Looking for Answers to Mediation’s Neutrality Dilemma in Therapeutic Jurisprudence

Kathy Douglas and Rachael Field*

Abstract:

The notion of neutrality has long been criticised in the mediation literature. It is often said that mediator neutrality is a myth that hides the reality of the impact of the mediator on both the content and the process of mediation. Despite these criticisms neutrality continues to be seen as central to mediation theory and to the acceptance of mediation as a legitimate, fair and just process. Internationally, new models of mediation are being developed that reject the concept of the neutral mediator. These models base their claim to fairness and legitimacy on being therapeutic in nature, valuing relationships highly, and including a multidisciplinary approach to understanding conflict and emotion. In this article we discuss the paradigm of therapeutic jurisprudence and its links with new models of mediation, such as the story-telling, transformative and narrative models. We argue that therapeutic jurisprudence can provide a legitimate foundation for mediation without reliance on the concept of neutrality.

Key Words:
Neutrality, Therapeutic Jurisprudence, Story-telling, Transformative Mediation, Narrative Mediation

Introduction

The recent literature on the concept of neutrality in mediation acknowledges that whilst it is a core concept to the mediation process,¹ it is also a controversially flawed theoretical notion.² Much of the academic critique asserts that neutrality is an unattainable aspiration,³ and yet many mediators,

* Kathy Douglas, Lecturer RMIT, Mediator, Dispute Settlement Centre of Victoria; Rachael Field, Senior Lecturer, QUT. The authors wish to thank Professor Bruce Winick for his generosity in reading and commenting on an earlier draft of the article. Thanks also to the anonymous referee for their constructive critique.

particularly those who practice problem-solving models of mediation, continue to see neutrality as an ethical requirement of their professional practice.\textsuperscript{4}

On an institutional level many dispute resolution services,\textsuperscript{5} and courts,\textsuperscript{6} include explicit claims about, or aspirations of, neutrality in the models of mediation they currently practise. Where the issue of neutrality is left unaddressed (either in mediation service provider promotional material, or in the relevant guiding legislation) there is often an implicit attribution of neutrality to the role of the third-party in the process.\textsuperscript{7} The practice of mediation occurs, then, in a number of different contexts with both explicit and implicit notions of neutrality remaining consistently relevant. This is despite the recognition of the problems with neutrality that has occurred.

Without the rhetoric of neutrality, mediation, as an alternative dispute resolution option, may be less appealing to court administrators, the legal profession and government. The mirroring of judicial neutrality gives a false sense of security regarding the fairness of the process. Further, the mediation profession’s adherence to the idea of neutrality arguably forestalls the growth and maturing of this unique dispute resolution option.\textsuperscript{8} There is a need, then, to consider what other philosophical approaches to the law and our justice system might assist the growth of mediation.


\textsuperscript{4} In many other codes of mediator ethics and standards there are references to mediators as third party neutrals of some sort, or ‘neutrals’. More recently, however, perhaps in response to the debate on neutrality, the word “impartiality” has increasingly been used. For example, in the model standards of the Association for Conflict Resolution (ACR): see www.acrnet.org (accessed 15 March 2006), and also in the Law Council of Australia’s ‘Ethical Standards for Mediators’, Updated February 2000, www.lawcouncil.asn.au (accessed 15 March 2006) which is based on the ACR model.

\textsuperscript{5} For examples of descriptions of mediators as neutral third parties see the information on the role of a mediator provided by the Department of Justice Victoria www.justice.vic.gov.au (accessed 15 March 2006) and the Institute of Arbitrators and Mediators Australia http://www.iama.org.au/mediation.htm (accessed 9 March 2006).

\textsuperscript{6} For example, court-annexed mediations occur under the auspices of the Departments of Justice in both Victoria and Queensland. The Dispute Resolution Settlement Centre of Victoria defines mediation as “a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator) …”: see the Dispute Settlement Centre of Victoria Information Kit (2005) available at http://www.justice.vic.gov.au/CA2569020010922A (access 15 March 2006). In Queensland the Dispute Resolutions Centres define mediation by saying that mediators “remain neutral – they do not take sides or pass judgment”: see http://justice.qld.gov.au/mediation/about/D04mediation.htm (accessed 15 March 2006).

\textsuperscript{7} See generally L Boule, ‘In and Out the Bramble Bush: ADR in Queensland Courts and Legislation’ (2004) 22 Law in Context 93. Note also that the National Alternative Dispute Resolution Advisory Council deleted the word ‘neutral’ from its revised description of mediation, see National Alternative Dispute Resolution Advisory Council, Dispute Resolution Terms, Canberra (2003) at 9. However, in its work on ADR standards NADRAC comments: “NADRAC has considered the debate over the appropriateness and validity of the concept of ‘neutrality’, and has noted suggestions to abandon the concept and to use alternative concepts such as ‘consensuality’. However, NADRAC believes that the concept of neutrality in ADR continues to have value.”: National Alternative Dispute Resolution Advisory Council, The Development of Standards for ADR: Report. Canberra (2001) at 114.

A new theory in the legal discourse is that of therapeutic jurisprudence; a philosophy which enunciates a different framework for legal actors in our justice system. Therapeutic jurisprudence has provided an innovative approach to the law that has brought about significant change. These changes are wide ranging and include the introduction of problem-solving courts, the promotion of therapeutic processes in correctional initiatives, and some changes in legal education. In Australia there have been many initiatives that could be categorised as taking on the therapeutic jurisprudence framework, including the adoption of a resolution by Western Australian Magistrates supporting this approach. The most significant support for therapeutic jurisprudence in this country has been in the criminal justice arena, where therapeutic jurisprudence has been linked to trends such as restorative justice. The potential of therapeutic jurisprudence to influence government policy makers and courts also seems to be growing.

In the following discussion we explore whether the philosophy of therapeutic jurisprudence can provide a new legitimising framework for mediation in place of the notion of neutrality. We particularly consider recently articulated models of mediation, sometimes termed ‘second generation practice’, which eschew neutrality and provide a more robust engagement with social science theory. These models include the storytelling, narrative, and transformative models of mediation. First, we discuss neutrality in mediation, we then consider some of the problems with the notion of neutrality, and finally we explore whether it is possible to find in the new paradigm of therapeutic jurisprudence an affirmation of mediation’s ‘second generation’ of practice.

