‘BEST FOR THE PROTAGONISTS INVOLVED’: VIEWS FROM SENIOR TORT LAWYERS ON THE VALUE OF MEDIATION IN VICTORIAN MEDICAL NEGLIGENCE DISPUTES

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Mediation is a dispute resolution process that is more informal and less expensive than litigation, offering confidentiality and encouraging party voice. In medical negligence, parties can experience the benefits that arise in the discourse of mediation, including an explanation about the medical error, or an expression of an apology. In this study, 24 senior tort lawyers were interviewed to explore the use of mediation in medical negligence. Data analysis shows that the participants valued mediation in medical negligence disputes as a case management tool that assisted clients to avoid the stress of litigation. Some lawyers specifically referred to the Civil Procedure Act 2010 *(Vic) as promoting mediation. As repeat players and advocates, the participants shielded their client from the legal system and dominated the mediation process. The majority of participants discouraged their client from speaking and prevented emotional engagement and dialogue with the tortfeasor. This research found that the model adopted by the senior tort lawyers resembles an evaluative or settlement style of mediation. The lawyers stymied the full potential of the process and diminished opportunities for party voice. The authors argue that better education for tort lawyers regarding the benefits of mediation would better meet the non-legal and emotional needs of disputants.*

I INTRODUCTION

Alongside case management, the court-connected use of alternative or appropriate dispute resolution (‘ADR’) has transformed how courts deal with cases.[1] These

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1 Chief Justice TF Bathurst, ‘The Role of the Courts in the Changing Dispute Resolution Landscape’ (2012) 35(3) *University of New South Wales Law Journal* 870, 871–4.

changes to the Australian civil justice system minimise adjudication through the judicial oversight of cases, with a focus on efficiency and the mandatory provision of dispute resolution options such as court-connected mediation.[2] The acronym ADR encapsulates a range of dispute resolution processes including negotiation, mediation, conciliation, and arbitration.[3] In many instances disputants are required to undertake pre-action requirements or use ADR processes prior to litigation.[4] Litigation is typically a prohibitively expensive, adversarial, and protracted process which lacks party participation and control.[5] Similarly, arbitration as a dispute resolution avenue can be lengthy and costly.[6] These processes contrast with mediation, which is a system of negotiation or decision-making where a neutral third party assists the parties to reach an agreement.[7] Mediation is a private and confidential forum that is generally less expensive, can be organised quickly, and promotes the early settlement of disputes.[8] As such, mediation is capable of addressing the shortcomings of litigation and can assist to manage non-legal issues in dispute resolution, such as interpersonal and emotional concerns that

2 Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 5th ed, 2016) 17–22 [1.60]; Laurence Boulle and Rachael Field, *Australian Dispute Resolution Law and Practice* (LexisNexis Butterworths, 2017) ch 1. For a discussion of court-connected mandatory mediation: see Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35(3) *University of New South Wales Law Journal* 929; Michael Redfern, 'Should Pre-Litigation Mediation Be Mandated?' (2012) 23(1) *Australasian Dispute Resolution Journal* 6; Paul Venus, 'Court Directed Compulsory Mediation: Attendance or Participation?' (2004) 15(1) *Australasian Dispute Resolution Journal* 29; Magdalena McIntosh, 'A Step Forward: Mandatory Mediations' (2003) 14(4) *Australasian Dispute Resolution Journal* 280; John Woodward, 'Court Connected Dispute Resolution: Whose Interests Are Being Served?' (2014) 25(3) *Australasian Dispute Resolution Journal* 159.

3 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (September 2003) 4. Dispute resolution processes other than trial were initially collectively referred to as 'alternative dispute resolution'. However, in recent times a preference has emerged for 'appropriate dispute resolution' or simply 'dispute resolution' amongst commentators: see Michael King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) 96.

4 Tania Sourdin, 'Civil Dispute Resolution Obligations: What Is Reasonable?' (2012) 35(3) *University of New South Wales Law Journal* 889 ('Civil Dispute Resolution Obligations'). For example, farm debt, franchising, family law, and retail lease disputes require mandatory pre-litigation ADR: *Family Law Act 1975* (Cth) ss 60I, 79(9); *Retail Leases Act 2003* (Vic) s 87; *Farm Debt Mediation Act 2011* (Vic) s 1. In a government context, ADR is used by the Dispute Settlement Centre of Victoria, Consumer Affairs Victoria and the Victorian Ombudsman: Department of Justice and Regulation (Vic), *Access to Justice Review: Volume 1 Report and Recommendations* (Report, August 2016) 195 ('*Access to Justice Review: Volume 1*').

5 Carrie Menkel-Meadow, Lela Porter Love and Andrea Kupfer Schneider, *Mediation: Practice, Policy, and Ethics* (Aspen Publishers, 2006) 93.

6 Guy Robin, 'The Advantages and Disadvantages of International Commercial Arbitration' (2014) 2(2) *International Business Law Journal* 131, 132.

7 Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 12; Sourdin, *Alternative Dispute Resolution* (n 2) 76. The Mediator Standards Board offers the following definition of mediation in the National Mediator Accreditation Standards:

> Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:
> (a) communicate with each other, exchange information and seek understanding
> (b) identify, clarify and explore interests, issues and underlying needs
> (c) consider their alternatives
> (d) generate and evaluate options
> (e) negotiate with each other; and
> (f) reach and make their own decisions.
> A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes.

Mediator Standards Board, *National Mediator Accreditation System (NMAS)* (1 July 2015) 9 [2.2] (citations omitted).

8 *Access to Justice Review: Volume 1* (n 4).

may arise in conflict.[9] The selected dispute resolution process can impact upon disputants' overall perception of fairness and satisfaction with the process.[10]

Theoretically, the value of mediation in the settlement of legal disputes lies not only in providing a possible monetary outcome, but also in giving the opportunity for dialogue between the parties to the conflict.[11] In this regard lawyers have a particular role to play in mediation, as their input can assist the success of the process.[12] Traditionally, many lawyers have approached mediation with an adversarial mindset, transferring the norms of the courtroom to mediation.[13] Recent shifts in legal culture have seen some lawyers developing and adopting a non-adversarial approach to dispute resolution which may help realise the neglected benefits of mediation.[14]

The level of growth in court-connected practice of ADR has withstood criticism.[15] Some writers fear that giving preference to ADR options (such as mediation) may undermine the development of landmark case law, result in lower funding to courts as caseloads decline, and provide 'second class justice' for disputants as parties are steered into mediation processes rather than being given access to the court system.[16] Claims that ADR provides greater procedural satisfaction to parties and perceptions of fairness have been critiqued, as research undertaken by Hensler in the United States ('US') indicates a preference for litigation by some disputants.[17] However, Hensler's research was undertaken more than two decades

9 Menkel-Meadow, Love and Schneider (n 5) 94; Boulle (n 7) 12.

10 See Peter Condliffe and John Zeleznikow, 'What Process Do Disputants Want? An Experiment in Disputant Preferences' (2014) 40(3) *Monash University Law Review* 305; Rosemary Hunter, 'Through the Looking Glass: Clients' Perceptions and Experiences of Family Law Litigation' (2002) 16(1) *Australian Journal of Family Law* 7.

11 Kathy Douglas and Clare Coburn, 'Attitude and Response to Emotion in Dispute Resolution: The Experience of Mediators' (2014) 16(1) *Flinders Law Journal* 111, 137.

12 The impact of lawyers' approaches to mediation affects their clients' view of mediation and the clients' opportunity to improve the relationship with the other party: Jean Poitras, Arnaud Stimec and Jean-François Roberge, 'The Negative Impact of Attorneys on Mediation Outcomes: A Myth or a Reality?' (2010) 26(1) *Negotiation Journal* 9, 12–14. Lawyers can be a positive force in a mediation, but it is dependent on the approach they take, which may shift according to a client's needs: Olivia Rundle, 'A Spectrum of Contributions That Lawyers Can Make to Mediation' (2009) 20(4) *Australasian Dispute Resolution Journal* 220, 222–8. The involvement of lawyers can result in an evaluative, rights-based approach dominating the court-connected context: Tania Sourdin and Nikola Balvin, 'Mediation Styles and Their Impact: Lessons from the Supreme and County Courts of Victoria Research Project' (2009) 20(3) *Australasian Dispute Resolution Journal* 142, 152.

