and credit, but more about an entirely different way of engaging with others and thereby creating another world that sustains the conditions in which one can join in the construction of meaning and morality. This is relevant for my argument that reconceptualising dispute resolution to enable parties to

[898] That is, on a realistic level to the best of the party's ability, readiness and willingness to do so at that time, aiming to function from Adult or Observer Self. Charmaz, above n 299; Gubrium and Holstein, above n 5; Gergen, above n 17.
[899] 'Business acquaintances' refers to Guideline 5 of Ricci's relationship chart. See Section 3.9.

make better sense of their losses will have a transformative effect on both ADR (as previously explained[900]) and the wider legal system.

For example, the use of the RM as mediation can be likened to Gergen's process of social bonding and coordinated action, which similarly acknowledges the collective efforts of parties required for social change.[901] I have extrapolated from Gergen's theory of collective acknowledgements to include an acknowledgement of losses in the RM, arising from the complementary transactions of Observer Self to Observer Self. I note that such transactions incorporate the concept of social inclusion adopted in legal discourse. That is, by functioning from the Observer Self, parties are better able to note and accommodate each other' differences in beliefs (assumptions and expectations); functional style (DISC and TA); worldviews (personal constructs); and levels of readiness, willingness and ability (resilience) to move forward (relational learning) from their loss (meaning reconstruction) to alter their social environment against any future loss. Considering all these interrelations becomes the process of social constructionism in action, and demonstrates that collective acknowledgement of losses is necessary for social change to occur from a grassroots level.

This topic is discussed briefly below to argue that social inclusion requires an interdisciplinary approach to augment the law's understanding of mediation to include the constructs of relational responsibility and loss. To make the argument, I note that the RM uses interdisciplinary studies and the process of social inclusion to more effectively achieve mastery, or at least greater effectiveness, in dispute resolution in the private relational world of disputes, as TJ has done in the public relational world of law courts.

5.5.1 The Transformative Potential of Social Inclusion

'Social inclusion' is a term adopted by courts to include TJ principles that inform the courts in relation to the reform of court services, with the aim of increasing the amount of multidisciplinary case management and collaboration. Freiberg[902] emphasises that the

[900] 2.4.3, p. 81.
[901] Gergen's version of restoring a relationship between antagonistic parties (through the process of 'social bonding' and coordinating action) can itself be a description of the dispute resolution process in social constructionist terms. Gergen, above n 17.
[902] Freiberg, above n 673.

transformation of the legal background—particularly in Victoria, Australia—through the influence of non-adversarial justice is not only practical, but is now recognised as an underpinning philosophy that informs the way some courts and the justice system operate. In other words, the non-adversarial justice approach has changed not only the possible answers to the difficult questions about 'justice', but the way the problems themselves are framed.[903]

Underpinning the practical, philosophical and cultural changes in the court system are changes to judicial education and the information provided to judicial officers (and others) regarding the meaning of non-adversarial processes, such as TJ and the evidence base for their court practices.[904] For example, the Australian Institute of Judicial Administration has developed a comprehensive and well-used clearing house on TJ that serves as an extensive guide for judges, and covers such topics as mental health, substance abuse, family violence and strategies to achieve behavioural change as part of the social inclusion of the justice system.[905]

According to Stockwell,[906] the justice system in Australia[907] now has the broader aims of not only resolving disputes, but also encouraging social inclusion and reducing offending and re-offending.[908] She observes that one aim for social inclusion in the justice system is to increase equity of access to justice across the state. For example, she notes one of the reforms to include the Next Generation Court, established in 2009, which addresses the underlying causes of offending and victimisation by using problem-oriented approaches that are integrated in the mainstream magistrates' court system so that they are not regarded as either marginal or temporary.[909]

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[903] Ibid 16.
[904] Ibid.
[905] Ibid.
[906] The chief executive officer of the Victorian Magistrates' Court, Charlotte Stockwell.
[907] Charlotte Stockwell, *Managing the Transition from the Adversarial to the Non-Adversarial Court Administrator's Perspective* (2010) The Australasian Institute of Judicial Administration: Excellence in Courts and Tribunals <http://www.aija.org.au/NAJ%202010/Papers/Stockwell%20C.pdf>.
[908] Ibid.
[909] Freiberg, above n 673, 14. The latest addition to the specialist lists in Victoria is the mental health court, which includes an assessment and referral court list, which was established in 2010 to meet the needs of accused people with a mental illness or cognitive impairment. In addition, the Family Court, via the less adversarial Trail Legislation introduced in 2004, affords primacy to the needs and interests of children by increasing the use of primary dispute resolution that involves mediation, conciliation, arbitration and family group conferences that attempt to resolve the problems between parties.

In line with this thinking, Frieberg offers a list of what he calls 'intrinsic' or 'embedded' elements of the new justice as it seeks to promote TJ, restorative justice and other streams of non-adversarial justice literature, based on Michael King. He states that the knowledge from these elements is no longer 'expert evidence', but is mainstream knowledge—the normal way of doing business in those courts.[910] Frieberg asserts that the transference of basic ideas from behavioural sciences to their application in law goes well beyond the understandings of the individual committed judicial officer, and well beyond the functional implementation of the problem-oriented or solution-focused courts. He asserts that non-adversarial justice now affects the very operation of mainstream courts themselves, and that, by so doing, it has been the greatest contribution to changing the justice system. He concludes that the probable reason that non-adversarial justice has been more effective in changing the justice system than the previous psychiatry, psychology and law paradigm is because of its impact in being adopted by mainstream courts—an impact that the interdisciplinary 'law and …' paradigm could not achieve because it was seen as 'the other discipline says' instead of 'we must'.[911]

In agreement with Frieberg, Wexler predicts[912] that the next challenge for TJ and non-adversarial justice is to create a new body of 'practical interdisciplinary scholarship'. He states that TJ 'regards itself as a framework for asking questions rather than a coherent body of knowledge that explains observed phenomena, which can predict future behaviour and which is verifiable'.[913] Wexler continues that what is currently needed is a commitment to the flexibility and creativity that arises from keeping an open mind and a willingness to challenge the traditional and experiment with the new.[914] Applying Wexler's reasoning to the private dispute resolution system, I propose that the RM is similarly such an attempt at social inclusion that is a distinct and may I suggest a significant means of empowering people to resolve their disputes in meaningful ways

[910] Michael King, *Solution-Focused Judging Bench Book* (The Australasian Institute of Judicial Administration, 2009); King, Freiberg, Betagol and Hyams, above n 25, 47.
[911] Freiberg, above n 673, 16.
[912] In 1997, Winick wrote that, 'The quest for truth can sometimes make us question basic assumptions. Although it may be uncomfortable and sometimes even painful to do this we must be brave enough to open our eyes to knowledge and to dare to see the world clearly, as it is, rather than as we might wish it to be.' David Wexler, 'The Development of Therapeutic Jurisprudence: From Theory to Practice' (1999) 68 *Revista Juridica University de Puerto Rico* 691, 711.
[913] Wexler, above n 880, 711. It is also interesting that psychology, in pursuit of its goal to be viewed as a science, prefers to explain phenomena that can predict future behaviour and are verifiable.
[914] Ibid.

by making better sense of their losses. The RM is similarly a 'framework for asking questions rather than a coherent body of knowledge that explains observed phenomena, which can predict future behaviour and which is verifiable'.[915]

Moreover, a social constructionist approach, such as the RM, can produce 'practical' interdisciplinary scholarship in private dispute resolution. For instance, using the interdisciplinarity of the NIS,[916] I propose that the RM better enables parties to maintain a willingness to experiment with the new. The NIS offers an opportunity for parties to challenge their assumptions and encourage social inclusion from both sides.[917] Through using the NIS and social constructionism, I argue that the RM offers parties an opportunity to change their possible answers to their own difficult questions about 'justice', thereby helping them reduce any future conflict between them. In this manner, I contend that the RM distinguishes itself from the existing traditional paradigms of mediation that focus on settlement, empowerment and/or recognition, rather than on social inclusion or the effect of grief on the legal outcome of the dispute that arises from relational learning.

Just as the impact of interdisciplinarity in TJ that says 'we must' (instead of the 'law and …' paradigm that says 'the other discipline says …'),[918] the RM similarly uses a 'we must' approach as part of constructionist social science. This is done to draw connections between the micro and macro processes of creating a just society by using the process of social inclusion as a more effective means of dispute resolution. I now consider the topic of constructionist social science as it unfolds in the RM.

5.5.2 The RM as Part of Constructionist Social Science

According to Gergen and other social constructionist researchers,[919] to succeed in creating more just societies, individuals must begin by changing themselves. They must encourage not only substantive unity regarding core ideas and political principles but

[915] Ibid.
[916] 3.4, p. 132-142.
[917] This is done by providing a benchmark for parties against which they can measure their options to better endure their losses into the future. See also Edward Thorndike, *The Principles of Teaching: Based on Psychology* (The Mason Press, 2013) 147
[918] Freiberg, above n 673, 16.
[919] Ibid; Gubrium and Holstein, above n 5.

also encourage the caring relationships and collaborative processes that are needed to support them in the long term, by improving the levels of skill and understanding in these areas.[920] Gubrium and Holstein stress that the field constructionist research deals with—physical, social or legal—has philosophical implications, such as the nature of people and their surroundings. [921] Cloke [922] confirms that relationships and processes generally have an extraordinary effect and transformative power because processes encode relationships and recapitulate content. He states that every conflict occurs within a relationship—not only between individuals, but also within a context, culture and environment. None of these are conflict neutral, but contribute—often in veiled and unspoken, yet significant, ways—to the nature, intensity, duration, effect and meaning of the conflict. [923] The elements of social inequality, economic inequity, political autocracy and environmental change are sources of chronic conflict throughout history. Moreover, such examples of enduring conflict create a culture of avoidance and aggression, and a set of adversarial attitudes and behaviours that limit the ability of individuals and groups to work together to improve their lives.