11 See The International Network on Therapeutic Jurisprudence website for the diverse applications of therapeutic jurisprudence and the growing literature, above note 9.
23 That is to say that these problems have long been iterated, however with little practical impact.
1. Neutrality in the Mediation Context

The importance of neutrality in the mediation context is illustrated by the fact that traditional definitions of mediation almost always include a statement to the effect that ‘the mediator is a neutral intervener in the parties’ dispute’.\(^\text{24}\) And yet neutrality is not a term with a clear or precise meaning in the context of mediation.\(^\text{25}\) In fact mediators themselves have been acknowledged as having a ‘very limited vocabulary to explain how neutrality functions.’\(^\text{26}\) As a result there is little commonality amongst mediators about the meaning of neutrality in practice,\(^\text{27}\) and relatively rigorous debate continues in the field of dispute resolution about the general meaning of the term.\(^\text{28}\)

Indeed, neutrality is an elusive concept in mediation,\(^\text{29}\) and one that is under-defined.\(^\text{30}\) For example, much of the literature on neutrality assumes or infers an understanding of what neutrality means without being explicit about it.\(^\text{31}\) As a result, the notion has become ‘a sort of umbrella term that embraces a number of concepts,’\(^\text{32}\) and therefore conveys a variety of meanings. For example, neutrality can be used to indicate that the mediator has no interest in the outcome of a dispute,\(^\text{33}\) that the mediator is not biased towards either party, and that the mediator generally lacks prior knowledge of the dispute and/or the parties. A neutral mediator might also be said to be one who


\(^{25}\) As MacKay comments: ‘It is easy enough to say that the mediator should be a neutral facilitator, but what does that mean?’: RB McKay ‘Ethical Considerations in Alternative Dispute Resolution’ (1989) 45 *Arbitration Journal* 15 at 21.


\(^{29}\) Gadlin and Pino above note 28 at 17.

\(^{30}\) For example, Laue has commented of the 1987 SPIDR ethical standards that ‘by my count, [the word neutrality] appears more than 35 times in the standards without any definition or description’: J Laue in Society of Professionals in Dispute Resolution (SPIDR) (1987) ‘SPIDR’s Ethical Standards for Professional Conduct’ *Forum*, Newsletter of the National Institute for Dispute Resolution, March at 12. See also comments at note 8 above.


\(^{33}\) GB Walker ‘Training Mediators: Teaching about Ethical Concerns and Obligations’ (1988)19 *Mediation Quarterly* 33.
makes no judgment about the parties or their dispute, and is fair and even-handed throughout the process.  

Neutrality, then, can be seen to involve ‘shades of meaning’. These shades of meaning make it an imprecise, ambiguous, and ‘fluid’ concept; and one that is predominantly intuitive as opposed to rational and logical. As Taylor puts it, neutrality is ‘context sensitive’, involving a flexible ‘continuum’ where, in her view, practice is the determinant of whether a mediator’s actions are ‘appropriately neutral or not’. The various and varied meanings of neutrality in mediation result in the term being both a descriptor for the values of the process, as well as for the general role of the mediator. It is a concept that covers practical elements, as well as ethical standards, of mediator conduct. Neutrality unavoidably, then, involves a ‘complex set of intertwined values, ethics, and best practices for different settings’.

In reality, however, this flexibility of meaning and connotation can be dangerous. This is particularly the case when real ambiguity is accompanied by an underlying assumption that no explicit explanation of what is meant by neutrality is considered necessary. The lack of any true collectively, consistently supported meaning of neutrality in the mediation context means not only that it is unable to provide practical assistance in terms of the real ‘situations that may transpire in a mediation’; but also that a folklore around neutrality has been allowed to develop that has ‘served to mystify … how neutrality works in practice’. These dilemmas arising from neutrality are clearly evident in the problem-solving models of mediation that are discussed in the next section.

2. The Centrality of Neutrality to Problem-Solving Mediation

Boulle suggests that defining theoretical differences in how neutrality might be conceived in the many differing models of mediation can help appropriately situate and refine our understanding of neutrality. Different approaches to,
and models of, mediation view the issue of neutrality in diverse ways, and much of the discourse surrounding neutrality incorporates ideology.\footnote{See for a discussion of a range of approaches JR Coben, ‘Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality,’ \textit{5 Cardozo Journal of Conflict Resolution} 65.} The neutrality ideology has been linked by Cobb to a moral commitment to concepts such as equality, participation, voice, and personal responsibility.\footnote{Cobb says that ‘moral values are so pervasive within our democratic culture that we do not notice them as moral commitments; we do not notice them as a frame containing moral discussions that is itself a moral framework.’: Cobb above note 19 at 1019.} No wonder, then, that mediators who want to see themselves as good, moral and democratic dispute resolution practitioners continue to see the notion of neutrality as central and key. The ideology of neutrality is most clearly, and most persistently, located in what might be considered traditional problem-solving models of mediation.

The key problem-solving models of mediation include settlement, facilitative and evaluative mediation.\footnote{Boulle, above note 2 at 45-46.} The dominance of these models is confirmed, for example, by the fact that the influential body, the National Alternative Dispute Resolution Advisory Council (NADRAC), often assumes in its literature a problem-solving orientation that centres on these models.\footnote{See for example National Alternative Dispute Resolution Advisory Council, \textit{The Development of Standards for ADR: Report} Canberra (2001).} Boulle, and others, have also described problem-solving models as the dominant models of mediation.\footnote{Boulle above note 2 at 46 and DJ Della Noce, RA Baruch Bush and JP Folger, ‘Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy,’ (2002) \textit{3 Pepperdine Dispute Resolution Law Journal} 39 at 49: “The problem-solving model, while seldom going by that precise name, and seldom acknowledging or exposing its ideological roots, is the dominant model in the mediation field.” We prefer the term settlement based mediation. There are some positive attributes in relation to problem-solving, that arguably should be retained, but the focus of the mediation should not be upon settlement, a driving force to achieve a solution to the problem.}

These models arguably allow for superficial assertions to be made of third party (mediator) neutrality because the mediator’s focus is on reaching a solution. Such models emphasise, consistent with liberal legal ideology, the importance of the individual, and focus on finding an end result, or outcome, to the problem that brings the parties to the mediation table. They tend to assume that the parties are ‘autonomous, self-contained, atomistic individuals, each motivated by the pursuit of satisfaction of his or her own separate self interests.’\footnote{Above.} It is also an assumption in relation to these models that the mediator’s expertise is focussed on process only and that their facilitation role involves predominantly assisting the parties to their own mutually agreed outcome of the dispute.\footnote{Above.} A notion of neutrality becomes \textit{plausible} if the rhetoric is that the mediator’s focus in problem-solving mediation is on process only, as opposed to the content or outcome of the dispute.

The notion of neutrality can also be argued as \textit{necessary} in the context of problem-solving mediation in that it can be seen as playing an ‘important
legitimising function’.\textsuperscript{52} The problem-solving nature of these models is comparable to the problem-solving nature of litigation; and problem-solving mediation is arguably made credible through its association with neutrality,\textsuperscript{53} which can also be found comparably in terms of the ideology of judicial impartiality.\textsuperscript{54} Parties in dispute are potentially drawn to the mediation process on the basis of neutrality’s promise of fairness and its offer of protection against biased or unfair practice. These protections can be said to connect problem-solving mediation with the authority and legitimacy of formal legal adjudication processes.\textsuperscript{55}

Whilst the settlement, evaluative and facilitative models of mediation are all predominantly about results-oriented problem-solving and assisting parties to arrive at their own resolution of their dispute, each model is unique in its approach. For example, the settlement model of mediation seeks to assist the parties to achieve consensus through an emphasis on incremental bargaining techniques. Mediator interventions tend to focus parties on a central point of compromise, and the negotiation phase of the mediation often includes a trading approach to achieve settlement. The facilitative model draws on negotiation theory to identify the parties’ underlying needs and interests. This model is said to be ‘process based’, focussing on the way decisions are made rather than on the substance of the decision.\textsuperscript{56} Creative problem-solving is used to attempt a ‘win-win’ solution for the conflict.\textsuperscript{57} Boulle notes that the facilitative model is the model most represented in the mediation literature and is the most common approach to training.\textsuperscript{58} And finally, evaluative mediation uses the likely court outcome of the dispute to inform the negotiations, and the mediator uses his or her expertise in the area to bring about an agreement between the parties.\textsuperscript{59} (This model, due to its highly interventionist nature will not be a focus for our discussions in this article; although, the neutrality claim can also be said to apply to evaluative models of mediation, in that it can be said that the mediators’ expertise can be used in a neutral way.\textsuperscript{60})

In both the settlement and facilitative models, the assertion that the mediator is neutral supports an understanding of the mediator as a disinterested third party who is able to guide the disputants through the mediation process.