13 Kathy Douglas, 'Shaping the Future: The Discourse of ADR and Legal Education' (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 118, 121, citing Chiara-Marisa Caputo, 'Lawyers' Participation in Mediation' (2007) 18(2) *Australasian Dispute Resolution Journal* 84 and Anne Ardagh and Guy Cumes, 'Lawyers and Mediation: Beyond the Adversarial System?' (1998) 9(1) *Australasian Dispute Resolution Journal* 72.

14 Boulle and Field (n 2) 260 [7.13].

15 Paula Baron, Lillian Corbin and Judy Gutman, 'Throwing Babies Out with the Bathwater?: Adversarialism, ADR and the Way Forward' (2014) 40(2) *Monash University Law Review* 283.

16 Ibid 294–6.

17 Deborah R Hensler, 'Suppose It's Not True: Challenging Mediation Ideology' [2002] (1) *Journal of Dispute Resolution* 81. Hensler refers in her article to the Research and Development study in the US comparing litigation, arbitration and judicial settlement conferences: at 89–90.

ago in a jurisdiction with a different legal culture. Contemporary Australian studies demonstrate the potential for parties to gain procedural satisfaction through ADR.[18]

Whilst a variety of disputes are referred to court-connected mediation, some practice areas, such as medical negligence, may derive more value from mediation than others. Healthcare disputes are highly specialised legal areas involving a complex intertwining of law and medicine. The publication of a decision in a dispute can have adverse reputational risks for the medical practitioner or hospital defendant who may be publicly labelled as negligent.[19] In medical negligence the needs of disputants (particularly plaintiffs) frequently extend to a desire for an expression of regret, sympathy, or an explanation as to the reasons for the adverse outcome.[20] In this regard, when practiced in a non-adversarial framework, mediation can be more suitable than litigation.[21] Mediation offers an opportunity for the tortfeasor to explain or express an apology or sympathy and the process may facilitate closure or convey forgiveness by the plaintiff.[22] Further, mediation can assist parties to maintain a professional relationship and express their emotions concerning allegations of medical negligence.[23] Mediation offers the benefit of privacy and confidentiality that is not afforded in public court proceedings, and this privacy may be particularly valuable to defendants whose reputation may be at stake in litigation. Plaintiffs may also wish to keep details of their injury private.[24] It is therefore important to investigate the use of mediation in medical negligence disputes to explore this context of practice. The aim of this study was to explore the use of mediation in court-connected medical negligence disputes from the perspective of senior Victorian tort lawyers, including the role of lawyers in such disputes.[25]

Lawyers who represent clients in mediation exert a significant impact on the

18 Kathy Douglas and Jennifer Hurley, 'The Potential of Procedural Justice in Mediation: A Study into Mediators Understandings' (2017) 29(1) *Bond Law Review* 69, 71, 73–4.

19 Kim Forrester, '"I Want You to Listen to My Side of This": Is There a Role for Mediation Early in the Health Care Complaints Process?' (2011) 18(4) *Journal of Law and Medicine* 701, 702; Susan J Szmania, Addie M Johnson and Margaret Mulligan, 'Alternative Dispute Resolution in Medical Malpractice: A Survey of Emerging Trends and Practices' (2008) 26(1) *Conflict Resolution Quarterly* 71, 73.

20 Eric Galton, 'Mediation of Medical Negligence Claims' (2000) 28(2) *Capital University Law Review* 321, 323.

21 Ibid 322–3.

22 Ibid 323–4.

23 Sheila M Johnson, 'A Medical Malpractice Litigator Proposes Mediation' (1997) 52(2) *Dispute Resolution Journal* 43, 49.

24 Boulle (n 7) 142.

25 This research study did not explore the role of mediators in medical negligence disputes, nor dispute resolution in a hospital-connected environment.

conduct and outcomes of the process.[26] In medical negligence mediation the majority of participants are represented by lawyers, and hence the role of lawyers in ADR is an integral aspect of the mediation process.[27] Tort lawyers are repeat players in medical negligence disputes, carrying over prior experience to future mediation processes.[28] This article reports on qualitative research conducted in 2016 using interviews with 24 senior tort lawyers (11 medical negligence lawyers from plaintiff and defendant law firms in Victoria, 10 barristers, and three judges with medical negligence litigation experience) to explore the value of mediation in medical negligence disputes. This research is part of a larger doctoral study which considered legal issues relating to medical negligence claims, and which explored the value of mediation in settling these claims. This research focused on court-connected mediation of medical negligence disputes and did not explore differences in voluntary and mandatory mediation or ADR and the use of apologies in the hospital healthcare context.

Firstly, this article will discuss the role of mediation in civil disputes and the emergence of legal education about ADR. Secondly, the article outlines the use of mediation in medical negligence claims, followed by an analysis of the role of lawyers in court-connected ADR. Thirdly, the article presents the empirical findings from this study. It discusses lawyers' views on the unrealised potential of mediation in Victorian medical negligence claims and the role of lawyers in influencing the structure and style of medical negligence mediation. Whilst the research participants in this study highly valued mediation as a vehicle for medical negligence dispute resolution, it was evident that the practitioners tended to dominate the mediation process by acting as a spokesperson and legal adviser on the parameters of settlement. The majority of participants described that during the process of mediation, parties are kept in separate rooms and discouraged from speaking, which prevents their clients from utilising the mediation process to achieve non-legal and non-financial objectives. The authors argue that lawyers can and should maximise the opportunities presented at mediation to address non-legal elements of medical negligence disputes and maximise disputant outcomes. Law school education and continuing professional development

26 Poitras, Stimec and Roberge (n 12) 12–14; Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* (Cambridge University Press, 2009) 245. See also research showing the key influence of lawyers in choosing dispute resolution options: Donna Shestowsky, 'Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures' (2018) 36(1) *Conflict Resolution Quarterly* 69.

27 Linda Mulcahy, 'Can Leopards Change Their Spots? An Evaluation of the Role of Lawyers in Medical Negligence Mediation' (2001) 8(3) *International Journal of the Legal Profession* 203, 211. See also Thomas B Metzloff, Ralph A Peeples and Catherine T Harris, 'Empirical Perspectives on Mediation and Malpractice' (1997) 60(1) *Law and Contemporary Problems* 107, 122.

28 Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law and Society Review* 95, 98–9. Lawyer 'repeat players' are in contrast to medical negligence disputants who are likely to be 'one shotters'. Repeat players could also be non-lawyers such as landlords who frequently engage in disputes with renters, who are 'one shotters': Brendan Edgeworth, 'Access to Justice in Courts and Tribunals Compared: Residential Tenancy Disputes in Sydney (1971–2004)' (2008) 27(2) *Civil Justice Quarterly* 179.

education[29] on the wider benefits of ADR would greatly assist practitioners to appreciate the benefits of mediation for their clients, beyond the settlement of claims, in providing further tools to achieve greater client satisfaction.

II THE ROLE OF MEDIATION IN CIVIL LITIGATION

A *Legislation and Policy Promoting Settlement*

In the past decade, the role of mediation has become increasingly prevalent in civil litigation, and legislation promoting settlement has significantly influenced lawyers' behaviour in mediation.[30] For instance, federal government policy demonstrates increasing support for ADR. A 2009 federal government report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, recommended augmenting the use of ADR and case management, and recommended that lawyers be better educated in non-adversarial processes.[31] Pre-action requirements[32] are contained in the *Civil Dispute Resolution Act 2011* (Cth) ('*Civil Dispute Resolution Act*') that introduced pre-litigation procedures in federal civil litigation.[33] Parties must include 'genuine steps' statements that contain initiatives to engage with the dispute.[34] Failure to undertake genuine steps may result in cost penalties in subsequent litigation.[35] Under s 4(1A) of the *Civil Dispute Resolution Act*, the ways to resolve a dispute are suggested by the legislation in a non-exhaustive list and are notably broad in nature, ranging from exchange of information, to the use of ADR.[36]

In Victoria, legislative reforms in 2010 promoted the early settlement of civil disputes through the passing of the *Civil Procedure Act 2010* (Vic) ('*Civil*

29 There is ongoing professional development available to lawyers about mediation. Legal education also includes ADR courses that may be core or elective: Boulle and Field (n 2) 22–23 [1.58]–[1.59]. See also Douglas N Frenkel and James H Stark, 'Improving Lawyers' Judgment: Is Mediation Training De-Biasing?' (2015) 21(1) *Harvard Negotiation Law Review* 1.