More importantly, Cloke stresses that social inequality, economic inequity and political polarisation are forces that are experienced personally as conflict. Yet, it is rare that any

[920] Ibid.
[921] Gubrium and Holstein, above n 5. For example, the innovations arising from mediation processes in family law and other legal arenas prompted the need to create NADRAC to advise the Attorney-General's department in Canberra in 2001 regarding the competencies, knowledge and skills required for mediators, and to assist in promoting a more cohesive regulatory environment, among other things. NADRAC noted in 2005 that the development of standards for mediators was hampered by the lack of a national representative body in the ADR area, making the setting of uniform standards throughout all Australian states very difficult. Drawing on an extensive consultative process over the next few years, the first step towards professionalising the mediation process was formally taken by opening the MSB in September 2010—a further example of transition from innovation to institutionalisation, so common with the bisociation process that occurs naturally through the mediation process. The potential for mediation to become a profession, rather than to remain a set of excellent life skills that can be used by all other professions, is still hotly debated, especially since the sudden and unexpected 'absorption' of NADRAC into the Attorney-General's Department on 8 November 2013. At the time of writing this thesis, there has been no official response by the government to dispute resolution practitioners in NSW to explain this absorption, despite specific requests from major groups to do so. The dispute resolution groups outlined their concerns that, without an independent body to inform it, the government no longer has a direct link to understand the needs of the dispute resolution community, and that the absorption would mean that the dispute resolution community will be competing with all the other interests of the Attorney-General's department to even be considered. Yet, the innovative ideas arising from mediation as a bisociation process, especially in areas such as family law, have definitely led to further institutional change that has changed the justice system itself. Alexander (2010) notes that there are now referrals to mediation at every court level in Australia, as well as in the growing private sector for mediation practice—good examples of institutional transformations that have made changes to the justice system.
[922] Kenneth Cloke, *Conflict and Movements for Social Change: The Politics of Mediation and the Mediation of Politics* (July 2013) Mediate <http://www.mediate.com/articles/ClokeK16.cfm>.
[923] Ibid.

of these systemic background elements are even noticed, let alone analysed, discussed or subjected to problem solving, negotiation or conflict resolution by those whose daily activities bring them into existence. Both Mayer and Cloke claim that every effort to end or ameliorate these sources of enduring conflict by individuals or movements for social change can be regarded a form of conflict resolution to create a more just society.[924]

By extending Cloke's and Mayer's ideas,[925] I argue that a social constructionist approach to mediation, such as the RM, is a personal means of addressing sources of enduring conflict by focusing on the relational wellbeing of the parties to approach a life-giving future.[926] The aim of the RM is to improve the skill level and understanding of parties about each other's losses—an understanding that I argue is needed to support parties in the long term to better endure their loss by making meaning in a philosophical sense. The act of better enduring loss confirms that the RM as mediation generally encodes a new basis for relationships and recapitulates content as constructionist research, thereby demonstrating that relationships and processes have extraordinary influence and transformative power. The RM encourages parties to notice the social inequality, economic inequity and political polarisation that they may be experiencing personally as conflict. It also helps them notice, analyse, discuss and subject these systemic background elements to problem solving, negotiation and conflict resolution as grounded theory researchers, to the best of their willingness, readiness and ability at that time.[927]

I argue that the RM can provide a context where the parties—within their range of ability, willingness and readiness—are able to use their Adult and Observer Self ways of thinking to analyse and discuss on a personal level the social and economic inequities that they believe resulted in their conflict. Moreover, they can take joint responsibility as grounded theory researchers to collectively reconstruct the meaning attached to their losses, so that they can individually better endure their loss into the future.[928]

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[924] Ibid.
[925] See Introduction Part 2, 10.
[926] Gergen, above n 17, 403.
[927] For example, see Guideline 2, which discusses competition as a social force and encourages parties to use a collaborative approach instead. See also Guideline 10, which encourages parties to function from a position of Adult in an attempt to engage their Observer Self to achieve an effective long-term agreement.
[928] See 2.3.2, 2.3.3, 2.4.3, pp. 71, 76, 100 and 3.1, 3.2.1, 3.2.2, pp. 105, 108, 113, 115.

By enabling parties to answer the question, 'what is the nature of ourselves and our surroundings as a result of the loss?', the RM has philosophical bearings. It enables parties to ask how their losses have changed their identity (such as in divorce proceedings, major injury or other form of loss). Similarly, parties can examine the nature of their surroundings so that what is considered by each party to be plainly obvious can be conceptually deconstructed and reimagined/reconstructed. Cloke implies[929] that people are implicitly responsible for learning better ways to address and resolve the conflicts that lead to social injustice. He confirms that mediation, like every process, has a political content. Reminiscent of Dewey's pragmatism,[930] Cloke states that mediation, as a voluntary process, is radically democratic because it uses consensus, rather than coercion, and subsequently produces a maximum of unity and a minimum loss of energy, time, commitment and resources in organisations. However, Cloke[931] claims that traditional mediation seldom considers anything beyond settlement. I argue that the RM enables parties to go well beyond settlement to consider more enduring ways to live with their loss and anticipate future conflict in a manner that enables conflict to be avoided.[932]

The intended outcomes of a social constructionist approach to mediation are more consistent with the democratic aims of progressive movements, as well as with social equality and community empowerment.[933] The constructionist argument on a macro level is that the understanding of 'problems' (such as sexual non-conformity or domestic abuse) and/or social issues (such as crime, poverty, sexual deviance, alcoholism and substance abuse—all matters that can require legal determination) are as much matters of rhetoric, power and influence as they are concrete social conditions.[934] Thus, such 'problems' can be deconstructed by constructionist researchers to offer a

[929] Like Gergen, above n 17.
[930] See 4.2.3, 148. Pragmatism is where people's ideas are grounded by the practical problems and requirements of life. Warren, above n 520, 32, 37.
[931] Cloke, above n 890.
[932] It may be argued that these same characteristics allow traditional mediation processes similarly to be viewed as a model for social interactions and a goal for creating more just future societies.
[933] Cloke, above n 890.
[934] Gubrium and Holstein state that various disciplines have developed lines of constructionist enquiry without reference to one another, so that the constructionist wheel has been reinvented more than once. They state that now is the time for one field to recognise the other—for example, the constructionist sociology of social problems should consult with the constructionist studies of public policy, and vice versa. I propose that the RM is one such forum where interdisciplinarity can achieve personal problem solving of disputes that have a basis in social conflict. Gubrium and Holstein, above n 7, 7–8.

trenchant conceptual and explanatory challenge to what previously were considered plainly obvious social issues.[935]

On a micro scale, Gergen[936] states that the vision of relational being as a practice invites productive co-creation of meaning, and, particularly, co-creation removes the barriers of antipathy to replace conflict with coordination. I argue that the RM illustrates how parties exercise relational being as a practice by inviting the productive co-creation of meaning around their losses, thereby removing the barrier of antipathy and replacing conflict with coordination. I claim that the RM ranges across the 'how and what' of reality and representation to conventional macroscopic and microscopic levels of analysis, much like a hologram. It links substantive, theoretical and procedural matters and their ongoing challenges from the micro world of decision making to the macro world of implementing the agreement in a supportive and protective social structure. Further, I propose that the process of the RM can be likened to a mixed-methods research approach.[937] The RM can be defined as a combination of qualitative and quantitative approaches[938] that mixes all phases of the research process to become a methodological orientation with its own worldview, vocabulary and technique, depending on what parties bring to the mediation.[939]

In relation to how the macro and micro interact from a social constructionist perspective, Gergen states that at the edge of consciousness lies an enormous expanse of the unspoken about the topic, but that there are already hundreds of practitioners exploring practices and enriching relational process in nearly all areas of knowledge. These include the open source movement in the computer world, which is an active movement to decentralise technologies so they can be available to all people.[940] Despite being lodged in an individualist tradition, Gergen claims that all these practitioners have demonstrated investment in inclusive participation.[941] From the local to the global, there is evidence of a greater and more clearly relationship-centred expansion of

[935] Ibid.
[936] Gergen, above n 17.
[937] 2.4.3, 89; Gubrium and Holstein, above n 7, 7.
[938] Quantitative studies of the success rate for mediation proliferate in the courts and other registered mediation accreditation bodies, while quantitative studies of instances of domestic violence in family law and so forth are also well founded.
[939] Creswell, above n 289, 5.
[940] Steven Weber, *The Success of Open Source* (Harvard University Press, 2005) 397.
[941] Gergen, above n 17.

consciousness, such as the National Coalition for Dialogue and Deliberation, which supports organisations and individuals engaged in using dialogue to benefit society and to assist in the collaborative creation of the future.[942] Gergen cites various institutions, such as the International Academy of Collaborative Professionals, which emerged from myriad grassroots groups[943] attempting to replace litigation with collaborative practice, and consists of professionals from the legal, mental health and financial sectors who work internationally to provide resources for education and networking.[944] One such resource provided is collaborative law, which is especially useful in cases of divorce and custody issues, where civil discussions are held, in which significant stakeholders participate to replace the litigation process.[945] In the case of medical negligence, collaborative law attempts to reduce the growing gap of distrust between patients and physicians by facilitating conversations that generate common understanding.[946]

Like the International Academy of Collaborative Professionals,[947] a recent meeting of the Australian Dispute Resolution Industry Forum[948] sought to facilitate interchange and civil sharing in relation to professionals from the arbitration, adjudication and mediation sectors. These professionals aim to work internationally and nationally to provide resources for education, training and networking to practitioners, and to develop and propagate collaborative means of approaching conflict so that a unified voice to the government can be created.[949] The practitioner groups that presently comprise the forum recognise, like Gergen,[950] that large-scale organisations—such as governments, religions, political parties and tribes—are often inept at moving beyond an ideology of self-gain, and leave smaller relational groups to develop and propagate collaborative