\textsuperscript{53} B Mayer ‘The Dynamics of Power in Mediation and Negotiation’ (1987) 16 Mediation Quarterly 75 at 83.
\textsuperscript{54} Boulle above note 2 at 18-19.
\textsuperscript{55} Above at 18-19.
\textsuperscript{56} Above at 171.
\textsuperscript{57} Above at 44-45.
\textsuperscript{58} Above at 46.
\textsuperscript{59} Riskin, who originally articulated a grid with the evaluative and facilitative categories, has revised the grid and the concepts and renamed them directive and elicitive, see L Riskin, ‘Decisionmaking in Mediation: The New Old Grid and the New New Grid System’ (2003-2004) 79 Notre Dame Law Review 2.
\textsuperscript{60} For example, along the lines of conciliation processes.
without influencing their decision-making as to the content and outcome of the dispute. Boulle, for example, has identified the facilitative model as trying ‘to uphold the neutrality of the mediator.’

There are, however, many issues arising from the neutrality claim in problem-solving mediation. Some of these issues derive from the falsity of neutrality, and are the focus of discussion in the next section; but others arise as a result of the morally driven belief in the truth of neutrality, referred to above.

For example, it is problematic from the perspective of achieving sustainable conflict resolution, that the ostensibly neutral stance of the mediator in outcome and results-oriented problem-solving models can result in insufficient time or attention being devoted to emotional issues in disputes. Clearly, a neutral mediator who controls process only is unable to involve themselves extensively in the detail of the parties’ emotions and relationships. Therefore, in many problem-solving mediations, particularly, for example, in court-connected mediation contexts, and in legal mediation contexts where the ‘shadow of the law’ is strong, relationship dimensions of conflict can be subordinated, because of a commitment to or belief in neutrality, to legal norms and court practices. These norms and practices at best pay only lip-service to issues of emotion, or deal with emotion through simplistic venting.

The next section considers in more detail how neutrality can be argued to be a false or misleading concept in problem-solving mediation, and examines some of the dilemmas that arise from the falsity of the notion. This leads us into a discussion of ‘second-generation’ mediation practices that contrast with problem-solving mediation, and can be considered as offering practical and positive approaches to mediation that can be said to be supported and grounded by the theory of therapeutic jurisprudence; approaches that do not rely on false concepts of neutrality.

3. The Falsity of Neutrality in Problem-Solving Mediation

Notwithstanding the neutrality claim associated with the practice of problem-solving models of mediation, each of the models can be exposed as contradicting the possibility of neutrality. Certainly, the critical mediation literature acknowledges the contradictions in theoretical and practical conceptions of neutrality in mediation; and confirms the inconsistency of the fact that neutrality remains a core concept to problem-solving mediation even whilst the dangers and difficulties of labelling mediators as neutral third parties

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61 Boulle above note 2 at 46 where he continues that the facilitative model also tries to uphold: “the process/content distinction, the minimalist intervention style and the consensuality of outcomes.”
62 Bush and Folger above note 22 at 239-247.
64 N Alexander, ‘Mediation on Trial: Ten Verdicts On Court-Related ADR’ (2004) 22 Law in Context 8, 17; the exception may be in the Family Law jurisdiction.
are apparent. Professor Boulle, for example, referring to the work of Tillet and Kurien, concedes that neutrality can be considered ‘the most pervasive and misleading myth about mediation.’

Neutrality can be said to be a false or misleading concept in the context of problem-solving mediation for a number of reasons. For example, whilst the rhetoric of the term can sound convincing, clearly ‘pure neutrality is very difficult to achieve and sustain.’ This is partly because experiential imperatives arising in the mediation room (where mediators are working ‘to assist clients who are struggling not only with interpersonal conflicts, but also intra-personal issues’) sometimes require a departure from conceptual notions of neutrality. That is, it is inevitable that a mediator’s actions and decisions in a mediation will be influenced to some extent by their own emotional reaction to the parties and the dispute, as well as their ‘own knowledge, experiences, and values.’ Whether the mediator is aware of it or not, an element of transference and counter-transference between them and the parties cannot be avoided.72

Another reason why neutrality can be considered a flawed concept in mediation is that, in the reality of mediation practice, mediators are truly powerful, and any ‘notion that mediators are passive participants in a process shaped by forces they have not deployed’ is not accurate. The work of Greatbatch and Dingwall, for example, has shown how mediator values and judgments can, and often do, enter the process and influence outcomes. In particular, in terms of the settlement and facilitative models, we know that some mediators will prioritise the reaching of a settlement, any settlement and will use what Greatbatch and Dingwall refer to as ‘selective facilitation’ to push...
negotiations towards achieving an outcome. In this way, the mediator is clearly not neutral and has a significant impact on both the content and outcome of the mediation. They cannot simply be said to be a process expert.\textsuperscript{75}

Astor and Chinkin also warn that ‘it is not sufficient simply to claim mediator neutrality (as) mediators have considerable power in mediation and there is evidence that they do not always exercise it in a way which is entirely neutral as to content and outcome.’\textsuperscript{76} According to Silbey ‘mediators exercise power by manipulating the immediate situation of mediation, and the interactions and communication between the parties, in order to control and shape the outcomes.’\textsuperscript{77} It is also known that the exercise of mediator power in this way can be gendered. For example, the \textit{Report on the Evaluation of the Family Court of Australia Mediation Service} stated that ‘women were significantly more likely to report that mediators pressured them into agreement or tried to impose their viewpoints on them.’\textsuperscript{78}

In terms of evaluative models, it has been said that the concept of a neutral, and yet evaluative mediator, is an oxymoron.\textsuperscript{79} This is because evaluation is an inherently non-neutral activity. It requires an engagement with the parties, their issues and their dispute, that is not envisaged in terms of how the notion of ‘neutrality’ ostensibly works in problem-solving mediation.

Another reason why the idea of neutrality is unreal in problem-solving mediation is that being neutral can contradict or interfere with what some mediators consider, in these models, to be their ethical duty to ensure just outcomes. Bernard et al, for example, consider neutrality to be a lesser value in the mediation process than the commitment to ensuring ‘fairness, or win-win settlements.’\textsuperscript{80} On this basis some mediators, consciously, non-neutrally and actively intervene for the benefit of a weaker party or absent third parties, such as children.\textsuperscript{81} McCormick has asserted that ‘a mediator committed to representation of all the interests cannot be preoccupied with neutrality.’\textsuperscript{82}

\textsuperscript{75} Boulle points to a growing realization amongst mediators of this issue and the concomitant realisation that neutrality is an aspiration rather than a reality see Boulle above note 2 at 35.