30 David Bamford and Mark J Rankin, *Principles of Civil Litigation* (Thomson Reuters, 3rd ed, 2017) 9–10.

31 Access to Justice Taskforce, Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, September 2009) 3 ('*A Strategic Framework for Access to Justice*'). See also Justice Andrew Greenwood, 'ADR Processes and Their Role in Consensus Building' (2010) 21(1) *Australasian Dispute Resolution Journal* 11, 12.

32 National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (Report, September 2009) 7 [2.1]; *A Strategic Framework for Access to Justice* (n 31) 104.

33 David Spencer, 'Pre-Litigation Procedures: A Legislative Update and Mediation Media Watch' (2011) 22(3) *Australasian Dispute Resolution Journal* 139. See also Michael Legg and Dorne Boniface, 'Pre-Action Protocols in Australia' (2010) 20(1) *Journal of Judicial Administration* 39.

34 *Civil Dispute Resolution Act 2011* (Cth) ss 6–7 ('*Civil Dispute Resolution Act*').

35 Ibid s 12.

36 It is not presently clear how widely these pre-action requirements have been accepted by the legal profession and there has been some resistance to their implementation: Tania Sourdin, 'Resolving Disputes without Courts: Measuring the Impact of Civil Pre-Action Obligations' (Background Paper, Australian Centre for Court and Justice System Innovation, March 2012) 51.

Procedure Act'). This Act included an overarching purpose 'to facilitate a just, efficient, timely and cost-effective resolution of the real issues in dispute'.[37] One way to achieve this is through court-connected mediation, particularly as judges are now expressly empowered to give directions to manage proceedings in accordance with the overarching purpose of justness, efficiency and cost effectiveness.[38] The *Civil Procedure Act* imposes myriad obligations relating to the 'overarching purpose' and 'overarching obligations' that affect how judges, lawyers, and clients behave in the civil justice system.[39] Lawyers and parties are obligated to engage in all opportunities for settlement of a dispute,[40] requiring lawyers to act cooperatively and collaboratively to 'facilitate faster and less costly resolution of disputes'.[41] Additionally, r 7.2 of the *Australian Solicitors Conduct Rules* prescribes a duty for solicitors to advise a client of any alternatives to litigation, which is likely to include mediation.[42]

The release of the Australian Government Productivity Commission's *Access to Justice Arrangements: Productivity Commission Inquiry Report* in December 2014 endorsed the trajectory of embedding ADR within the civil litigation process.[43] The report highlights the benefits of ADR in providing speedy processes, ranging from mediation and conciliation, to early neutral evaluation and arbitration, that may be more suitable for parties than litigation.[44] ADR, and particularly mediation, can reduce the costs of disputes by avoiding a court hearing. The Productivity Commission noted that 'ADR can also be less formal or more culturally appropriate than a court or tribunal hearing, and this may suit some parties'.[45] Most noteworthy is the report's recommendation that ADR should be used 'as the default dispute resolution mechanism'.[46]

Similarly in August 2016, the Victorian government's *Access to Justice Review* report endorsed the use of ADR, particularly mediation.[47] The review emphasised the capability of ADR to amplify access to justice by providing a quicker and

37 *Civil Procedure Act 2010* (Vic) s 7(1).

38 Ibid s 47.

39 Ibid ss 12–14, 16–27.

40 According to s 22 of the *Civil Procedure Act* (n 37), lawyers and parties must use 'reasonable endeavours' to resolve disputes and these endeavours may include the use of ADR. Under s 23, ADR can also be used, at least to narrow issues in dispute, even if resolution is not possible through ADR. Under ss 66–8, the *Civil Procedure Act* (n 37) explicitly promotes ADR and includes the option of mandatory mediation and other non-binding ADR processes.

41 Marilyn Warren, 'The Litigation Contract: The Future Roles of Judges, Counsel and Lawyers in Litigation' (2015) 4(2) *Journal of Civil Litigation and Practice* 51, 54.

42 Law Council of Australia, *Australian Solicitors Conduct Rules* (at 24 August 2015) r 7.2.

43 Australian Government, Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report* (Report No 72, 5 September 2014) vol 1, 12.

44 Ibid 286–8.

45 Ibid 286.

46 Ibid 48, 294.

47 *Access to Justice Review: Volume 1* (n 4) ch 4.

cheaper process for the parties.[48] A specific focus was the role that apologies may provide, as a meaningful means of redress which could reduce the appetite for litigation.[49] The review found opportunities for expanding the role of mediation as a dispute resolution mechanism,[50] and recommended greater use of ADR by government departments.[51] In August 2018 the Law Council of Australia released a national review into the state of access to justice in Australia.[52] As part of this report the Law Council of Australia recognised the need to expand the use of ADR, including online dispute resolution ('ODR'), with the proviso that the practice includes safeguards for vulnerable users including the elderly and those who are victims of family violence.[53]

Influential writer Genn has criticised the United Kingdom's legal system in prioritising ADR options and decreasing the opportunity for litigants to have a hearing as they are directed into processes such as mediation.[54] Noone has warned that vulnerable users of our justice system may be inappropriately pushed into ADR processes that do not sufficiently protect them.[55] She argues that power differentials should be considered in mediation practice to address disadvantage.[56] Mediators should also consider if parties are repeat players and whether systematic issues arise in disputes.[57] Durbach has warned against the dangers of public interest litigation being devalued by a continued focus on ADR.[58] She argues that issues relating to gender, class, and race may be hidden by private ordering processes and thus societal concerns are not debated in the public arena of the courts.[59] In a 2018 address by the former Chief Justice of the Supreme Court of Western Australia, his Honour while acknowledging critiques of ADR, has argued that the 'win lose' nature of litigation means that it is sometimes in parties' interests to mitigate risk of an unfavourable outcome of a court hearing through settlement.[60] Changes in the use of ADR should be seen as part of an

48 Ibid 195.

49 Ibid 209. See also Prue Vines, 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' (2005) 27(3) *Sydney Law Review* 483.

50 *Access to Justice Review: Volume 1* (n 4) 236 recommendation 4.3.

51 Ibid 240 recommendation 4.4.

52 Law Council of Australia, *The Justice Project* (Final Report, August 2018) ('*The Justice Project*').

53 Ibid pt 2 ch 1 12–15 ('People: Building Legal Capability and Awareness').

54 Hazel Genn, 'What is Civil Justice For? Reform, ADR, and Access to Justice' (2012) 24(1) *Yale Journal of Law and the Humanities* 397. See also Hazel Genn, *Judging Civil Justice* (Cambridge University Press, 2010) xii–xiv.

55 Mary Anne Noone, 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance' (2011) 37(1) *Monash University Law Review* 57, 65–8.

56 Ibid 77.

57 Ibid 76.

58 Andrea Durbach, '"Between the Idea and the Reality": Securing Access to Justice in an Environment of Declining Points of Entry' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 214.

59 Ibid 224.

60 Chief Justice Wayne Martin, 'Alternative Dispute Resolution: A Misnomer?' (Speech, Australian Disputes Centre, 6 March 2018) 9.

evolution of the Australian justice system in response to concerns relating to access to justice. Increases in the use of ADR, subject to practice safeguards, are in tandem with other initiatives such as increased access to litigation funders, legislative changes to class actions (where ADR can play a role),[61] support for self-represented litigants and the emergence of ODR.[62] There is also likely to be continued growth in the use of ADR in the family law system. Recently, the Australian Law Reform Commission's final report recommended the expansion of the use of Family Dispute Resolution ('FDR'), particularly mediation, but with the provision of improved assessment of power imbalances and targeted education.[63]

Along with policy and law reform recommendations for the greater use of ADR there have been increasing calls for the inclusion of ADR in the legal curriculum to educate future lawyers about the wide range of dispute resolution options available.[64] Research by Fisher, Gutman, and Martens points to the benefits of studying ADR.[65] This research showed a shift in La Trobe University law students' attitudes to legal practice through the experience of undertaking a first year compulsory, stand-alone course in ADR.[66] In this research the majority of students in the sample demonstrated a shift from a largely adversarial approach to litigation, to an approach that privileged collaborative problem-solving.[67] In 2012 the National Alternative Dispute Resolution Advisory Council ('NADRAC') published a study into the teaching of ADR in Australian law schools.[68] This research indicated that ADR is taught in many law schools in Australia, although sometimes as a law elective.[69] NADRAC argued that legal education is an important part of changing the culture of the legal profession to include non-adversarial means, including the use of negotiation and mediation, and that ADR should be core in the curriculum.[70]

61 Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Report, March 2018) 150 [6.62].