[942] Ibid 398.
[943] The 21st Century Dialogue and the Compassionate Listening Project and others have been established to facilitate interchange and the civil sharing of concerns. Gergen, above n 17, 3.
[944] See, eg, Kathleen Clark, 'The Use of Collaborative Law in Medical Error Situations' (2007) 19 *The Health Lawyer* 19. Gergen praises the work of several collaborative practices for reducing or managing conflict—practices that represent an international movement to determine alternatives to brute-force approaches to conflict. Gergen, above n 17, 399.
[945] See, eg, Clark, above n 912. Gergen praises the work of several collaborative practices for reducing or managing conflict—practices that represent an international movement to locate alternatives to brute-force approaches to conflict. Gergen, above n 17, 399.
[946] Ibid.
[947] The 21st Century Dialogue and the Compassionate Listening Project and others have been established to facilitate interchange and the civil sharing of concerns. Gergen, above n 17, 3.
[948] On 14 May 2014, the first forum for the Dispute Resolution Industry in Australia was established in response to the unexpected and sudden 'absorption' of NADRAC into the Attorney-General's Department, thereby rendering its previously much-respected position defunct.
[949] It is such a new creation that its official name was undecided at the time of writing this thesis.
[950] McNamee and Gergen, above n 660.

means of approaching conflict.[951] The aim of the forum is to consider this goal in the attempt to represent the needs of the dispute resolution industry to the government. Such a movement aligns with what Gergen terms the 'New Enlightenment', in which the value of the self is replaced by the value of relationships.[952]

As the quest for meaning in the global transformation in consciousness replaces the Hobbesian dystopia of 'all against all' with a vision of 'all with all', I argue that the RM demonstrates an investment in inclusive participation. It does so by providing a tool for genuinely disputing parties to assist in their collaborative creation of a future that makes sense of their losses, by supportively engaging in dialogue that anticipates any future or ongoing conflict.[953] Thus, I claim that the fifth proposal can be substantiated when parties collectively acknowledge how their disappointment from their loss affects each other's psychological wellbeing and how it also affects the legal outcome of their dispute to form their own version of justice.[954] This is successfully achieved more often

[951] For example, the Alliance for Peacebuilding (www.allianceforpeacebuilding.org) brings together peace-building organisations from around the world to share information and innovation, the Search For Common Ground (www.sfcg.org) has active projects in 17 different countries, the Global Peace Works organisation (www.center2000.org) gathers volunteers from multiple religions to serve local communities, and PeaceXPeace (www.peacexpeace.org) connects women from around the world to work locally for peace. For more information about the political implications of communal collaboration, see Harold Saunders, *Politics is About Relationship: A Blueprint for the Citizen's Century* (Pelgrave Macmillan, 2007). See also Gergen, above n 17, 399.

[952] McNamee and Gergen, above n 660.

[953] Gergen states that there are three driving forces for the movement of relational consciousness, each of which places relationships at the forefront of consciousness and points to the necessity of relational wellbeing for the world's future. The first is communication technology, where one becomes a bridge of communication that exponentially increases the potential for effective co-action, which leads to a profound increase in ongoing connectivity and increased capability of effective collaboration between the world's people. The second is globalised organising, which links communication technologies to skills in coordination, thereby facilitating the coordination of realities, visions and agendas as it serves the individual and group at all levels (community, regional, state, national and international) to link globally, so that networking becomes a way of life, and the values of autonomy and independence 'slip into history'. The third is not the opportunity for increased efficacy, but the threat to the environment. This ignites concern over the environmental ravages resulting from systematic exploitation of the earth, and calls for sustainability as the necessary alternative. The concept of sustainability is already considered by some as insufficient, requiring instead a collaborative movement by the world's people. Gergen, above n 17, 402. Ibid, Ch 2; Peter Kinderman, John Read, Joanna Moncrieff and Richard P Bentall, 'Drop the Language of Disorder' (2013) 16 *Evidence Based Mental Health* 2-3; Rachel Carson, *Silent Spring* (Houghton Mifflin Harcourt, 2002); Tazim Jamal and Amanda Stronza, 'Collaboration Theory and Tourism Practice in Protected Areas: Stakeholders, Structuring and Sustainability' (2009) 17 *Journal of Sustainable Tourism* 169; B L Turner et al, 'A Framework for Vulnerability Analysis in Sustainability Science' (2003) 100 *PNAS* 8074; Chris Ryan, 'Equity, Management, Power Sharing and Sustainability—Issues of the 'New Tourism' (2002) 23 *Tourism Management* 17; Zinaida Fadeeva, 'Promise of Sustainability Collaboration—Potential Fulfilled?' (2005) 13 *Journal of Cleaner Production* 165; Grace K C Ding, 'Sustainable Construction—The Role of Environmental Assessment' (2008) 86 *Journal of Environmental Management* 451.

[954] Freiberg, above n 673, 4.

than not in practice, although the parties and/or the mediator may not be consciously aware that they have engaged in effective mediation as social constructionism in action.

I claim that the RM is an attempt to unite the macro with the micro forms of relational being, much like a hologram, to become a more effective means of dispute resolution in a relational world. I conclude that the analysis of the RM as presented herein forms the basis for a theoretical explanation of a social constructionist model of mediation, in which the law can benefit by further expanding its conception of the mediation process to include an interdisciplinary approach regarding the construct of loss and the emotion of grief. [955]

[955] Ibid.

Conclusion

I conclude by noting that the grieving process can occur in many types of loss, and that grief and loss can be loaded with complexities and fraught with difficulties. Above all, I note that the relational aspect of grieving has been largely overlooked, particularly in the field of mediation. To address this oversight, I have used a normative benchmark of psychological research on basic responses to grief and loss—the NIS—to offer parties a behavioural assignment with which they can reinforce their rational thinking and engage their responsible actions during the mediation process.

I argue that the NIS offers a practical focus that can make a significant difference to parties in times of grieving by enabling them to exercise the time-honoured power of chronicling their experiences of loss in the mediation process as grounded researchers, in such a manner that the losses can be better endured outside the mediation process. I claim that collectively acknowledging the effect of grief on the quality of any ongoing or enduring relationship between parties helps the parties form macro structures in which their losses are better endured. I conclude that parties become agents of social change as they collectively reconceptualise their own meaning of justice, with which they can individually better endure their losses.

I have stressed the significance of the constructs of the readiness, willingness and ability of both parties to genuinely engage in the process of resolution as a core principle in developing a basis for a theoretical explanation of a social constructionist model of mediation.[967] I argue that this thesis demonstrates how mediation can deal with loss in a relational world to be a more effective means of dispute resolution, and have presented five proposals that were explained in five separate chapters. I make the following claims:

1. that genuine disputes arise from a loss of expectations that are not met
2. that the only reason to conduct any mediation is to make sense of the loss caused by the breakdown of expectations

[967] See the Introduction.

3. that the only way to make sense of loss is to analyse the meaning attributed to the loss and determine how that meaning fits in with the worldview/personal constructs of the parties—to deconstruct the meaning of the loss
4. that to move forward from the loss, parties must assign new meaning to the loss—to reconstruct the loss through the process of relational learning
5. that using relational learning can raise the consciousness of parties to actively engage in their 'game in the making'.

I argue that, through the process of social inclusion, parties become agents for social change that is used to access their own means of justice as a way to better endure their loss.

Chapter 1: Setting the Parameters of the Study—Understanding Loss

In the first chapter, I established the parameters of the study and claimed that every conflict takes place within a relationship—not only between individuals, but also in a context, culture and environment. None of these are conflict neutral, but contribute—often in veiled and unspoken, yet significant, ways—to the nature, intensity, duration, influence and meaning of conflicts.[968] I presented an analogy from the natural sciences where the microscopic changes of a flickering flame in chaos theory can be likened to the microscopic changes in interpreting the terms of the contract, where expectations are not met, which results in dispute. This analogy provides a better understanding of the 'flow of perceptions' that consist of the apparent uncertainties, non-linearity and unpredictable aspects of the behaviour that forms a dispute, just like that of a flickering flame.[969]

I argued that a greater focus on loss allows apparent chaos to become a constantly changing set of ordered pattern formations that form the values and beliefs of the parties—otherwise known as the 'glimpses of insight' from the Observer Self for both sides that can be changed.[970] The changing sets of ordered pattern formations become the building blocks for relational learning to emerge.[971] I extrapolated from Gergen's definition of social constructionism as the 'game in the making' and applied it to

[968] Cloke, above n 890.
[969] Ibid.
[970] 1.8, 32.
[971] Kiel and Elliot, above n 79, 1.

explain and analyse the mediation process as similarly being the 'game in the making' between parties, and thereby formed a social constructionist model of mediation.[972]

Chapter 2: Making Meaning of Loss

The second proposal was that parties come to mediation to deal with their loss of expectations from any contractual or other relationship. Their expectations and attendant assumptions usually constitute their opening statements. These can be changed as the parties engage as grounded theorists in the methodology of the RM.[973] The theories of Neimeyer and Sands and others[974] explain the construct of loss and the process of meaning reconstruction, while the theories of Charmaz around grounded theory represent the methodology of the RM, in which parties engage to better live with their losses.