\textsuperscript{76} Astor and Chinkin above note 1 at 102. Professor Wade has said that ‘virtually every step taken by a mediator involves the exercise of power.’: J Wade, ‘Forms of Power in Family Mediation and Negotiation’ (1994) 6 Australian Journal of Family Law 40 at 54. The research of Greatbatch and Dingwall asserts that mediators are clearly not neutral in their mediation practice above note 74.

\textsuperscript{77} Silbey above note 3 at 352.

\textsuperscript{78} S Bordow and J Gibson Evaluation of the Family Court Mediation Service Family Court of Australia Research and Evaluation Unit (1994) at 112.

\textsuperscript{79} Kovach and Love above note 24.

\textsuperscript{80} Bernard et al above note 3 at 72.

\textsuperscript{81} Astor considers that this has ‘the regrettable consequence that what many mediators would regard as ethical behaviour involves loss of neutrality’: H Astor, ‘Rethinking Neutrality: A Theory to Inform Practice – Part II’ (2000) Australasian Dispute Resolution Journal 145 at 147.

\textsuperscript{82} M McCormick (1997) ‘Confronting Social Injustice as a Mediator’ 15 Mediation Quarterly 293 at 295.
A further problematic complication arises in the theoretical distinction that is sometimes drawn between neutrality and impartiality. The aim of this distinction is in fact to address some of the problems with the concept of neutrality in mediation by acknowledging that a mediator may not always be neutral, but should always be impartial. That is, certain mediator uses of power in mediation (for example interventions, actions or evaluations) are considered legitimate even though they might be said to strictly contradict the notion of neutrality; this legitimacy derives from the basis that such conduct can still be said to sit within the concept of impartiality. However, such semantic distinctions are not necessarily meaningful or practically relevant for mediators or parties in terms of how they experience the reality of the mediation room. Many people, for example, consider neutrality and impartiality to be synonymous. We don’t consider the distinction to be particularly useful, then, in any real sense; at least not without detailed explanation being provided to the parties.

On the basis of the issues with neutrality in problem-solving mediation articulated here, we support approaches to mediation that move beyond the current preoccupation with false assertions of neutrality. We consider it imperative that parties have a clear and accurate understanding of what the mediation process can and cannot do for them, and as neutrality cannot realistically be achieved we argue that the better approach is to move to models of mediation that can be supported in other ways. Our belief is that the theory of therapeutic jurisprudence offers a potential way forward for doing away with the perceived need for neutrality to be a legitimising concept for mediation. In particular, therapeutic jurisprudence can be seen to provide a strong theoretical foundation to what is known as ‘second generation’ mediation practice. Some of these approaches to mediation are discussed in the next section.

4. Second Generation Practice: Models of Mediation Not Reliant on Neutrality

In contrast to problem-solving mediation, some newer approaches to mediation developed in the last decade reject neutrality and instead place a higher value on the mediator’s engagement with the parties and their connection with important emotional and relationship issues in the mediation setting (as opposed to being focussed predominantly on achieving a settlement). These new models which have been termed ‘second generation practice’, have a focus on the community and the wider dimensions of conflict,
steering away from the individualistic, outcome satisfaction-based criteria of problem-solving models that are focussed on settlement outcomes.

Proponents and practitioners of ‘second generation practice’ models of mediation are not afraid, or reluctant, to acknowledge the impact the mediator has, in reality, on the content of mediation; and thereby are ready to acknowledge the falsity of assertions of neutrality in the mediation context. Sara Cobb believes that it is this acknowledgement that in fact results in a more theoretically robust approach to mediation:

This is a radical departure from what could be called ‘first-generation’ mediation practice, where the mandate not to impact on the content of the dispute is thought to be essential to preserving the privilege the parties have to define their own problems and build their own solutions. However, once we adopt an interactionist or social constructionist perspective, the mandate to separate content from process dissolves, as mediators recognize the inevitability of their impact on the content of the dispute. This attention to the evolution of the content calls for a ‘second-generation’ mediation practice in which mediators interact with disputants so as to evolve the conflict stories, reformulate relationships, reframe the past and rebuild the future.

Second generation practice mediation models, which include mediation as storytelling, narrative mediation and transformative mediation, each reject mediator neutrality in favour of prioritising and valuing mediator intervention and engagement. They incorporate interdisciplinary approaches to mediation which include post-modern and social constructionist theory. Each model is discussed below, with a focus on considering the ways in which they explicitly move away from any reliance on the concept of neutrality.

4.1 Mediation as Storytelling

A ‘second-generation practice’ model developed by Cobb is known as ‘mediation as storytelling’. In this model, the mediator intervenes (a non-neutral activity) in the stories being told by the parties to a dispute in order to empower them through enhanced participation. The mediator works to destabilise the parties’ original narratives, which allows each party then to contribute, along with the participative and involved mediator, to the construction of a new joint narrative. The mediator can use generic mediation techniques, such as opening statements, private meetings and questioning to facilitate the process of the co-construction of the parties’ story. The co-constructed story then works as the foundation on which resolution of the dispute can be based.

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87 Cobb above note 19 at 1029.
88 As indicated each include postmodern and social constructivism in their theories, but each also include significant differences in their models.
89 Cobb above note 20.
90 Cobb above note 19.
In ‘mediation as storytelling’ morality is embedded in the individual stories that disputants bring to mediation. It is an almost inevitable part of each party’s developing narrative that the other party to the dispute is the wrongdoer and they should change or need to change. Through the telling of the stories, and through overt mediator interventions (which include a favouring of versions of reality), shifts can occur in the parties’ perceptions and understandings of each other and of the dispute. That is, parties are able to see each other in terms of the victim story that they have brought to the mediation (double witnessing) and this leads to the possibility of a co-constructed story that equates to a new view of the dispute.

This approach, Cobb asserts, allows the collective community (at least of the mediation environment) to witness the conflict and restore harmony through the creation and acknowledgment of social norms. Clearly, there is no room in this model for the language of neutrality, or for any pretence of a value-free framework for such practice. Rather, the mediator must be accepted as an engaged and active participant in deconstructing the egocentricity of the parties’ original moral stances and in contributing to the rebuilding of the new joint narrative.

4.2 Narrative Mediation

Another form of ‘second generation practice’ is a model of mediation that has grown out of narrative therapy in New Zealand, and is known as ‘narrative mediation’. This model is similar to Cobb’s in that it constructs mediation as a storytelling process. The creators of ‘narrative mediation’ reject the problem-solving model and the pretense of neutrality, and adopt social constructionism as a theoretical basis for practice. This approach incorporates existing larger societal stories and their effect upon the stories that each participant expounds in the mediation. The differing stories that participants bring to the mediation are a matter of perspective. The mediator makes clear that when perspectives differ it is due to the diverse understanding of meanings. Through a number of mediator interventions, such as curious questioning and externalizing the problem, mediators in this model seek to destabilise stories of mutual blame and ask participants to contribute to an alternative story.