62 The Victorian government has promised funding for support for unrepresented litigants and the provision of online dispute resolution: Martin Pakula, 'Major Investment to Improve Access to Justice' (Media Release, Victoria State Government, 23 May 2017) <www.premier.vic.gov.au/major-investment-to-improve-access-to-justice/>.

63 Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (ALRC Report No 13, March 2019) 252–3; Australian Law Reform Commission, *Review of the Family Law System* (Issues Paper No 48, March 2018) 34–8 [101]–[115].

64 Tania Sourdin, 'Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field' (2012) 23(3) *Australasian Dispute Resolution Journal* 148; James Duffy and Rachael Field, 'Why ADR Must Be a Mandatory Subject in the Law Degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer' (2014) 25(1) *Australasian Dispute Resolution Journal* 9; Pauline Collins, 'Resistance to the Teaching of ADR in the Legal Academy' (2015) 26(2) *Australasian Dispute Resolution Journal* 64.

65 See Tom Fisher, Judy Gutman and Erika Martens, 'Why Teach ADR to Law Students? Part 2: An Empirical Survey' (2007) 17(1–2) *Legal Education Review* 67.

66 Ibid 84.

67 Ibid 80.

68 National Alternative Dispute Resolution Advisory Council, *Teaching Alternative Dispute Resolution in Australian Law Schools* (Report, 2012).

69 Ibid 6–7.

70 Ibid 4, 8.

Research on the place of ADR courses in legal education and the pedagogy practiced showed that where it is a core course in the legal curriculum it may be a stand-alone course, a module in a substantive area of law, or combined with the study of civil procedure.[71] In late 2016, the Law Admissions Consultative Committee revised the *Model Admission Rules 2015* for legal practice, altering Civil Dispute Resolution (formerly Civil Procedure) to include the teaching of ADR.[72] Given that Civil Dispute Resolution is part of the 'Priestley 11' core units law students must complete to gain admission to practice, this recent revision represents a significant shift in the acceptance of ADR in the education of lawyers. This change in the Priestley 11 requirements does not mandate how ADR is to be taught. Therefore, it may only be a minor part of the curriculum or it may be a stand-alone unit such as at La Trobe University.[73]

B *The Role of ADR in the Litigation Process*

Historically, some academic commentators warned against the wholesale adoption of alternative processes to manage litigation, fearing that entrenching mechanisms like mediation into the justice system would shift power from the courts to the bureaucracy.[74] A consequence of such a shift may be that financially disadvantaged groups will access ADR rather than the courts, as the prohibitive costs of litigation may disenfranchise ordinary citizens from accessing the court system.

Over-emphasising the potential for ADR to offer a diminished experience of justice may disguise the capability of ADR to offer empowering alternatives to litigation.[75] Mediation can provide a cost-effective alternative to the disenfranchising expense of litigation. There is a danger that litigation paradigms will coopt mediation so that they mirror traditional, adversarial legal approaches to dispute resolution.[76] An adversarial approach to mediation jeopardises the possible benefits of the process such as self-determination for parties,[77] by introducing rights-based and combative tactics to the mediation room. The experience for disputants may vary depending on whether mediation is voluntary or court-connected. Voluntary

71 Kathy Douglas, 'The Role of ADR in Developing Lawyers' Practice: Lessons from Australian Legal Education' (2015) 22(1) *International Journal of the Legal Profession* 71, 75.

72 Law Admissions Consultative Committee, *Model Admission Rules 2015* (at December 2016) sch 1.

73 See 'Dispute Resolution' *La Trobe University* (Web Page) <www.latrobe.edu.au/students/your-course/subjects/current/law1dr-dispute-resolution>.

74 Richard L Abel, 'The Contradictions of Informal Justice' in Richard L Abel (ed), *The Politics of Informal Justice* (Academic Press, 1982) vol 1, 267, 288–9.

75 For the benefits of mediation, including generally high party satisfaction rates: see Boulle (n 7) ch 1.

76 Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "the Law of ADR"' (1991) 19(1) *Florida State University Law Review* 1, 17.

77 Ibid 11.

mediation occurs through the consensual agreement of the parties.[78] Court-connected mediation refers to the situation where parties are encouraged or ordered by a judge to undertake mediation prior to a matter proceeding to trial.[79] Court-connected mediation can be voluntary, insofar as parties may attempt mediation during the litigation process, or it may be ordered by a judge pursuant to legislation, regulation, or court practice notes.[80] Scholars have acknowledged the operation of schemes which mandate participation in mediation prior to commencing legal action, and that such schemes can have an adverse impact upon voluntariness as a key tenet of mediation.[81]

The experience of a party in mediation will be affected by the model of mediation practised when a dispute is mediated. There are several different models of mediation and also ways of approaching models such as through shuttle negotiation/mediation.[82] Riskin,[83] in an influential analysis of models, pointed to the use of two main models of mediation: the facilitative and evaluative models. He argued that mediation could be explained as a grid showing movement between an approach where the mediator sought to gain agreement through delving behind parties' positions and discovering needs and interests, to an approach where the mediator advised parties of likely court outcomes and evaluated their dispute.[84] Riskin aimed to provide a grid to assist parties and their lawyers, to understand and make choices about mediation models.[85]

Facilitative models emphasise party empowerment where parties make their own decisions through collaborative problem solving.[86] Evaluative mediation will often include an advisory role for the mediator with the aim of reaching a settlement according to parties' legal rights and entitlements.[87] In some evaluative mediation sessions, the mediator exerts pressure on the parties to settle, thus diminishing

78 Hanks (n 2) 930.

79 Boulle (n 7) 560 [14.1].

80 Krista Mahoney, 'Mandatory Mediation: A Positive Development in Most Cases' (2014) 25(2) *Australasian Dispute Resolution Journal* 120, 120.

81 Hanks (n 2) 930.

82 Boulle and Field (n 2) 271–2, 286–7.

83 There have been several publications discussing the Riskin grid: see, eg, Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* 7 ('Understanding Mediators' Orientations, Strategies, and Techniques'). Additionally, there are more relationship focused models such as the transformative model of mediation which is not widely practised in court contexts: Robert A Baruch Bush, 'Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades' (2008) 84(3) *North Dakota Law Review* 705, 756–60.

84 Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques' (n 83).

85 Leonard L Riskin, 'Decisionmaking in Mediation: The New Old Grid and the New New Grid System' (2003) 79(1) *Notre Dame Law Review* 1, 4.

86 Carole J Brown, 'Facilitative Mediation: The Classic Approach Retains Its Appeal' (2004) 4(2) *Pepperdine Dispute Resolution Law Journal* 279, 283.

87 Boulle (n 7) 44–5.

party self-determination and decision-making.[88] The settlement model is focussed on incremental bargaining to achieve a resolution to a dispute.[89] Shuttle negotiation/mediation refers to the practice of the mediator moving between rooms and parties with offers and counter offers.[90] This approach has been advocated as a way of dealing with power imbalances between parties.[91] Significantly, the institutionalisation of mediation has resulted in the rise of an evaluative rather than a facilitative model of mediation in some court-connected programs.[92] Other than evaluative or settlement-focused mediation, reaching party consensus and maintaining self-determination are central tenets to a procedurally satisfying outcome for both parties.[93]

Procedural justice refers to the parties' perceptions of the fairness of a process by which a decision is reached, such as having their voice heard.[94] Procedural justice can be contrasted with substantive justice which focuses on the legal merits of a dispute.[95] Hollander-Blumoff and Tyler identified four key criteria that influence parties' perceptions of fairness: opportunity for disputants to share their stories; neutrality; trust; and courtesy and respect.[96] Research into procedural justice indicates that litigants wish to feel heard by a third party authority figure when engaged in dispute resolution.[97] As such, procedural justice outcomes require that disputants be given an opportunity to have their voice heard in dispute resolution processes.[98] If a litigant believes a process accords with procedural justice they will be more likely to 'live with' the decision and thus also carry out any court

88 Lela P Love, 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1997) 24(4) *Florida State University Law Review* 937, 941. Some commentators argue that the rise of evaluative mediation is inevitable: see, eg, Jeffrey W Stempel, 'The Inevitability of the Eclectic: Liberating ADR from Ideology' [2000] (2) *Journal of Dispute Resolution* 247. Cf Lela P Love and Kimberlee K Kovach, 'ADR: An Eclectic Array of Processes, Rather than One Eclectic Process' [2000] (2) *Journal of Dispute Resolution* 295.