Chapter 3: The NIS—Analysing Loss

Chapter 3 presented the guidelines that form the NIS, including description and analysis of the DISC.[975] The NIS is the distinguishing feature of the RM. It consists of 10 guidelines as a normative benchmark against which participants can measure their level of grief to decide whether they are ready, willing and able to move forward from their loss. Underpinning the concepts of the NIS is the belief that disputing parties can share the benefits of psychological research around coping with grief and loss to creatively recombine existing components or ideas that require multiple influences, divergent schemas and an open mind to allow new connections to emerge.[976]

The normative framework of the NIS accommodates the stress arising from the legal obligations of parties to assist in their decision-making capacity.[977] It uses the personal constructs of parties as a fundamental part of their process of relational learning to

[972] Ibid; Gergen, above n 35.
[973] The issue-exploration phase of the mediation is where the parties engage in their theories of their own and the other party's losses, grounded in their experience, from which they then discuss the effect of their feelings, and propose possible ways forward as grounded researchers.
[974] Neimeyer, above n 362, 27; Neimeyer and Sands, above n 233.
[975] Ibid; Gergen, above n 35.
[976] Koestler, above n 763.
[977] As they engage in their 'game in the making' within the mediation process to form a new social order as their own access-to-justice measure.

better understand their combined assumptions and expectations that form their worldviews. With this knowledge, the NIS assists parties, especially those in ongoing relationships,[978] to deconstruct the loss in order to redistribute the power so they can co-create a future through their collective relational learning that causes a grass-roots social change.[979]

Chapter 4: Deconstructing the Process of Relational Learning—A Theoretical Explanation for a Social Constructionist Approach to Mediation

The fourth proposal developed a theoretical explanation for a social constructionist model of mediation, beginning with the theories of Dewey's pragmatism and Kelly's[980] personal constructs. It then discussed how relational learning combines with the theory of meaning reconstruction to become the process of social constructionism in action, and how the concepts of mindfulness[981] and TA[982] merge with personal construct theory to become the process of relational learning. It described how parties reconstruct their loss so that it can be better endured.

It argued that the assumptions and expectations with which parties enter mediation affect their personal constructs/worldviews to the point of stagnation, and must be deconstructed through the NIS in order for a collective acknowledgement to be reconstructed around the meaning of the loss. It claimed that the RM specifically focuses on understanding the loss from each party's perspective, and that collectively making sense of the loss enables the loss to be individually better endured, whether there is resolution or not.

To care about what happens to the individual's loss and to their sense of being wronged, I proposed that engaging the complimentary relations of Adult–Adult is best to analyse the parties' values.[983] I introduced the notion of Observer Self with which to recognise

[978] Such as divorced parents.
[979] 2.4.2, pp. 67, 71, 77; 4.3.2, pp. 168, 174.
[980] Chapter 4, 152–3. In terms of people as scientists researching what works in their own world.
[981] Vago and Silbersweig, above n 587, 1. See 4.3.2, pp. 164.
[982] Berne's TA. Berne, above n 597, 30
[983] Ibid.

the wider (macro) social aspects of the 'game in the making' as it unfolds along with the intra-psychic developments (micro) validated from the Adult. My concept of Observer Self differs from Berne's understanding of Adult–Adult transactions because it incorporates the concepts of mindfulness on a holistic scale, where biases around one's own assumptions and expectations are reduced during self-processing in order to create a sustainable, healthy mind.[984] I argued that such a worldview engages the processes of relational learning to develop personal growth.

The significance of relational learning is to validate the feelings of loss from the past (felt by the Child) and the expectations (of the Parent) of how things should have been in order to arrive (through the Adult) to an understanding of how things are (through the Observer Self) and how things will be organised in the future. The analogy from this micro perspective can be extended to the macro perspective to state that law can be represented as the Parent, psychology can be represented as the Child, traditional mediation can be represented as the Adult and a social constructionist model of mediation (the RM) can be represented as the Observer Self.

I have argued that the process of bisociation redistributes the power between parties so that the innovations of meaning making around the losses (in the option-generation phase) change into an 'institutional' collective acknowledgement and address the losses—otherwise termed 'settlement'. The legal outcome of the parties' dispute (their settlement) becomes itself a catalyst for an organic, grassroots change to the social fabric in which the parties co-relate. This becomes their own means of justice around their losses. This describes how parties reconstruct their loss so that it can be better endured, thereby forming a basis for a theoretical explanation of a social constructionist model of mediation.

Chapter 5: Social Inclusion—A More Effective Access-to-justice Measure

The fifth proposal discussed how the individual interacts with society, and proposed that individual responsibility is not sufficient when using a social constructionist approach to

[984] This observation of mindfulness and the Observer Self arises from my experiences as a mediator during the last 20 years. Vago and Silbersweig, above n 587, 1.

mediation. Instead, it proposed that relational responsibility is also required, where parties can place their loss in terms of a broader picture, much like a hologram where the micro world of the parties' decision making affects their macro world of implementing agreements and anticipating possible ways to avoid future or ongoing conflict.

I argue that the RM assists the parties to better interact with each other socially, economically, politically and environmentally, and offers them an opportunity to work in a truly democratic society within an egalitarian outlook that includes the social dimensions of construing, stressing freedom, enquiry and toleration of a diversity of viewpoints.[985] In this manner, individual responsibility becomes relational responsibility as part of the parties' ongoing 'game in the making', where the individual interacts with society by placing their private solutions (agreements) within the broader legal and societal contexts.[986]

Using the NIS to co-create new meanings around loss from a variety of different disciplines, including psychology, education, and law, I argue that the RM changes the quality of the conflict from negative and destructive to positive and constructive. It does so by encouraging parties (including the mediator) to explore and discuss the assumptions and expectations that brought them to the dispute and that can also lead them away from the dispute in a more humane, compassionate and collaborative manner. Thus, I claim that the law can benefit by further expanding its conception of the mediation process to include an interdisciplinary approach around the construct of loss and emotion of grief.

Chapter 5 therefore moves from the micro world of Chapters 1 to 4, where disputes were handled on a personal level, to introduce the macro components of social inclusion that make the RM a more effective means of dispute resolution in a relational world. Using a social constructionist approach, loss can be defined as the period of chaos following the shattering of expectations that were previously held. Loss can thus be a catalyst in finding each party's truth to their own version of social justice, which is

[985] 4.3.3, pp. 144-6. This view shares similar features to Gergen's notions of social bonding and coordinated action as part of relational being, and is a view that is at the heart of the workings of the RM.
[986] 1.8, 40.

individually meaningful on a psychological level and collectively implemented on a legal level. The focus is on how one responds to the dispute. For example, as stated earlier, the process of parties reviewing their circumstances, measuring their hopes against their knowledge of reality, and taking stock of what they already have enables them to realise that their lives, while not perfect, are manageable. As with brief therapy, the process of describing their preferred future is sufficient for some parties to realise that enough of their goals are already being achieved for them to continue without further assistance or therapy. This offers an effective model of ADR for use in all manner of disputes involving ongoing relationships—a model that takes seriously the task of resolving disputes.

I conclude by proposing a new definition—namely, that the RM as a social constructionist model of mediation is the process of social constructionism in action, where the parties and mediator, as joint relational learners, co-create a means of everyday social justice that anticipates conflict with which to better endure their losses into the future.[987]

[987] 2.2, p. 54.

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Appendix

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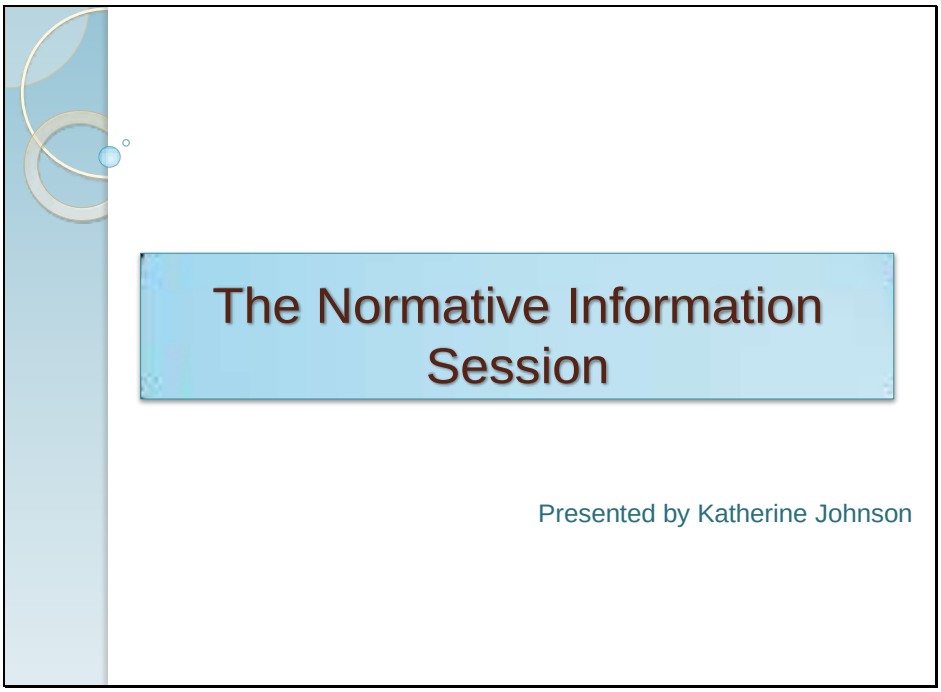