Power is a concern in this model and the mediator will deconstruct issues relating to power such as gender and race. However, human agency is acknowledged. That is, the mediator is reflective about his/her own power in the mediation, described as reflexivity, and the way that privilege and power is discussed and deconstructed by the mediator is noted as affecting the story of the mediation. ‘This process of opening to view is not a neutral activity, however. Reflexive moves that would make relational positions evident begin in themselves to shift or transform these positions.’

91 Above at 1031.
92 Winslade and Monk above note 21 at 35-37.
93 Above 37-54.
94 Above at 40.
95 Above at 121.
A new story can be created from the experience of the mediation that is a shared story and the mediator has the authority, from the process of mediation, to contribute to this story. The stories may be written as part of the mediation process. Again, as with ‘mediation as storytelling’, as a co-author of the resultant story, the mediator must be accepted as an inherently non-neutral participant in the parties’ discussions, explorations and negotiations.

4.3 Transformative Mediation

Proponents of ‘transformative mediation’ see the process as offering an opportunity to deal with conflict in a unique manner. Unlike litigation, and other dispute resolution options, transformative mediation is seen as providing a forum for the exploration of the relational dimension of conflict and as providing the possibility of the transformation of the parties’ conflict. This approach to disputes shares the similarity with ‘narrative mediation’ that it relies on post-modern and social constructionist literature.

Importantly for the purposes of this article, under this model, the mediator pursues the outcome of transformation explicitly in the mediation, and does not ascribe to a neutral position. The aim of the process is to achieve the twin objectives of empowerment and recognition contributing to moral growth. Parties can achieve empowerment through deciding for themselves how to address the conflict they are experiencing. Mediator interventions encourage parties to see the conflict from the other party’s point of view, achieving a degree of empathy (referred to as recognition). The moral growth of participants is seen as having an effect on the disputing parties (a private benefit), but also on the wider community (a public benefit) through participant education in dealing with conflict.

This approach when analyzing what conflict means to people draws upon the work of a number of disciplines including, communication, cognitive psychology and social psychology. Bush and Folger, the authors of the transformative model, focus on the way humans react to conflict. Their theory is informed by the view that an individual’s reaction to conflict is a form of

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96 Above at 121-122.
97 Above at 37-47.
98 Bush and Folger above note 22 at 37.
99 Above at 60.
100 Della Noce et al above note 49 at 48.
101 Boulle above note 2 at 46 argues that in regard to the transformative model ‘The mediator’s most significant function is to conduct and maintain the process and have no active role in the parties’ decision-making. This reduced role and responsibility enables mediators to retain their neutrality in conducting the process.’ In contrast we would argue that the theory of transformative mediation as practised by Bush and Folger recognises the problematic nature of neutrality and acknowledges the impact of the mediator upon the mediation with the aim of achieving the normative orientation of conflict transformation and moral growth. See Della Noce et al above note 49 at 57 where they state that ‘the mythology of absolute mediator neutrality and unitary practice could not be sustained; even imported theories were revealed to be value-based.’
102 Bush and Folger above note 22 at 78.
103 Above at 48.
crisis. When parties are faced with significant disagreement there is a sense of disempowerment and displacement so that an individual's sense of self and relationships with others is affected. Parties humanly react to this sense of weakness by becoming self-absorbed and self-centred. According to Bush and Folger: ‘If a person’s core sense of identity is linked to a sense of both autonomy and connection, and if both of those are compromised at the very same time, it makes perfect sense that this will be a profoundly disturbing experience.’ This process is described as a negative spiral of conflict. The transformative model assists mediators to recognize the negative spiral of conflict and provides a number of interventions to reverse this spiral. Answers to the problem that brought the parties to the mediation may be decided on as part of the process, but this outcome is not the primary aim. Indeed, the ‘satisfaction story’ of problem-solving models of mediation with their focus upon solutions, is rejected by this model. Through facilitating the transformation of the parties, the mediator demonstrates a level of engagement and interaction in the process that cannot be reconciled with neutrality.

These three models of mediation, storytelling, narrative and transformative, demonstrate that it is possible to conceptualise effective mediation without reliance on the rhetoric of neutrality. What remains necessary, however, is a deeper theoretical perspective to provide a strong foundation to these various models, and to sustain their legitimacy. We argue that there is potential to find this foundation in the concept of therapeutic jurisprudence.

5. Finding Resonance Between Second Generation Mediation Models and Therapeutic Jurisprudence: Non-Neutral Mediation

In the preceding sections of this article theoretical and practical problems with neutrality in mediation generally, and in problem-solving mediation in particular, were discussed. We also suggested that therapeutic jurisprudence could offer a new theoretical and conceptual paradigm for the practice of ‘second generation’ mediation models that do not rely on the rhetoric of neutrality. In this section we explore the notion of therapeutic jurisprudence more thoroughly, and make our argument more explicit for its potential in forming a new theoretical basis to constructive contemporary mediation practice.

It is our view that an entirely new theoretical basis to mediation is required because the suggestions that have been made to date to overcome the falsity of neutrality in mediation are inadequate. For example, proposals to re-contextualise the concept of neutrality to give it meaning, or to

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104 Above at 55.
105 Above at 61.
106 Above at 45-53.
107 Bush and Folger above note 22 at 9-18.
conceptualise it to make it more relevant to practical issues and realities,\textsuperscript{109} are not clear enough to make a sound practical impact. Nor is the suggestion for a situated approach that moves from a binary construct of neutrality, as either existent or non-existent, to a broader concept of legitimizing mediation through focusing on notions of consensuality and ‘maximizing party control.’\textsuperscript{110}

These suggestions fail to recognise the full extent of the problems associated with assertions of neutrality in the mediation context, and whilst some look to promote approaches to mediation in which the notion of neutrality is absent, they become practically untenable because the dichotomy of first and second generational mediation practice is not acknowledged.

In addition, some of the ideas, whilst conceding that neutrality is problematic, still suggest a continuing element of emphasis or reliance on neutrality as a legitimising factor for problem-solving models of mediation. This indicates to us that the mediation profession is unready to abandon the notion of neutrality.\textsuperscript{111} Mayer concludes that the fact that mediators continue to rely so heavily on neutrality as a defining feature of their process and practice, places the mediation profession in crisis.\textsuperscript{112} This is because, in his view and as is borne out by ‘second generation practice’ models, neutrality is not necessarily what parties embroiled in conflict are looking for. His contention is that the neutrality tag has largely been about reassuring courts, and government, of the ability of mediation to mirror, to some extent, the validity of the litigation process.\textsuperscript{113}

The apparent lack of readiness to let go of the concept of neutrality by mediators could also possibly be attributed to the fact that many practitioners are challenged by the emerging professional status of mediation. Once known predominantly as an ‘industry’, now increasingly considered a profession in its own right, mediators perhaps are struggling with the juxtaposition of their practical roots and the theoretical requirements of a profession; particularly a profession so closely associated with the law. This may not necessarily be the stuff of crisis, but it is important to recognise that there will be damaging consequences for the credibility of mediation as a profession if mediation practitioners do not engage with the neutrality dilemma in a more sophisticated way. Mediation’s future may well be compromised if practitioners take an unreflective approach, are slow to grapple with theory, or remain wedded to ‘how to’ approaches to mediation.\textsuperscript{114}