89 Boulle (n 7) 44–5.

90 Mieke Brandon, 'Use and Abuse of Private Session and Shuttle in Mediation and Conciliation' (2005) 8(3) *ADR Bulletin* 41, 44, citing Ruth Charlton, *Dispute Resolution Guidebook* (LBC Information Services, 2000) 6.

91 There are various reasons to use shuttle mediation including where there is a need to protect the physical and emotional safety of parties, to allow expression of strong emotions by one party without the other party being present, or to allow private discourse with the mediator rather than the opposing party in order to avoid blame or other emotional reactions: Brandon (n 90) 44.

92 Nancy A Welsh, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6(1) *Harvard Negotiation Law Review* 1, 23. In Victoria, research has pointed to the use of evaluative mediation in some contexts in the Supreme and County Courts and the negative impact upon the parties' experience of the process (although overall satisfaction with mediation was evident in the research): Sourdin and Balvin (n 12) 147–51.

93 Nancy A Welsh, 'Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation' (2017) 70(3) *Southern Methodist University Law Review* 721, 723–4.

94 Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] (1) *Journal of Dispute Resolution* 1, 3 ('Procedural Justice and the Rule of Law').

95 Ibid 8–12.

96 Ibid 5–6.

97 Tom R Tyler, 'What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22(1) *Law and Society Review* 103, 129 ('What is Procedural Justice?').

98 Hollander-Blumoff and Tyler (n 94) 5–6.

orders.[99]

Mediation can be used as a case management tool to decrease pressure on courts yet may not effectively provide litigants with alternative processes that enhance party self-determination.[100] Approaches to mediation that neglect the potential benefits of self-determination undermine the quality of justice delivered within the Australian legal system.[101] Evaluative mediation in the court-connected context may decrease the parties' experience of procedural justice.[102] Research shows that enabling a party to tell their story in full during a process, and being treated with respect by a third party can be more important to parties than the outcome of a dispute.[103] Welsh argues that the experience of procedural justice for litigants should be built into court-connected mediation processes so that parties have the opportunity to participate, and feel that their voices are validated during the process.[104] Context plays a part in the experience of mediation for both lawyers and parties. The next section explores the context of mediation in medical negligence claims.

III MEDIATION IN MEDICAL NEGLIGENCE CLAIMS

Despite critique that features of mediation are unsuitable for medical negligence claims, mediation of personal injury disputes continues to grow.[105] Boulle cites reasons for the apparent unsuitability of mediation in personal injury disputes as encompassing:

1. an inequality of bargaining power between plaintiffs and insurer defendants;
2. a limited issue in dispute (damages); and
3. the lack of a need to preserve an ongoing relationship between the parties.[106]

A complicating factor is that the negligent party (the doctor) is rarely present in

99 Tyler, 'What is Procedural Justice?' (n 97). For a discussion of procedural justice in relation to the ADR process of restorative justice: see Tom R Tyler, 'Restorative Justice and Procedural Justice: Dealing with Rule Breaking' (2006) 62(2) *Journal of Social Issues* 307, 308.

100 Robert A Baruch Bush, 'Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field' (2002) 3(1) *Pepperdine Dispute Resolution Law Journal* 111, 116.

101 Nancy A Welsh, 'The Place of Court-Connected Mediation in a Democratic Justice System' (2004) 5(2) *Cardozo Journal of Conflict Resolution* 117, 142.

102 Nancy A Welsh, 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise without Procedural Justice' [2002] (1) *Journal of Dispute Resolution* 179, 184–7.

103 Ibid.

104 Nancy Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001) 79(3) *Washington University Law Quarterly* 787, 791–2.

105 Boulle (n 7) 364 [10.18].

106 Ibid.

mediation, as that role is adopted by the insurer.[107] Yet procedural justice literature highlights plaintiffs' desire to have their voice heard in dispute resolution.[108] Doctors' lack of participation in mediation can result in missed opportunities to meaningfully participate in this potentially healing process and can thus deprive plaintiffs of achieving a sense of procedural justice.[109]

Despite these missed opportunities, mediation is supported for a number of reasons. Taking medical negligence cases to trial can negatively exacerbate a plaintiff's emotions and can risk public disgrace to the defendant's professional reputation due to the adversarial nature of litigation.[110] Compounding this is the already stated cost, complexity and duration of medical negligence litigation.[111] Finally, litigation raises complex legal issues relating to causation that may be discussed within mediation.[112] These factors make mediation attractive to plaintiffs and defendants in medical negligence.[113]

A *The Mediation of Medical Negligence Claims*

In many medical negligence cases, plaintiffs have sustained significant physical and psychological injuries and the resolution of these cases occurs within a highly-charged emotional environment.[114] As a class of disputants, plaintiffs pursuing a mental harm action may particularly benefit from mediation due to the informal process that is shorter and less stressful than litigation.[115] Unlike litigation, plaintiffs are provided with timely breaks during the process, which can avoid anxiety-inducing events that may compound psychological injury.[116]

A fundamental feature and benefit of mediation is confidentiality.[117] Section 131 of the *Uniform Evidence Acts* provides that statements in mediation are made on a 'without privilege' basis, meaning these statements cannot be admitted

107 For instance, in a US study of 31 mediations, 25 out of 31 plaintiffs attended mediation but no doctor attended: Chris Stern Hyman et al, 'Interest-Based Mediation of Medical Malpractice Lawsuits: A Route to Improved Patient Safety?' (2010) 35(5) *Journal of Health Politics, Policy and Law* 797, 807, 814.

108 Hollander-Blumoff and Tyler (n 94) 5–6.

109 Carol B Liebman, 'Medical Malpractice Mediation: Benefits Gained, Opportunities Lost' (2011) 74(3) *Law and Contemporary Problems* 135, 140–1.

110 Campbell Bridge, 'Medical Negligence Litigation: Issues, Psychology and Why Mediation Offers the Best Solution for All Parties' (Conference Paper, Asian Mediation Association Conference, 5 June 2009) 7.

111 Ibid.

112 Ibid 10.

113 Lisa Emanuel and Michael Mills, 'Medical Negligence, Litigation and Mediation' (2002) 5(4) *ADR Bulletin* 55, 56.

114 David Alcorn, 'Mediation and the Psychologically Injured Plaintiff' (1996) 12(1) *Queensland University of Technology Law Journal* 162, 167.

115 Ibid.

116 Ibid.

117 Confidentiality in the mediation process derives from contractual common law and equitable principles: *Brown v Rice* [2007] EWHC 625 (Ch); *Williamson v Schmidt* [1998] 2 Qd R 317.

into evidence in related court proceedings.[118] Specifically, confidentiality of the mediation process is beneficial in medical negligence, by ameliorating plaintiff feelings of shame or guilt associated with exposure to public scrutiny.[119]

For insurers, mediation as a mechanism to settle personal injury insurance disputes may be financially advantageous.[120] Mediation can assist the parties to attain an integrative outcome, enabling the claimant to meet their non-legal needs whilst reducing the payout figure for the insurer, as both parties attain their goals and experience a more satisfactory outcome than they would in litigation.[121] Mediation allows for positive communication, dialogue, and exchange of information between parties.[122] The presence of a mediator can prevent hostility manifesting,[123] as a claimant in an insurance dispute is likely to be in an emotional state. Further, mediators can manage the claimant's expectations and realistic notions of fairness.[124]

Motivation for plaintiffs in medical negligence claims is often driven by factors beyond financial objectives.[125] Victims of medical negligence can be emotionally driven when instigating a claim, seeking to have their story heard, or seeking an apology from the medical practitioner.[126] Procedural justice research indicates that procedural satisfaction can be realised if participants are 'heard' in the dispute resolution process, by telling their story and being treated with respect.[127]

Mediation can facilitate disputants' participation in the process, which can deliver a sense of fairness and satisfaction.[128] Studies show that the presence of lawyers does *not* negatively affect litigants' perceptions of procedural justice, nor does lawyer presence inhibit factors of 'voice, … status recognition, trust and neutrality'.[129] In the family law context, 'lawyers have a positive attitude towards ADR' and their clients perceive their lawyers' approaches favourably regarding fairness and satisfaction.[130] In a qualitative study assessing interviews

118 *Evidence Act 1995* (Cth) s 131; *Evidence Act 2011* (ACT) s 131; *Evidence Act 1995* (NSW) s 131; *Evidence (National Uniform Legislation) Act 2011* (NT) s 131; *Evidence Act 2001* (Tas) s 131; *Evidence Act 2008* (Vic) s 131. Queensland, South Australia and Western Australia have not adopted the uniform evidence legislation.