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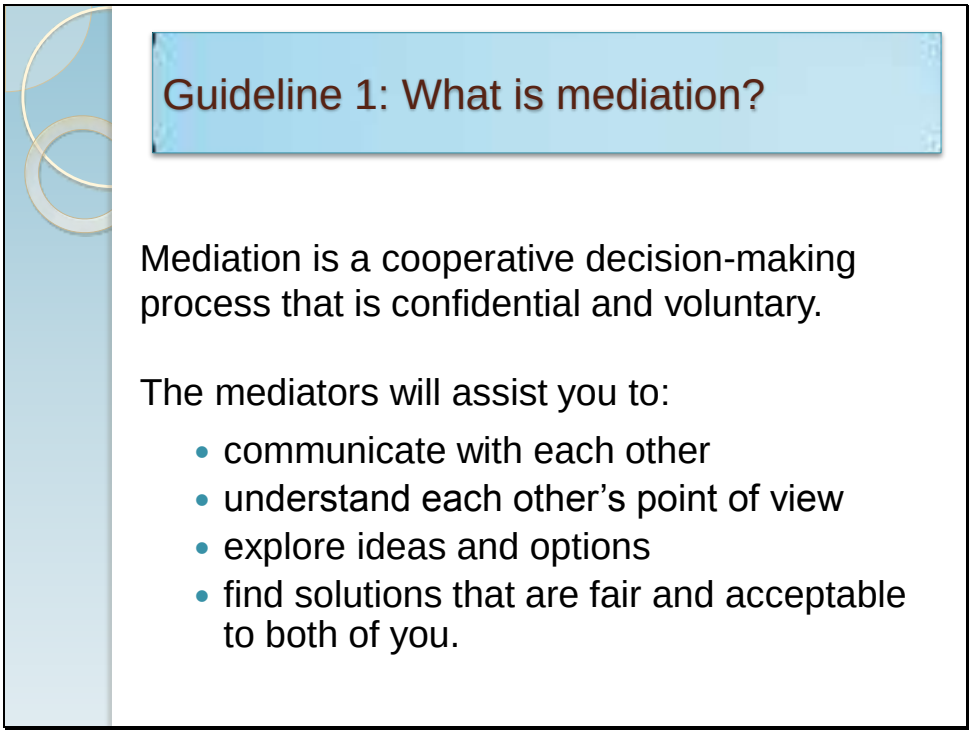

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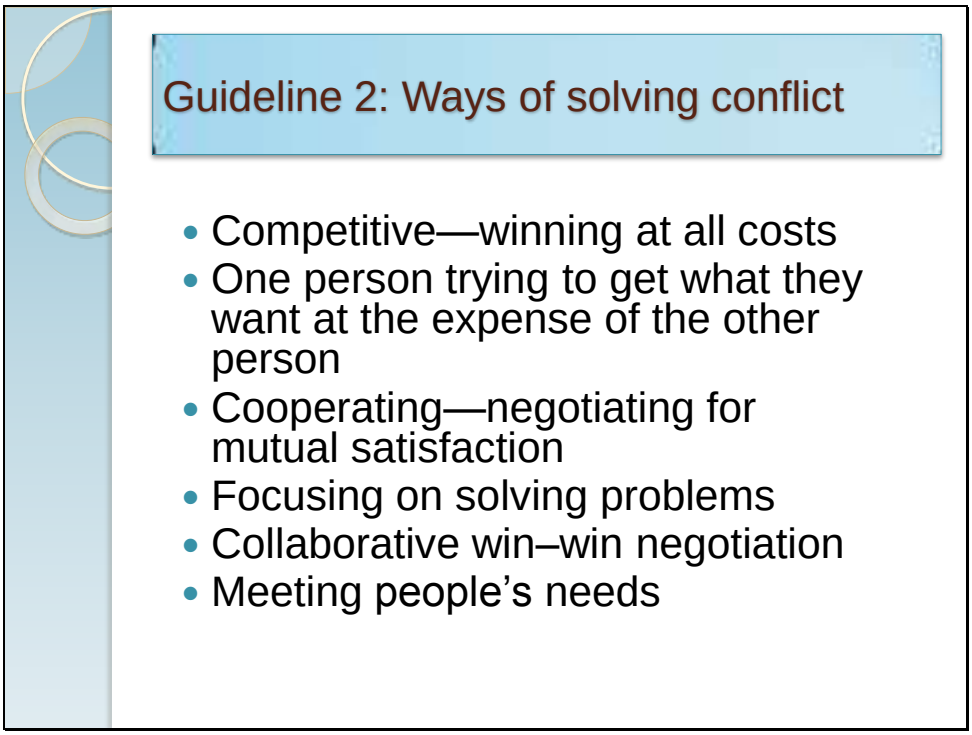

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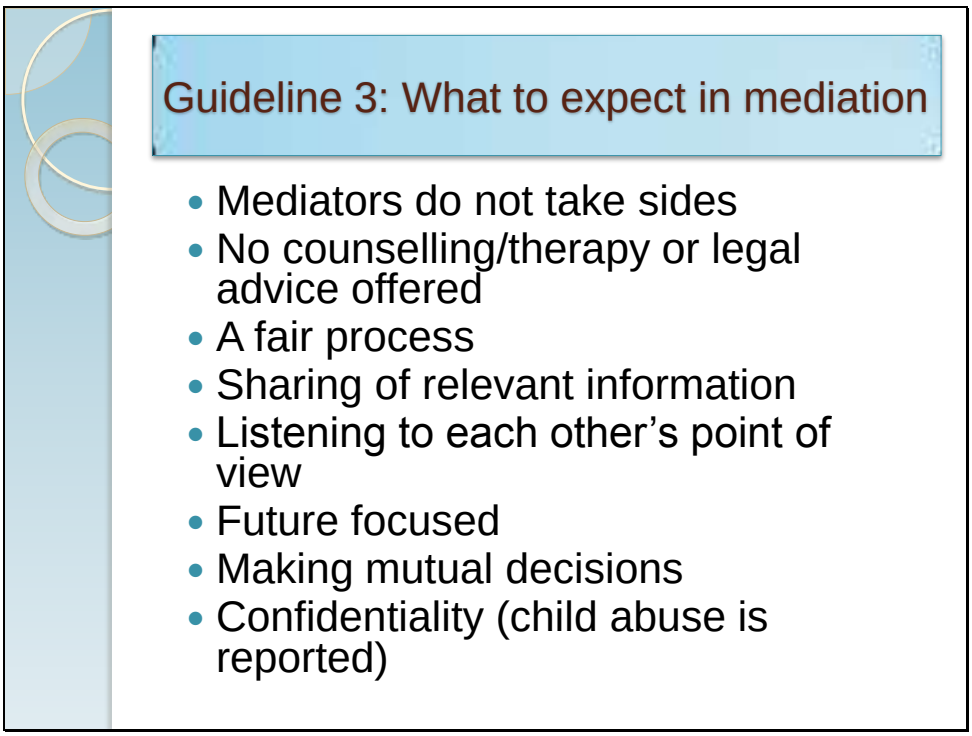


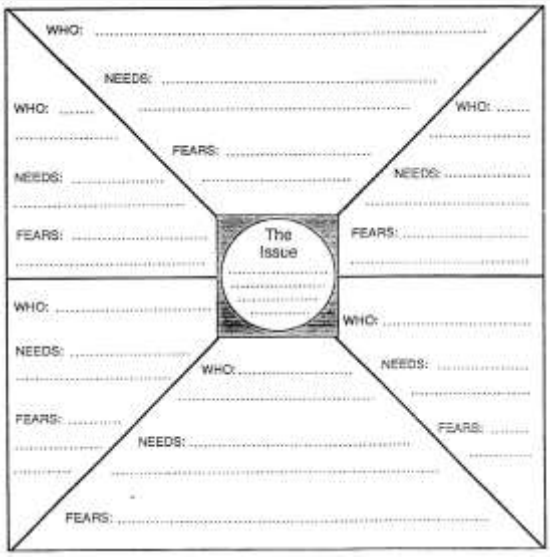
Slide 5

Guideline 4: Mapping the conflict

- What is the issue/problem/conflict?
- How many parties are there?
- Write down each person's needs—what motivated them?
- Write down each person's anxieties or fears.
- List those areas you have in common.
- What are the options?

Slide 6

Guideline 4: Mapping the conflict



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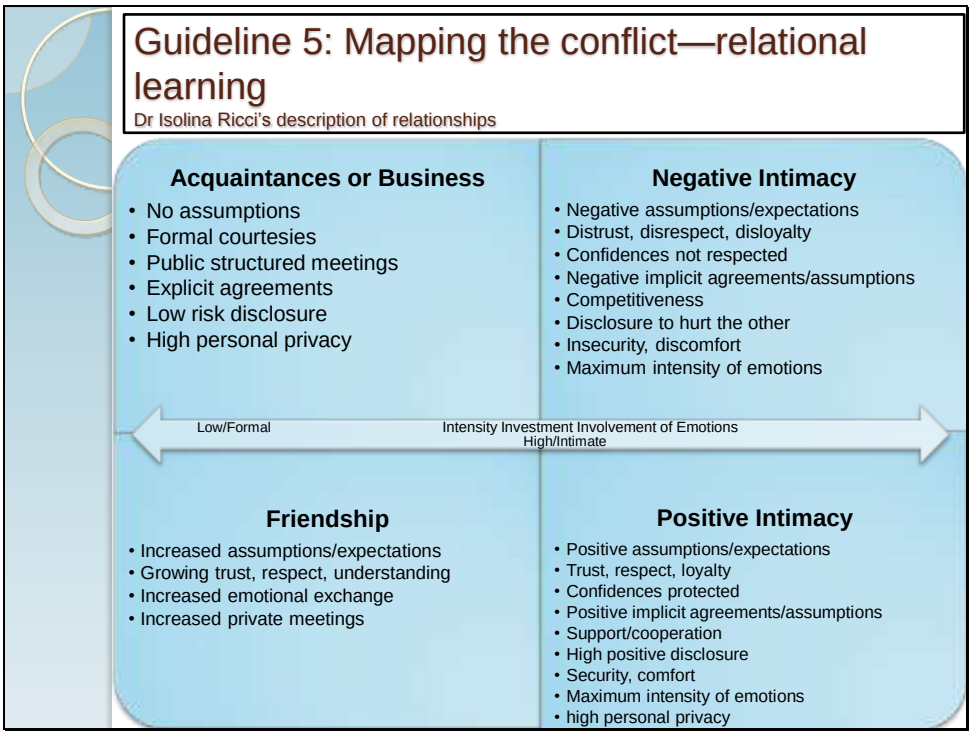