\textsuperscript{109} Taylor above note 27.
\textsuperscript{110} Astor above note 1 and note 47. See also on the importance of consensuality: B Wolski, ‘Voluntariness and Consensuality: Defining Characteristics of Mediation?’ (1997) 15 Australian Bar Review 213.
\textsuperscript{112} Mayer above note 8 at 17.
\textsuperscript{113} Above.
\textsuperscript{114} Della Noce et al above note 49 at 45. For some discussion about mediators’ possible reluctance to engage with issues relating to concerns with mediator power in the process see H Astor, ‘Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner,’ (2005) 16 Australasian Dispute Resolution Journal 30.
One of our objectives in writing this article is to go some way toward helping to encourage a more reflective approach amongst mediation practitioners; another objective is to make a contribution to the development of mediation theory. Our arguments in the next sections look to a professional future for mediation that offers significant potential.

5.1 Therapeutic Jurisprudence

Therapeutic jurisprudence offers an alternative paradigm in which to situate and ground mediation practice, particularly second generational practice, without reliance on the notion of neutrality. For professional mediators it offers a new way forward for conceptualising their practice without value-laden pretences associated with the myth of neutrality.

Therapeutic jurisprudence is a relatively recent concept in the development of legal theory. Sometimes described as an approach to practice rather than a theory, therapeutic jurisprudence is considered to be a new way of looking at the law. Therapeutic jurisprudence in the legal context asks legal actors, and traditional legal processes, to submit to a new kind of scrutiny by making the legal outcome of actions, including legal decisions of lawyers, judges and others participating in the legal system, the central focus of consideration. In looking not only at the content of a case but also the process, therapeutic jurisprudence concerns itself with effects on the well-being of participants. The theory asks questions about the effect on clients of the law; and of the impact on the emotional life and psychological well-being of those affected by our justice system. These are questions we think can be useful in the mediation context.

Originating in the area of mental health law therapeutic jurisprudence attempts to chart the therapeutic impact, or lack of impact, of the legal system. It is an interdisciplinary approach, utilising material from the social sciences. As indicated, this approach has been most widely adopted in Australia in the criminal justice jurisdiction. However, therapeutic

\[\text{115} \text{ The website for therapeutic jurisprudence provides information regarding new applications of this philosophy and a recently re-organised bibliography categorised by areas of practice, see The International Network on Therapeutic Jurisprudence above note 9.}\]

\[\text{116} \text{ A Frieberg, ‘Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?’ (2003) 20 Law in Context 6, 9.}\]


\[\text{118} \text{ Above.}\]

\[\text{119} \text{ Winick and Wexler above note 12 at 12.}\]

\[\text{120} \text{ Often used to provide a framework for interdisciplinary practice between various professions such as the law and social work: C Hartley and C Petrucci, ‘Justice, Ethics and Interdisciplinary Teaching and Practice: Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and the Law’ (2004) 14 Washington University Journal of Law and Policy 133.}\]

\[\text{121} \text{ J Popovic, ‘Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary’ (2003) 20 Law in Context 121. This has been utilised in the new courts, such as Drug and Koori courts.}\]

jurisprudence can also be applied in the civil jurisdiction, and potentially to the diverse settings of mediation. Importantly, therapeutic jurisprudence appears to have support from some areas of government in Australia. The potential attraction to policy makers of therapeutic jurisprudence is something we regard as valuable in terms of the possibilities the theory offers as an alternative legitimising foundation to mediation practice.

We are not the first to link therapeutic jurisprudence to mediation movement. Nor are we the first to find synergies between therapeutic jurisprudence and second-generation models of mediation practice. There is established support for the assertion that therapeutic jurisprudence has much to offer in terms of conceptualising mediation practice. We are we think, however, the first to consider the connection between therapeutic jurisprudence and a notion of mediation that is legitimate without neutrality. Our concept of mediation uses the theory of therapeutic jurisprudence to exclude any need for a concept of neutrality on the basis that it places a greater value and emphasis on mediators taking responsibility for the impact of their professional practice on the wellbeing of parties as participants. These issues are explored further in the next section.

5.2 Therapeutic Jurisprudence as a Foundation to the Practice of Second Generation Mediation Models: Removing the Need for Neutrality.

Importantly, the potential of therapeutic jurisprudence to ground and affirm second-generation models of mediation is enhanced by the fact that it is not a theory that is constructed or reliant on legal positivist philosophy. That is, the legal positivist preoccupation with neutrality and neutral third parties, who represent the objective scientific approach of the positivist tradition, can be left behind in looking to therapeutic jurisprudence for a new approach. This is because, refreshingly, therapeutic jurisprudence acknowledges the law as a social force, it sees the connection and integrative impact of social science and the law, and interprets legal processes, and has the potential to interpret mediation, in the light of its social impact.

Importantly, proponents of therapeutic jurisprudence acknowledge the high value placed upon emotional well-being when assessing the impact of the law. The normative agenda of the philosophy is to look for therapeutic outcomes where there is no conflict with other widely accepted values in the

law, such as due process concerns. The philosophy has no pretence of being a ‘neutral, value-free mode of scholarly inquiry’, and its approach arguably does not conflict with some of the other major areas of critical thought that inform the law, such as critical legal studies and feminist jurisprudence.

And yet, therapeutic jurisprudence has been criticised for possibly entrenching the status quo in terms of the operation of the law and criminology. Indeed, the term ‘therapeutic’ might be said to be one that is saturated with implications of social control and paternalism. However, the approach of therapeutic jurisprudence is to embrace all forms of scholarly investigation, and to encourage diverse voices and applications through an inclusive definition of the philosophy. In this way therapeutic jurisprudence may allow previously unacceptable approaches to the law, and mediation, (for example, those grounded in therapeutic concern and emotion), to become more acceptable to government policy makers and courts.

Alternative models of mediation found in ‘second-generation practice’, can be strongly associated with the concern found in therapeutic jurisprudence for the normative orientation of emotional and psychological well-being, and the promotion of positive therapeutic objectives for the parties. With a grounding in therapeutic jurisprudence, mediation can unapologetically aim to ‘maximise its therapeutic affects and minimise its anti-therapeutic affects.’

Importantly for our thesis, therapeutic objectives do not sit compatibly with the notion of a neutral third party. Indeed, adoption of a therapeutic jurisprudence framework requires acceptance of an active, engaged, involved and participatory third-party in the story of the mediation. Therapeutic jurisprudence, in fact, can be seen as giving rise to an imperative for mediation to ‘create the most beneficial and emotionally satisfying solution for a particular client’s interests and unique circumstances.’ If the mediator abandons neutrality and involves themselves more actively, mediation may ‘have excellent therapeutic effects for the client.’ In particular, second-generation practice models, and their critical stance in relation to neutrality, demonstrate clear links to the potential of the discourse of therapeutic jurisprudence.