119 Alcorn (n 114) 167.

120 Paul Harpur, 'The Financial Benefit for Insurers: Mediate in Personal Injuries Disputes' (2004) 15(1) *Australasian Dispute Resolution Journal* 70.

121 Ibid 78.

122 Ibid 74–5.

123 Ibid 76.

124 Ibid 77–8.

125 Relis (n 26) 42–6.

126 Ibid 44.

127 Tyler, 'What is Procedural Justice?' (n 97) 129.

128 Sourdin and Balvin (n 12) 147–51.

129 Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9(2) *eLaw Journal: Murdoch University Electronic Journal of Law* 13.

130 Jill Howieson, 'The Professional Culture of Australian Family Lawyers: Pathways to Constructive Change' (2011) 25(1) *International Journal of Law, Policy and the Family* 71, 72.

with Victorian mediators, Douglas and Hurley found that procedural justice can occur in mediation, but that mediators have not realised the potential for mediation to offer this kind of experience for parties.[131] Many of the mediators in that study believed parties needed to have their voice heard and validated, and many commented on the parties' desire to share their side of the story.[132]

Emotion is a key component of conflict, as emotional experiences of parties can define and drive conflict.[133] Emotion is described as consisting of three components: the physiological experience; a cognitive process; and a communicative process.[134] Exploration of emotion within mediation literature is identified as an opportunity to canvas underlying interests and concerns of parties through discourse, enabling the expression of emotions.[135] Research has found that attention to emotion in conflict management can potentially lead to a transformation of the dispute, generating improved communication and greater understanding.[136]

In the past decade, researchers have focused on the role that mediators' understanding of emotion plays in mediation.[137] A positive correlation has been found between a negotiator's emotional intelligence and the opposing party's trust and desire to work together again.[138] Douglas and Coburn explored mediators' attitudes and strategies for addressing emotional expression through interviews with Victorian Civil and Administrative Tribunal mediators.[139] All research participants perceived 'that emotion was a significant aspect of the mediation process'[140] and 11 out of 16 participants were willing to encourage or allow emotion to be expressed.[141] Six mediators discussed specific techniques to encourage emotional expression, including reflection of emotional content, paraphrasing, and questioning.[142] The authors argue this evidences a shift in practice towards a higher 'awareness of the emotional dimensions of conflict'.[143]

131 Douglas and Hurley (n 18).

132 Ibid 83.

133 Michelle Maiese, 'Engaging the Emotions in Conflict Intervention' (2006) 24(2) *Conflict Resolution Quarterly* 187; Tricia S Jones, 'Emotional Communication in Conflict: Essence and Impact' in William F Eadie and Paul E Nelson (eds), *The Language of Conflict and Resolution* (Sage Publications, 2001) 81, 91–2.

134 Jessica Katz Jameson et al, 'Exploring the Role of Emotion in Conflict Transformation' (2009) 27(2) *Conflict Resolution Quarterly* 167, 168, citing Jones (n 133).

135 Jameson et al (n 134) 169.

136 Ibid 184–5.

137 Cheryl Picard and Janet Siltanen, 'Exploring the Significance of Emotion for Mediation Practice' (2013) 31(1) *Conflict Resolution Quarterly* 31, 31.

138 Kihwan Kim, Nicole LA Cundiff and Suk Bong Choi, 'The Influence of Emotional Intelligence on Negotiation Outcomes and the Mediating Effect of Rapport: A Structural Equation Modeling Approach' (2014) 30(1) *Negotiation Journal* 49, 49.

139 Douglas and Coburn (n 11).

140 Ibid 126.

141 Ibid 129.

142 Ibid 132–3.

143 Ibid 143.

B *The Role of Lawyers in Mediation*

The rise in court-connected ADR (particularly mediation) in the Australian legal system correlates with a rise of lawyers participating in ADR.[144] Arguably, the approach and attitude of lawyers to ADR is an integral aspect of the mediation process.[145] Lawyers are legally obligated to actively encourage their clients to participate in ADR, stemming from the *Civil Procedure Act* requirements, professional conduct rules, and non-binding guidelines.[146] Lawyers are duty-bound to advise and assist clients with the filing of a genuine steps statement in federal jurisdictions.[147] Lawyers owe a general duty to a client to act with 'honesty and courtesy, competence and diligence, loyalty and confidentiality'.[148] The existence of voluntary guidelines may also assist lawyers in setting the ethical standard expected in mediation.[149] Rundle identified five categories of lawyer involvement in mediation, ranging from the role of 'absent advisor' to acting as 'expert contributor' and/or a 'spokesperson' in the mediation.[150] She posits that lawyers move through a range of roles during a mediation.[151] A study of mediator perceptions found that mediators value the contribution of lawyers when lawyers adopt the role of 'expert contributor', as parties benefit from legal advice during mediation.[152]

Lawyers have great capacity to influence the mediation process.[153] A 2009 evaluative study of mediation in the Supreme and County Courts of Victoria showed that in some cases, lawyers adopted a mediation process better suited to the lawyers' needs and culture, rather than their clients.[154] Sourdin's research found that even though parties valued mediation, the experience of the process did not accord with the facilitative model of mediation.[155] Often there was little opportunity for a party to speak in a mediation, the dialogue in the mediation was

144 Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758, 758, citing Chief Justice Bathurst (n 1) 872–4.

145 Olivia Rundle, 'Barking Dogs: Lawyer Attitudes towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 77, 87.

146 Douglas and Batagol (n 144) 763.

147 *Civil Dispute Resolution Act* (n 34) ss 6–7, 9.

148 Bobette Wolski, 'An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation: Challenges for Rule Drafters and a Response to Jim Mason' (2013) 16(1) *Legal Ethics* 182, 187 (citations omitted). See also at 188–9.

149 See, eg, Law Council of Australia, *Guidelines for Lawyers in Mediations* (at August 2011).

150 Rundle, 'A Spectrum of Contributions That Lawyers Can Make to Mediation' (n 12) 222–8.

151 Ibid.

152 Douglas and Batagol (n 144) 780–4.

153 Ibid 765.

154 Tania Sourdin, *Mediation in the Supreme and County Courts of Victoria* (Research Report, Department of Justice, 1 April 2009) iv ('*Mediation in the Supreme and County Courts*').

155 Ibid 151–2 [5.74].

rights-based rather than interest-based, and the mediator would employ shuttle techniques, moving between parties with offers.[156] The report recommended, amongst a number of initiatives, the requirement that only mediators accredited under the National Mediation Standards (the voluntary mediator scheme) should be permitted to mediate in the County Court and Supreme Court to incorporate an element of quality assurance in the mediation program.[157] The report also includes recommendations relating to greater court oversight in relation to mediation, as well as various initiatives to attempt a shift in the culture of lawyers practising in the court to be more receptive to the process of mediation and the potential non-legal benefits.[158]

A Canadian study undertaken by Relis examined the perceptions of legal and lay actors in litigation and mediation of personal injury disputes, finding that lawyers dominated the mediation process and frequently ignored their client's needs.[159] Regarding plaintiffs' litigation aims, Relis concluded that lawyers' perceptions are that plaintiffs sue predominantly for monetary reasons, and consequently lawyers exclude other plaintiff objectives such as receiving an admission of fault or apology, for which mediation may be better suited.[160] Her study found strong support from lawyers for participation in voluntary mediation.[161] The lawyers in Relis' study were not opposed to mandatory mediation, showing an increased acceptance for mediation in the resolution of medical negligence disputes.[162] Relis addresses the issue of power in mediation, noting that despite a plaintiff's desire to have the defendant present at mediation, many defendant lawyers advised their clients *not* to attend the mediation for tactical reasons.[163] This decision undercuts the benefits that mediation can bring: as the doctor is absent from mediation, there is an inability to address emotional objectives and consequently the mediation venue is transformed into a bargaining arena around financial compensation.[164]