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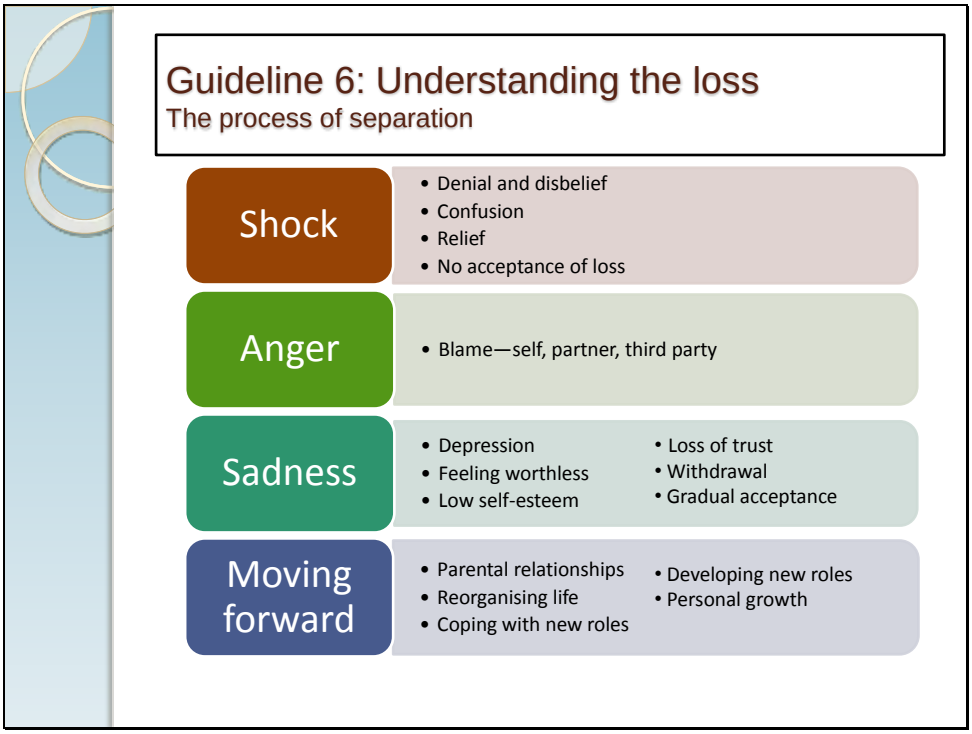
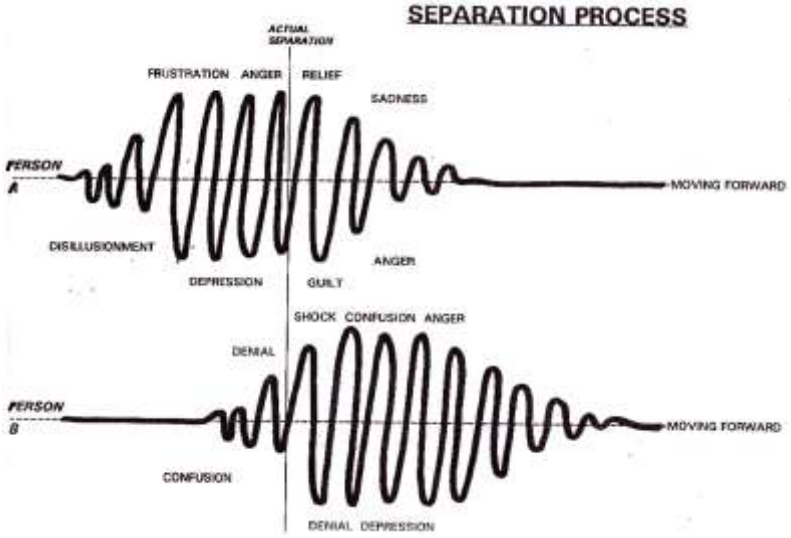


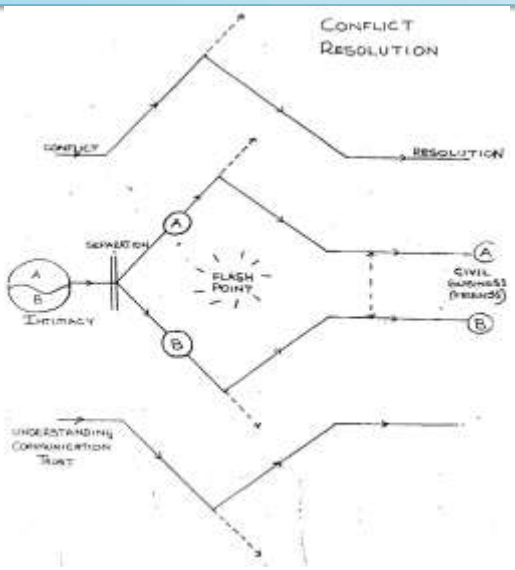
Slide 9

Guideline 7: Readiness to move forward



Slide 10

Guideline 8: Understanding conflict resolution



Slide 11

Guideline 9: Preparation for mediation

1	Define **ISSUES/NEEDS** for your side - Substantive - Relational/emotional - Procedural
	Then **PRIORITISE** them - Must have - Would like to have - Can trade
2	**SAME** for the other side
3	Create some possible **SOLUTIONS** to satisfy the needs and priorities of both sides
4	Find both sides' best and worst **ALTERNATIVE SOLUTIONS** if agreement is **NOT** reached at the mediation
5	Ascertain both sides' **AUTHORITY** to mediate
6	Decide whether to use a negotiating **TEAM**
7	Research the other side's **NEGOTIATION STYLE** and plan strategies to work with that style
8	Decide on **LOCATION** for and **TIMING** of the formal mediation session

Slide 12

Guideline 10: Questionnaire to prepare for mediation

1	What am I hoping to achieve through mediation?
2	What are my issues and concerns and how do I rank them in terms of importance?
3	What might the other side hope to achieve by going to mediation?
4	What might be the other side's issues and concerns and how might they rank them?
5	What are the possible options for settlement that satisfy my needs and priorities?
6	What are the possible options for settlement that satisfy the other side's needs and priorities?
7	If I do not settle my dispute at mediation what: - could be the best alternative? - could be the worst alternative?
8	Does the person who will attend the mediation have complete authority to settle?
9	Should I be sending more than one person to mediation?
10	Am I prepared to completely reappraise my view of the dispute based on what I see, hear and learn at the mediation?

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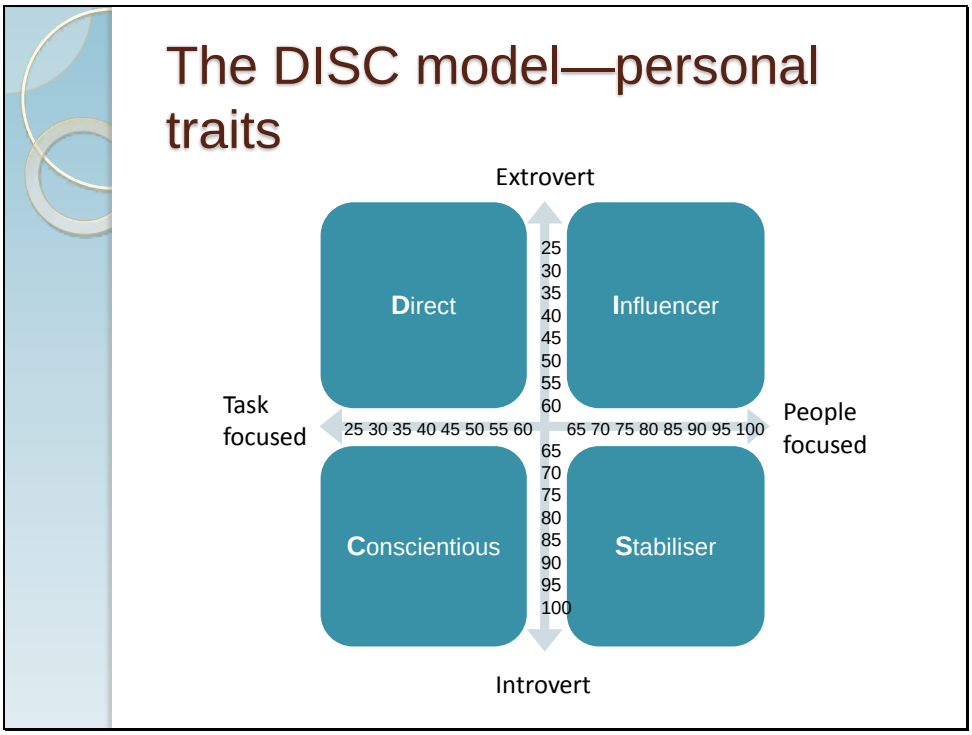