128 Winick and Wexler above note 12 at 7.
131 The term has been described as a “flexible heuristic” by McMahon and Wexler above note 124 at 1.
132 Drawing on Wexler above note 10 at 8 where he is talking about the law more generally.
133 Wexler above note 10 at 14.
134 Winick and Wexler above note 12.
135 Schneider above note 125 at 3.
136 Above at 6.
The key areas of positive connection are numerous, six will be discussed here.\textsuperscript{137} These areas of connection demonstrate the scope of therapeutic jurisprudence to provide the legitimising foundation to mediation that has previously been found in the concept of neutrality.

The first area, importantly, is that therapeutic jurisprudence allows for mediators to acknowledge that mediation is ‘an interpersonal and affective activity.’\textsuperscript{138} A key value of mediation can in fact be said to derive from this quality ‘because a broad range of issues can be addressed in contrast to the more narrow scope of issues that are dealt with in litigation,’\textsuperscript{139} and this ‘makes the mediation process even more therapeutic and beneficial to the client.’\textsuperscript{140} For example, ‘often the mere ability to be heard and to tell their story is cathartic’ for parties in dispute.\textsuperscript{141} The integration of the parties’ stories into the negotiations by the mediator is a non-neutral and participative process, which therapeutic jurisprudence justifies by taking an holistic approach to achieving a just and appropriate outcome for the parties. Additionally, ‘the opportunity to sit across from the person whom the client perceives as having wronged him or her has been shown as helpful in moving past the dispute and productively working toward the future.’\textsuperscript{142} The mediator’s work with that dynamic is inherently non-neutral, but is affirmed by the fact that a therapeutic jurisprudential basis to their actions values their integrated participation in this way. Also, apologies are a therapeutic aspect of mediation,\textsuperscript{143} but by encouraging an apology a mediator is acting in an inherently non-neutral way. The concept of therapeutic jurisprudence supports this approach.

A second positive connection between mediation and therapeutic jurisprudence can be found in the focus offered by therapeutic jurisprudence on an interdisciplinary and cross-jurisdictional orientation.\textsuperscript{144} ‘Insights from the social and behavioural sciences – especially psychology, psychiatry, criminology and social work – are routinely employed in studies conducted within the therapeutic jurisprudence framework.’\textsuperscript{145} Similarly, mediation has been an area of practice that has been informed by diverse disciplines such as psychology, social work and law.\textsuperscript{146} Mediation research in this country has tended to focus on the analysis of disputes which are, or might otherwise be, the subject of litigation. For example, in an attempt to assess whether

\textsuperscript{137} These key areas have been developed from the introduction to the special issue of Law in Context focussed on therapeutic jurisprudence: McMahon and Wexler above note 124 at 1.

\textsuperscript{138} McMahon and Wexler above note 124.

\textsuperscript{139} Schneider above note 125 at 6.

\textsuperscript{140} Above.


\textsuperscript{142} Schneider above note 125.

\textsuperscript{143} Above at 6 referring to JR Cohen ‘Advising Clients to Apologize’ (1999) 72 S California Law Review 1009.

\textsuperscript{144} McMahon and Wexler above note 124 at 2.

\textsuperscript{145} Above.

\textsuperscript{146} Mayer above note 8 at 18.
mediation is cheaper and quicker than going to court, evaluations have been conducted of court-connected mediation. Similarly, attempts have been made to ascertain client satisfaction with the process.\textsuperscript{147} A wider research agenda is now being encouraged that the discourse of therapeutic jurisprudence might support.\textsuperscript{148}

A third positive connection lies in focusing on mediation in action.\textsuperscript{149} That is, therapeutic jurisprudence encourages consideration of the actual processes of mediation and its evolution, and discourages abstract considerations of mediation practice – as might be found in mythical notions of neutrality. This allows mediators to be ‘mindful of the need to be aware of the unintended consequences’ of their activities and to think more reflectively about what they do ‘as well as different and better ways of doing those things.’\textsuperscript{150}

A fourth positive connection between mediation and therapeutic jurisprudence lies in the promotion of an ethic of care.\textsuperscript{151} This idea has resonance with many feminist writers and their critique of mediation.\textsuperscript{152} Many of their concerns regarding problem-solving models can be linked to the mirroring of the litigation process and the notions inherent in a focus on rights. An ethic of care approach can be promoted in mediation through connecting with therapeutic jurisprudence and thereby arguably meeting some of the concerns feminists have expressed.

A fifth positive connection lies in the support offered through the therapeutic jurisprudence framework for the adoption of multiple perspectives in understanding mediation as an important dispute resolution option for parties.\textsuperscript{153} This approach is borne out by the contribution to mediation theory of the diverse disciplines mentioned previously, and importantly the framework of therapeutic jurisprudence would discourage the dominance of one discipline area over others in mediation practice.\textsuperscript{154}

A sixth positive connection is in the area of adopting an optimistic agenda for reform.\textsuperscript{155} Mediation has been hailed as the saviour of our legal system in that it has been seen to provide a true alternative to litigation. Many critics of the process have articulated serious concerns, which should not be taken

\textsuperscript{147} T Sourdin, \textit{Alternative Dispute Resolution} NSW: Thomson LawBook Co (2\textsuperscript{nd} ed. 2005).
\textsuperscript{149} McMahon and Wexler above note 124 at 3.
\textsuperscript{150} Above.
\textsuperscript{152} See for a summary of feminist concerns Astor and Chinkin above note 1 at 128-134.
\textsuperscript{153} McMahon and Wexler above note 124 at 3-4.
\textsuperscript{154} For example Mayer warns of the prospect of the field of conflict resolution being absorbed into the field of law. The approach of therapeutic jurisprudence may guard against this trend, see Mayer above note 8 at 7.
\textsuperscript{155} McMahon and Wexler above note 124 at 4.
lightly, regarding the truth of this assertion.\textsuperscript{156} Despite these concerns, however, the potential of mediation to provide a unique, alternative and positive option in dispute resolution remains very real. There are both public and private benefits to the widespread use of mediation in our society. The opportunity exists, for example, through mediation to entirely transform the way that citizens deal with conflict. As Bush and Folger have said, ‘personal experiences that reinforce the civic virtues of self-determination and mutual consideration are of enormous public value - and this is precisely what the process of conflict transformation provides.’\textsuperscript{157} Similarly, therapeutic jurisprudence provides the framework for an optimistic agenda for reform in terms of the way we deal with conflict and the way in which we promote policy change in the legal and justice systems and more widely in society.