In Relis' study, an analysis of the participants' mediation objectives highlighted the divergence between the plaintiffs' extra-legal objectives and the lawyers' tactical agendas.[165] The experiences during the mediation emphasised this divide: plaintiffs used the mediation process to express their emotions and extra-legal needs, whilst the lawyers used the information obtained during the mediation

156 Ibid 48–9 [2.14].
157 Ibid iv.
158 Ibid.
159 Relis (n 26) 237–9.
160 Ibid 34.
161 Ibid 82.
162 Ibid.
163 Ibid 125–6.
164 Ibid 126.
165 Ibid 153.

process strategically in future litigation.[166] This divergence was evident regarding mediator perceptions: plaintiffs focused on the mediators' human attributes, whilst the lawyers preferred an evaluative mediation style, focusing on the tactical assistance the mediator could offer.[167]

In a 2010 study, Hyman and others evaluated the use of mediation in medical malpractice lawsuits involving New York City private hospitals.[168] Structured interviews were undertaken with participants and mediators in 31 mediations from 67 lawsuits.[169] The plaintiff lawyers were more willing to mediate than defendant lawyers: plaintiff lawyers agreed to mediate in 49 cases, compared with defendant lawyers who agreed to mediate in 31 cases.[170] The researchers noted this as a surprising finding, attributing the refusal to factors including unsuitability of the case for mediation, legal exposure, differing attitudes towards losing a case, existing settlement negotiations, preference of certain mediators, and lawyers' desire to increase billable hours.[171] In the Hyman study, plaintiffs participated in 25 mediations and their plaintiff lawyers reported concerns of loss of control over their client, and of what their client might hear in mediation.[172] Although the mediation style was described as interests based (rather than evaluative which focuses on legal and financial issues), both plaintiff and defence lawyer participants reported satisfaction.[173]

In 2014, Melville, Stephen and Krause explored the role of lawyers in medical negligence claims, through interviews with 30 medical malpractice claimants from England and 30 claimants from Scotland.[174] The research found that medical negligence lawyers adopt a 'client-aligned' approach, which takes into consideration their clients' practical and emotional needs but does not necessarily follow their clients' wishes.[175] The lawyers were able to manage their clients' expectations, provide emotional support, and keep their clients well-informed.[176]

Tyler contends that tort lawyers 'assume that their clients are primarily interested in

166 Ibid 194–5.

167 Ibid 224.

168 Hyman et al (n 107) 801.

169 Ibid 798.

170 Ibid 804–5.

171 Ibid 813–14.

172 Ibid 815.

173 Ibid 818, citing Leonard L Riskin and Nancy A Welsh, 'Is That All There Is? "The Problem" in Court-Oriented Mediation' (2008) 15(4) *George Mason Law Review* 863.

174 Angela Lee Melville, Frank Stephen and Tammy Krause, '"He Did Everything He Possibly Could for Me": Medical Malpractice Claimants' Experiences of Lawyer–Client Relations' (2014) 21(2) *International Journal of the Legal Profession* 171, 175.

175 Ibid 188–9.

176 Ibid 176, 188.

receiving large and fair settlements, and in having their cases resolved quickly'.[177] In an analysis of empirical studies of tort litigation, Tyler found litigants are more procedurally focused than outcome oriented, wanting to participate in the settlement of disputes and seeking to have their views heard, rather than simply focusing on the settlement sum.[178] Tyler concluded that lawyers' views of client expectations are fundamentally flawed and do not address clients' non-outcome related concerns.[179] Tyler's conclusion accurately describes the approaches of the legal participants in this study who favoured rights-based settlement approaches over meeting the needs of their clients. In light of the findings of the studies discussed in this section, a Victorian study was devised to explore the mediation of medical negligence claims and gather perspectives of senior tort lawyers practising in this field.

IV A STUDY OF MEDIATION IN VICTORIAN MEDICAL NEGLIGENCE CLAIMS

A *Methodology*

The qualitative research that informs this article was conducted with 24 senior tort lawyers (consisting of 11 medical negligence lawyers from plaintiff and defendant law firms in Victoria, 10 barristers and 3 judges with medical negligence litigation experience) in Victoria between November 2015 and June 2016. The research data was gathered through semi-structured, in-depth interviews with lawyers, rather than parties, to gather their views on mediation practice.[180] The data was gathered in the context of a wider study about legal challenges in medical negligence compensation. A sample of senior tort lawyers were purposively selected based on their extensive medical negligence experience, and invited by email to participate in the research.[181] Subsequently, a number of participants were obtained via 'snowballing' where participants recommended other participants. The interviews lasted between 30 minutes and 1 hour.

Eleven participants identified as predominantly representing plaintiffs, and 8

177 Tom R Tyler, 'A Psychological Perspective on the Settlement of Mass Tort Claims' (1990) 53(4) *Law and Contemporary Problems* 199, 199.

178 Ibid 201.

179 Ibid 203.

180 Ethics approval for this project was granted by the RMIT University Ethics Committee on 15 October 2015 (Project No 19618).

181 Participants were selected using purposive sampling, meaning that they were selected based on certain characteristics. Many of the interview questions centred around medical negligence law reform that occurred in 2002–03, hence the participants needed to have at least 15 years' experience to comment on the effects of the reforms. An internet search was conducted to locate the participants. Subsequently the snowball sampling method was used where participants already interviewed recommended other participants for the study. See Christina Quinlan, *Business Research Methods* (Cengage Learning, 2011) 213.

identified as predominantly representing defendants. Five participants were categorised as court lawyers, comprising 3 judges and 2 lawyers employed by Victorian courts. Ten of the 24 participants were barristers, with 4 predominantly representing plaintiffs, and 6 predominantly representing defendants. The average length of experience of the participants was 21 years. Eleven participants had 20 or more years of experience in medical negligence. In this report of the findings, the participants' identity was concealed by assigning the lawyer a number and a category, such as 'Lawyer Plaintiff', 'Lawyer Defendant' or 'Lawyer Court'.

Participants were asked to reflect on their experience of mediation in medical negligence disputes, including the role of lawyers, expression of emotion, and whether mediation is a more suitable dispute resolution avenue than a court trial. Participants were also asked to comment on the benefits or disadvantages of the mediation process, and whether any particular challenges are present in the mediation of medical negligence disputes following the 2002–03 civil liability reforms. Interviews were audio recorded with the consent of the interviewees, and transcripts were coded to identify emergent themes. While qualitative research is not usually affiliated with numerical representation of the data, some scholars accept that use of numbers in qualitative research is a legitimate and valuable method of presenting data.[182] Therefore, in some sections numerical indicators are used to offer greater clarity and illustrate the data analysis. The findings of the study relating to the use of mediation for medical negligence disputes and the role of lawyers in this context are presented and discussed below.

B *Research Limitations*

One limitation of this study is that the participants' responses did not expressly distinguish whether their views on mediation were in the context of litigation already having been commenced, or whether mediation was used as a genuine alternative to trial. Therefore, there is potential to undertake further comparative research into mandatory and voluntary use of mediation in medical negligence disputes. This study was confined to court-annexed mediation of medical negligence disputes in Victoria. Wider issues, such as mediation or use of apologies in hospitals, were not explored. The role of a mediator who was also a lawyer was not part of the research project. The sample size of the study of lawyers was small, however the participants were highly experienced in medical negligence and well placed to offer valuable insights into mediation practice. Whilst the study was undertaken in the Victorian medical negligence jurisdiction, the findings may be useful in other Australian jurisdictions and personal injury claims more broadly as these disputes have similar features.

182 Joseph A Maxwell, 'Using Numbers in Qualitative Research' (2010) 16(6) *Qualitative Inquiry* 475, 480; Karen Messing et al, 'Qualitative Research Using Numbers: An Approach Developed in France and Used to Transform Work in North America' (2005) 15(3) *New Solutions* 245.