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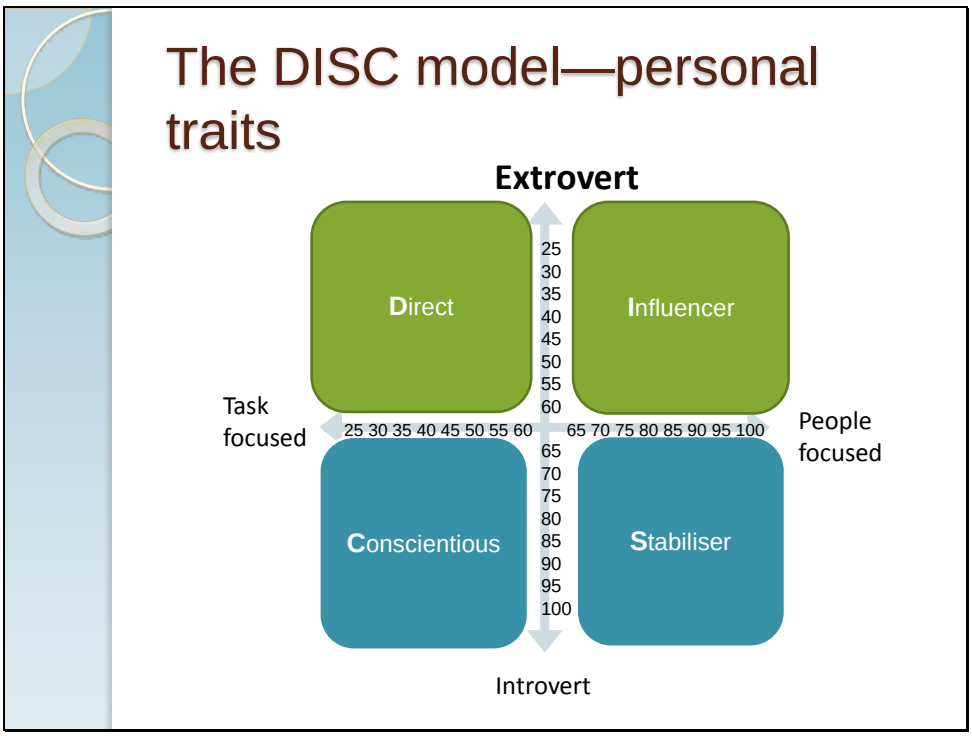

Slide 15

Extrovert personal traits

Quadrant D (direct style)

Strengths	Improvement opportunities
Organised	Flexibility
Accomplishes tasks	Openness
Independent	Acceptance of others
Determined	Acknowledgement of others
Leaders	Cooperation
Goal oriented	'Win–win'
Efficient	Patience
Direct	Encourage others
Strong willed	Sensitivity
Decision maker	Listen to others
	Delegate
	Relax

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Extrovert personal traits

Quadrant I (influencer style)

Strengths	Improvement opportunities
Creative	Listen receptively
Motivating	Follow through
Brain-stormer	Think before acting
Enthusiastic	Organisation
Imaginative	Planning
Fun loving	Doing your homework
Energetic	Discipline
Risk-taking	Setting goals/objectives
Competitive	'Just the facts'
Social skills	Straight forward communication

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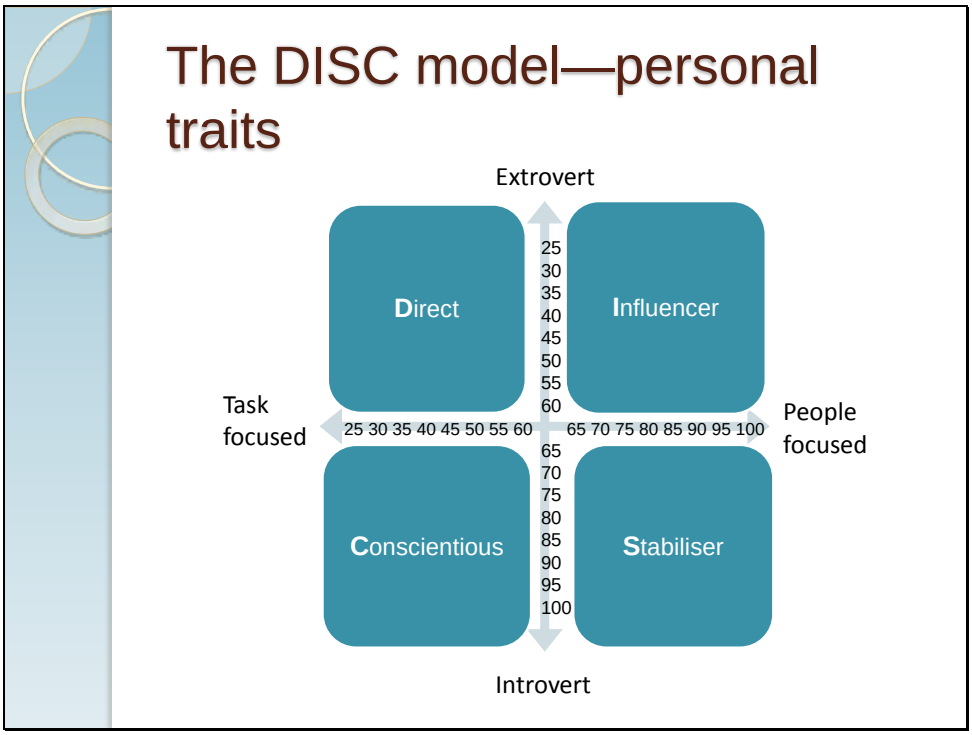

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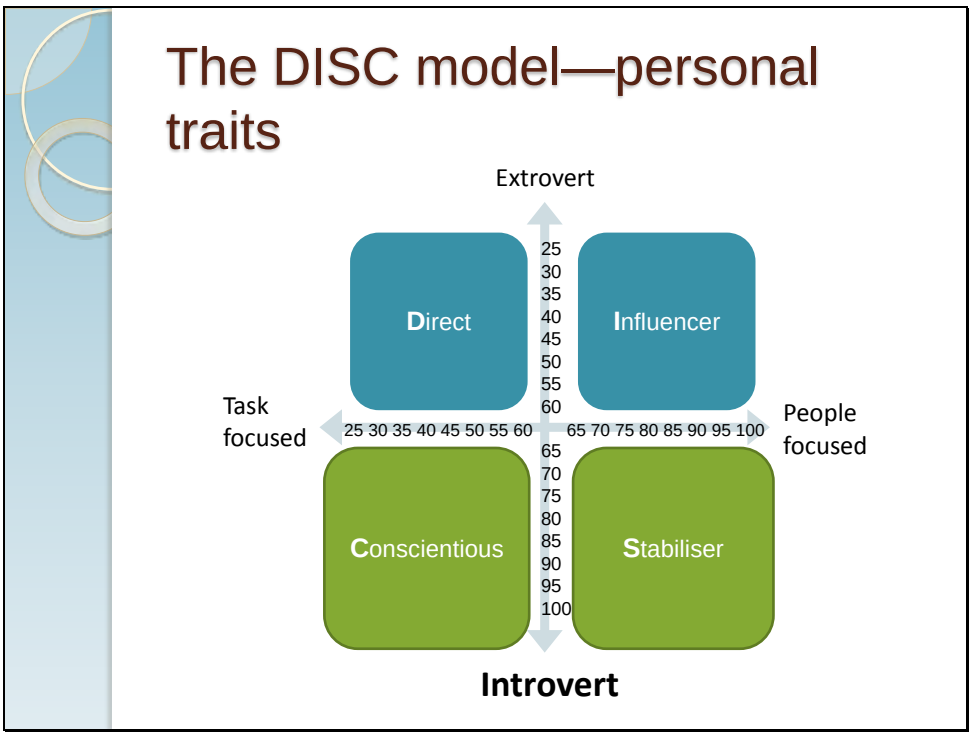

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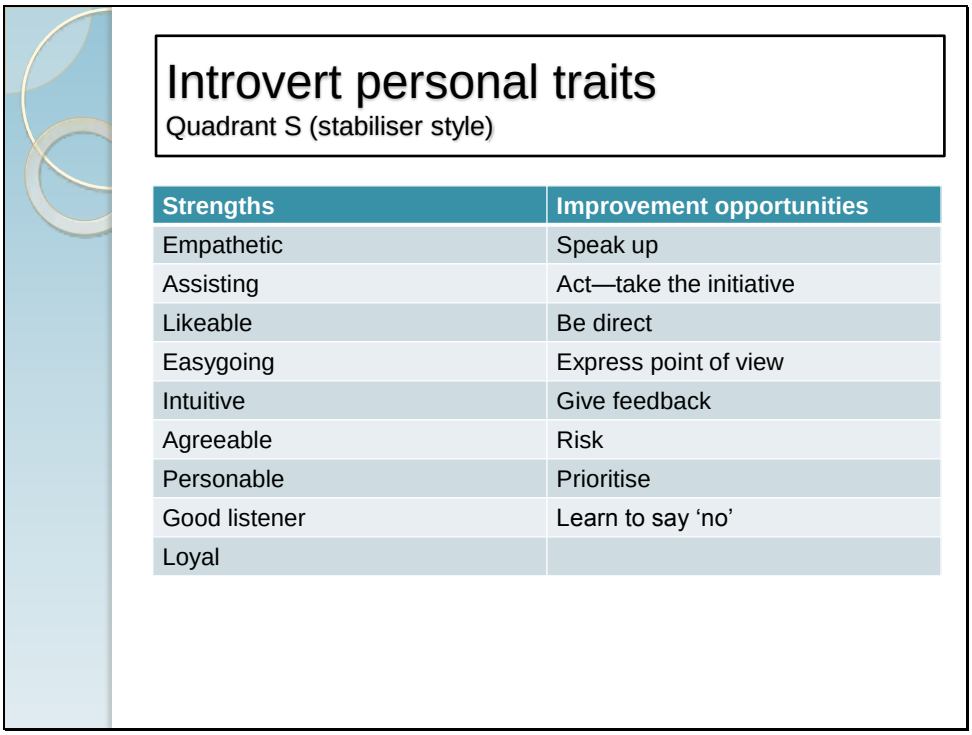