Clearly, the second-generation mediation models of storytelling, narrative and transformation fit within the six elements of positive connection between mediation and therapeutic jurisprudence philosophy outlined here. Each model, reflects principles of therapeutic jurisprudence, as they deal with emotion and relationships and focus on issues for individuals. Further, these models consider the wider community and also the social impact of dispute resolution.\textsuperscript{158} Mediation, through these models, has the potential to be known for its therapeutic effect, especially through the incorporation of storytelling.\textsuperscript{159} Further, and more pragmatically, a therapeutic connection can be established in that, as a timely and efficient process, mediation has a therapeutic benefit of being able to ‘clearly alleviate stress in clients on both sides of the dispute, and allow clients to move forward.’\textsuperscript{160}

Another area of interest pursued by scholars of therapeutic jurisprudence is the psychology of procedural justice. Research has shown that a sense of being involved in a fair process that is conducted in good faith and that treats participants with dignity and respect affects the overall satisfaction of participants and the likelihood that they will comply with the outcome. In particular, participants seem to value telling their story and being listened to by an authority figure.\textsuperscript{161} Procedural justice has been explored by a number of writers in the mediation area.\textsuperscript{162} Some have argued that particular forms of mediation do not provide a psychological outcome most preferred by

\textsuperscript{156} For example concerns relating to the privatising of disputes, the special needs of certain groups such as Indigenous communities and the reduction in the establishment of important precedents, see Astor and Chinkin above note 1 at 9-10.
\textsuperscript{157} Bush and Folger above note 22 at 82.
\textsuperscript{158} Paquin and Harvey above note 126.
\textsuperscript{159} Above.
\textsuperscript{160} Schneider above note 125 at 6.
\textsuperscript{161} Winick and Wexler describe this concept as follows: ‘The literature on the psychology of procedural justice, based on empirical work in a variety of litigation and arbitration contexts, shows that if people are treated with dignity and respect at hearings, given a sense of “voice,” the ability to tell their story, and “validation,” the feeling that what they have said has been taken seriously by the judge or hearing officer, they will experience greater satisfaction and comply more willingly with the ultimate outcome of the proceedings, even if adverse to them’, see Winick and Wexler above note 12 at 129.
\textsuperscript{162} See for example Mayer above note 8 at 23-28; and note that Boulle identifies procedural justice as an attribute of facilitative mediation, above note 2 at 44.
In relation to court-connected mediation in particular, where there has been a drift to evaluative models, there has been criticism of the parties experiences that often involve a process that is dominated by lawyers and shuttle negotiation techniques.\textsuperscript{163}

In the context of our discussion of neutrality there may be an argument that second generation practice models do not satisfy parties because the express absence of neutrality may lead to a sense of a consequent lack of procedural justice. That is, parties may not feel that the process is conducted in good faith if the mediator does not describe him or herself as neutral. However, we believe that participants may still experience psychological satisfaction if mediators ensure that they are even-handed in their approach.\textsuperscript{165} For example, with regard to narrative mediation the authors of this approach highlight the importance of carrying out mediator interventions in a manner that does not alienate either party.\textsuperscript{166} We would argue that the term ‘neutrality’ is not required to ensure that participants experience a procedurally just process, and that we can turn to the therapeutic framework to provide the foundation for any requisite sense of even-handedness.

Whilst the connections between therapeutic jurisprudence and second generation mediation practice are clear, it is important to note that at present these models are not widely practised in Australia\textsuperscript{167} although the transformative model has had some success in the USA.\textsuperscript{168} Therefore, whilst the framework of therapeutic jurisprudence may assist to legitimise some of these more contentious models of mediation, in order for the mediation profession truly to move forward, and away from the rhetoric of neutrality, there is a need for second-generation models of mediation to be more widely accepted by the community, practitioners, courts and government. Utilisation of the therapeutic jurisprudence framework may allow courts and governments to see mediation practice in a way that does not rely upon neutrality, but as having value due to the legitimising nature of the therapeutic jurisprudence discourse.

\begin{thebibliography}{99}
\item As we noted above there is often now a distinction made between the terms impartiality and neutrality, NADRAC above note 48 at 112-113. However, there is a danger that this distinction can lead to confusion as many regard the terms to be synonymous, for example, mediators or parties may interpret neutrality as impartiality, see for a discussion of this concern Cobb and Rifkin above note 3 at 42.
\item For example the narrative mediation approach values the opportunity private meetings provide to build rapport with a party. Building rapport would be a more difficult task to achieve where both parties are present as it might be seen as excessively warm to one party over another, see Winslade and Monk above note 21 at 137 to 140. When speaking of the need to deal with one parties exaggerated sense of entitlement Winslade and Monk warn of the need to provide assistance in a ‘… manner that does not alienate the party who appears to be the most advantaged as the mediation begins’, see Winslade and Monk above note 21 at 101.
\item Boulle above note 2 at 47.
\item Bush and Folger above note 22 at 99.
\end{thebibliography}
It is also important to ask whether therapeutic jurisprudence is useful to problem-solving models of mediation. We believe that positive connections and benefits are possible in relation to the facilitative model of mediation. For example, the adoption of the therapeutic jurisprudence framework may allow facilitative mediation to distance itself from the neutrality banner and help it to evolve out of the emphasis on settlement. There is also the intriguing opportunity to use the therapeutic jurisprudence framework to encourage practitioners of the facilitative model to analyse emotion and relationships in a more sophisticated manner and to see these concerns as a priority in mediation.

It should be acknowledged that in fact some writings regarding therapeutic jurisprudence include reference to facilitative models of mediation, and that problem solving is a common connector in terms of, for example, therapeutic jurisprudence being closely associated with problem-solving courts. We suggest therefore that the issue of the problematic juxtaposition of neutrality and problem solving mediation can find beneficial resolution through the therapeutic jurisprudence approach.

Caution is also warranted in terms of the adoption of this theory as the basis for a new approach to mediation, however, at least to some extent. That is, whilst ‘mediation might be following therapeutic jurisprudence principles, the actors in mediation might not be.’ As Schneider has said, ‘when lawyers have not become part of the therapeutic solution, they can clearly become part of the problem. If clients are counselled not to really participate in the mediation, mediation can lose much of its potential therapeutic advantage. If courts require attendance at mediation with unwilling parties, the mediation can just serve to aggravate the parties further prior to what may be an inevitable trial.’

The mediation process, then, from a therapeutic perspective, can also be abused. Indeed, few jurisdictions require good faith mediation, and ‘mediations can be used as fishing expeditions for free discovery, can be used by one side to test the witness’ ability and can be used solely to cost the other side time and money.’ These issues require us to take some care when thinking about the therapeutic possibilities of mediation.

**Conclusion**

Our argument in this article has been that therapeutic jurisprudence, a new concept in the legal discourse allowing for an interdisciplinary approach that incorporates the emotional impact of the law, can provide the legitimising framework for mediation previously found in the attribute of neutrality. To

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169 See for example Wexler above note 10 at 100.
171 Schneider above note 125 at 9.
172 Above at 10.
173 Above.
174 Above.
open up the benefits of the therapeutic perspective, however, it is necessary for mediators to be prepared to acknowledge that neutrality is not possible and that new models of mediation should be adopted that do not rely on neutrality for legitimacy.

Therapeutic jurisprudence has entered the legal discourse. It provides a framework for significant innovative change in our justice system, in general, and in the practice of mediation, more particularly. It can also provide the framework for a shift from the neutral mediator in first generation practice of mediation to the more reflective, interactive, involved mediator of second generation practice. The mediation profession must demonstrate that it has reached a level of maturity where it is now better able to adapt to a view of practice that is no longer reliant on the crutch of neutrality. With therapeutic jurisprudence as a foundation, it will be possible to encourage a practice of mediation that is innovative, and that values emotion, relationships and the community.