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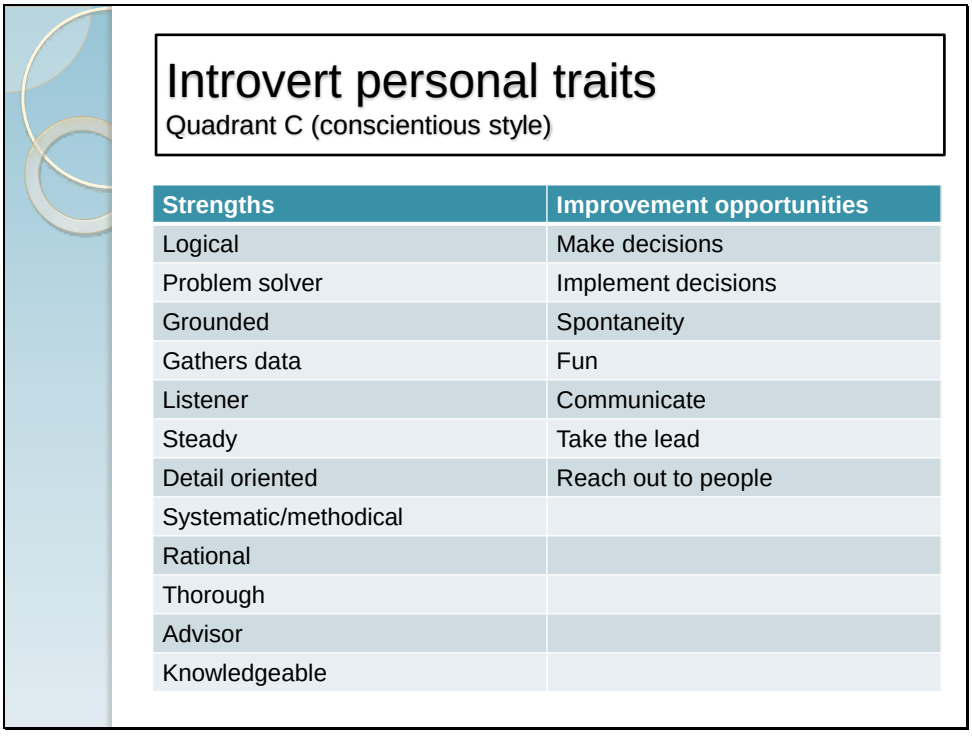

Slide 21

Negotiating stylistic differences

People with	Direct style	Influencer style	Stabiliser style	Conscientious style
Need to learn to:	Listen to feelings, as well as words. Humility.	Pause, check themselves. Count to 10. Discipline.	Reach for goals. Determination.	Make decisions without waiting for more data. Initiation.
Measure progress by:	Results. Goal oriented; may run over people to get there.	Applause. Active, dominant feedback from audience.	Attention. Like to have others stroke them.	Activity. Keep busy and results will fall into place.
Must be allowed to:	Get into competitive situations and try to win.	Get ahead quickly with a fast-moving challenge.	Relax and feel good about the people around them.	Be let off the hook, not cornered or pressured.
Will ask:	What? (The results-oriented question)	Who? (The personal, dominant question)	Why? (The personal, non-goal question)	How? (The technical analytical question)
Need leadership that:	Allows them freedom to do things their way.	Inspires them to bigger and better accomplishments	Details specific plans and activities.	Structures a framework or track to follow.

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Negotiating stylistic differences

People with	Direct style	Influencer style	Stabiliser style	Conscientious style
Save:	Time. They come across as busy and efficient.	Effort. They like to take the easy way.	Relationships. Friendship means a lot to them.	Reputation. They hate to look bad or get caught without data.
Take endorsement from:	Getting the job done well and on time.	Social skills. They like to be good at winning people.	Friends—'if they still like me, I must be doing it right'.	Knowledge. They relate to others around information.
Become most effective with:	A position of authority and responsibility.	Some structure with which to reach the goal.	Structure for the goal and methods for the task.	A place to apply logical analysis.
Rely on the power of:	Personality. They hope they are strong enough to improvise.	Feeling. Expect their winning ways will carry them through.	Acceptance. Their ability to stroke others will save the day.	Expertise. When in doubt, retrieve more data.

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Traits list ‘A’ (Task oriented or people focused)

Circle the number that suits you best and write the sum here: _____

Random	1	2	3	4	Methodical
Expressive	1	2	3	4	Private
Relationship oriented	1	2	3	4	Task oriented
Spontaneous	1	2	3	4	Calculated
Gregarious/ warm	1	2	3	4	Aloof/cool
Disorganised	1	2	3	4	Organised
Impulsive	1	2	3	4	Discriminating
Close	1	2	3	4	Distant
Relaxed	1	2	3	4	Self-controlled
Unstructured	1	2	3	4	Structured
Casual/ disorderly	1	2	3	4	Neat/orderly
Tolerant	1	2	3	4	Exacting/ meticulous
Guided by inspiration	1	2	3	4	Guided by facts

Demonstrative	1	2	3	4	Undemonstrative
Trusting	1	2	3	4	Sceptical
Intuitive	1	2	3	4	Logical
Lenient	1	2	3	4	Strict
Available	1	2	3	4	Undisclosed
Inconsistent	1	2	3	4	Disciplined
Personal	1	2	3	4	Impersonal
Other directed	1	2	3	4	Self-directed
Friendly	1	2	3	4	Reserved
Feels	1	2	3	4	Thinks
Unconventional	1	2	3	4	Conventional
Like to work with a team	1	2	3	4	Like to work alone

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Traits list ‘B’ (Introvert or extrovert)

Circle the number that suits you best and write the sum here: _____

Initiating	1	2	3	4	Yielding
Firm	1	2	3	4	Flexible
Self-reliant	1	2	3	4	Supportive
Decide quickly	1	2	3	4	Contemplate decisions
Pioneering	1	2	3	4	Comfortable
Eager	1	2	3	4	Patient
Risk-taking	1	2	3	4	Careful
Outspoken	1	2	3	4	Reflective
Enjoy challenges	1	2	3	4	Enjoy routine
Take charge	1	2	3	4	Take direction
Direct/blunt	1	2	3	4	Subtle/tactile
Pushy	1	2	3	4	Reticent
Make statements	1	2	3	4	Ask questions

Insistent	1	2	3	4	Conforming
Dominating	1	2	3	4	Compliant
Act	1	2	3	4	Ponder
Confrontative	1	2	3	4	Avoid conflict
Outgoing	1	2	3	4	Introspective
Talk	1	2	3	4	Listen
Demanding	1	2	3	4	Accommodating
Out in front	1	2	3	4	Behind the scenes
Forceful	1	2	3	4	Receptive
Competitive	1	2	3	4	Cooperative
Extrovert	1	2	3	4	Introvert
Challenge	1	2	3	4	Agree

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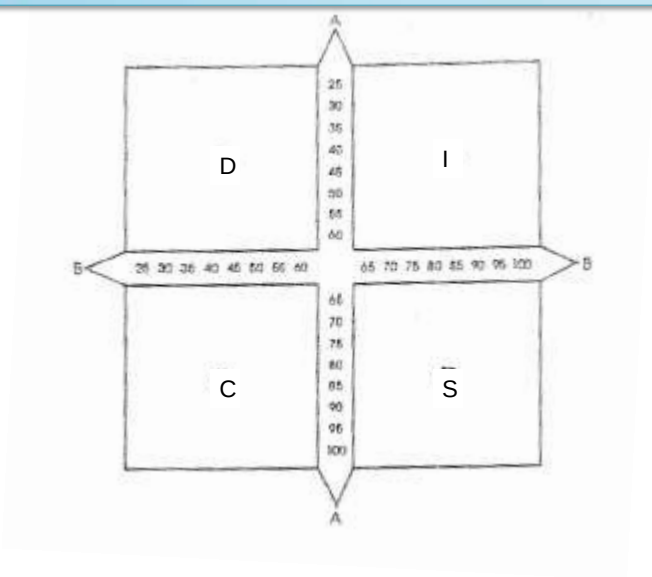
Personal traits



Slide 26

Case Study 1: Harassment

- In year X, there was alleged harassment of Mr A by Mr B over a long period, including aggressive posturing, swearing, abuse and so forth.
- The company ordered an independent investigation of the allegations of harassment to formulate a process to resolve the dispute and prevent further harassment because:
  - the conflict was unable to be resolved
  - the behaviour was a breach of the Merchant Navy Code of Conduct
  - the conflict was affecting all staff morale.

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Case Study 1: Harassment

- Human resources requirements from mediation process:
  - alleged harassment to be resolved to the satisfaction of both parties, with a written agreement
  - Mr B had already had two previous warnings, and the mediation would constitute a final warning
  - If the mediation did not resolve the matter to the satisfaction of both parties, arbitration will take place.
- Outcome of the mediation:
  - After an extensive investigation in preparation for a mediation between Mr A and Mr B, Mr B did not attend the mediation on the allocated day, despite all confirmations to do so.
  - A follow-up mediation-arbitration (med-arb) resulted, where Mr B was referred to further counselling and the Code was modified to include counselling as part of the grievance procedures.

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Case Study 2: Employee job dissatisfaction/ redundancy offer

- Investigation into workplace dispute between an employee and her immediate manager regarding loss of job and status due to change and upgrade of work practice—computer system:
  - manager unsuccessfully tried placing the employee in other areas of middle management—complaints, black listing
  - Company grievance procedures—failed.

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Case Study 2: Employee job dissatisfaction/ redundancy offer

- Pre-mediation meeting:
  - employee hostile (placard), grievance—the past
  - Mediation is about the future, not the past
  - Lengthy discussions with both sides
  - Set up support persons to attend mediation (one support for each party, plus human resources manager and director of department)
  - Set up date and order of proceedings.

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Case Study 2: Employee job dissatisfaction/ redundancy offer

- Mediation and outcomes:
  - It was agreed that the focus was on the future, not the past
  - Most favourable outcome for the company and employee was to offer redundancy
  - Employee resisted for various personal reasons, but eventually agreed it was in her best interest
  - Met with union representatives and so forth to determine the best offer for the employee
  - Five years later?