C *Findings*

In this study, there was a strong acceptance of mediation. All 24 participants endorsed the benefits of mediation for medical negligence, however their reasons varied. As noted, commentators have endorsed the use of ADR processes to resolve medical malpractice claims as they are 'informal, confidential, speedy, enforceable, cost effective and consensual as opposed to determinative'.[183] Given that mediation literature pertaining to medical negligence disputes suggests their suitability, it was important to ascertain whether participants in this study viewed mediation as a suitable form of dispute resolution of medical disputes. Participants were asked, '[i]s mediation a more suitable form of dispute resolution than litigation in medical negligence claims?' All 24 participants endorsed the benefits of mediation and responded in a manner that either expressly stated it was a more suitable dispute resolution avenue, or implied through their response that it was. For example, participants commented:

> Mediation is an intrinsic and very desirable aspect to litigation. (Defendant Lawyer 1)
>
> Mediation is a really important step in the process. (Plaintiff Lawyer 2)
>
> I can't speak highly enough of mediation. (Defendant Lawyer 3)
>
> I think it's a very important method. (Plaintiff Lawyer 8)
>
> As much as it's against every barrister's commercial interest to promote mediation … it's the best for the protagonists involved. (Defendant Lawyer 4)

Twenty-three participants stressed that cost was a major benefit of undertaking mediation. The majority detailed how expensive it is to litigate a medical negligence case at trial and the potential of mediation as a cost-saving process. For example, 2 lawyers stated:

> I think, number one, the legal costs are much less significant at mediation. And there's a much less significant stress level for clients at mediation than there would be at court. (Plaintiff Lawyer 1)
>
> So I think there are great advantages in mediation not as opposed to litigation but as a part of it and I think that they advantage both plaintiffs and defendants. (Defendant Lawyer 1)

A strong theme expressed by a majority of the participants regarded the potentially harmful effect of a court hearing. For example, participants stated:

183 Emanuel and Mills (n 113) 56.

> Litigation is traumatic for plaintiffs as well as defendants … No one wants to be dragged through that. A lot of plaintiffs think that they would like to have their day in court but it's awful. (Defendant Lawyer 2)

> [T]hey say mediation is a success where all the parties walk away equally unhappy — maybe that's a bit down on the process but, I mean, it's such a huge gamble for people to proceed to trial in most cases. (Plaintiff Lawyer 2)

Confidentiality is an integral aspect of the process of mediation, as common law, statutory rules and equitable rules of privilege prevent the parties and the mediator disclosing matters discussed at mediation in subsequent court proceedings.[184] In contrast to litigation in court, mediation affords the medical practitioner an opportunity to avoid publicity regarding allegations of medical negligence.[185] Both plaintiffs and defendants value the privacy that mediation offers. Participants noted the importance of avoiding court to maintain confidentiality as a strong benefit. For example, 2 participants commented:

> [Mediation is] private and confidential so we haven't got doctors and nurses with their faces in the paper or cameras chasing them down the road. The same [goes] for plaintiffs. They're not exposed to the media … Trials are publicised. They're costly. They're time consuming. I imagine they would be incredibly intimidating for a plaintiff and I think they all just increase the level of stress and anxiety of all involved. So trial is really is the last option. (Defendant Lawyer 3)

> I think one of the main benefits [of mediation] is [that] it provides a confidential forum for parties to openly ventilate the issues and try and distil some of the key parts of the dispute. I think particularly when you're dealing with health professionals for example, or any sort of professional, you obviously need to take into account that, at the end of the day, this is their reputation on the line and their livelihood. [I]f matters can be resolved at a mediation or shortly thereafter on a confidential basis I think that's going to … be a better outcome for them. (Court Lawyer 4)

In total, 5 participants highlighted the importance of confidentiality, particularly in light of the role of media. In addition to protecting the privacy of the parties, 1 participant observed that keeping medical negligence out of the spotlight bolsters the public's confidence in the health system. However, this presents a

184 John K Arthur, 'Confidentiality and Privilege in Mediation' (2015) 2(5) *Australian Alternative Dispute Resolution Law Bulletin* 91.

185 Rita Lowery Gitchell and Anderw Plattner, 'Mediation: A Viable Alternative to Litigation for Medicial Malpractice Cases' 2(3) *DePaul Journal of Health Care Law* 421, 442–3.

consequent risk that medical errors will be swept under the carpet.[186] Preserving confidentiality could prevent hospitals, clinics, and practitioners from addressing medical errors and imposing safeguards for the future, while confidential settlements prevent negligence from being uncovered by the public.[187] The failure to have medical practitioners admit and understand the reason for error indicates a missed opportunity to educate doctors and consequently improve healthcare more broadly.[188]

Participants were asked about the advantages and disadvantages of the mediation process, and whether any challenges are present in the mediation of medical negligence disputes following the 2002–03 civil liability reforms, but their responses were overwhelmingly positive about mediation. As previously stated, all 24 participants endorsed the benefits of mediation. None of the participants vociferously opposed mediation or contended that mediation presented a challenge in the resolution of medical negligence disputes. The participants' responses did not suggest that the 2002–03 civil liability reforms had any influence over the mediation process nor that the reforms introduced any challenges in the mediation process.

As already noted, reports into the provision of dispute resolution advocate further expansion of ADR, including mediation, into our justice system[189] and amended legislation has attempted to temper the traditionally litigious mindset of lawyers. In the Victorian context, the *Civil Procedure Act* provides an improved framework for utilising ADR and mediation in court-connected practice. Significantly, several participants in this study pointed to the integration of mediation into the court-connected context since the advent of the *Civil Procedure Act*. When asked, '[t]o what level do you engage in mediation?', 16 participants stated that they engaged with the process because it was mandatory. The majority of participants used words such as 'compulsory' or 'court-ordered', or descriptions such as 'you have to attend mediation' to describe engagement with the mediation process. Other participants focused on voluntary engagement. For example, participants stated:

> Well, [the parties have] got no choice. They're always court ordered. But you do see ones that aren't court ordered where people, for example early on, want to meet and discuss. I would be very surprised if anyone said it wasn't successful. It has been successful in a number of cases. In the medical negligence field, it's

186 See Katherine Towers, 'Medical Negligence "Shouldn't be Hidden"', *The ustralian* (Australia, 2 November 2015) where practitioners from Australia's leading medical negligence law firms have recently called for 'a centralised, national system to monitor [healthcare] complaints' so that all complaints could be filtered through a single system. They contend that while the terms of the financial settlement may be kept confidential, plaintiffs should not be prevented from discussing their experiences publicly.

187 Ibid.

188 Liebman (n 109) 140–1. Liebman argues that the non-participation of doctors at the mediation of medical negligence disputes constitutes a lost opportunity for, inter alia, institutional policy changes to alter practices that have led to the error.

189 *The Justice Project* (n 52).

> got advantages for both plaintiffs and defendants. (Plaintiff Lawyer 7)

> Every order in any litigation in the common law division will include a mandatory requirement for mediation. So it's absolutely imperative. (Court Lawyer 2)

In contrast, 8 participants did not frame their engagement with mediation as part of the institutional compulsion of case management. Rather, these participants expressed insights regarding the positive benefits of mediation. They perceived that there was 'genuine goodwill about participation' (Plaintiff Lawyer 8), that the 'main players are pretty keen on it' (Defendant Lawyer 5), and 'the desire to mediate is enormous' (Court Lawyer 3). One participant framed participation as a useful tool:

> I think that mediation remains a really fruitful tool for resolving complaints. Parties generally approach it with good intentions and they engage constructively in [mediation] … The parties always engage in mediation in medical negligence disputes. To the extent that they engage I think is pretty constructive. (Plaintiff Lawyer 2)

Three participants expressly made reference to the influence of the *Civil Procedure Act*:

> I think the judges are getting very critical under the *Civil Procedure Act* if they feel that a proper attempt at mediation hasn't occurred or that medical reports are starting to be exchanged after the mediation process because then, of course, you have a trial looming and you've got the possibility that the trial may be adjourned if there's further … investigations after the mediation. (Plaintiff Lawyer 1)

> I think the *Civil Procedure Act* has been an excellent introduction. I think that it's having quite an impact on cases in this jurisdiction and I am heavily in favour of that Act and the need to have a proper basis for everything that you allege. And I think it has gone further to encouraging parties to try and resolve matters earlier and to cooperate with one another. (Defendant Lawyer 3)

> [T]he Court has always, even before the introduction of the *Civil Procedure Act*, required alternative dispute resolution to be employed in medical cases and really in common law cases. So there's no case in the common law or in the medical jurisdiction that will come to Court without a mediation. And the parties approach the mediation responsibly and try to resolve the cases. (Court awyer 1)

The changing culture of lawyers, where legislation and court practice orientate the profession to mediation, is particularly evident in this cohort of practitioners. In the context of medical negligence claims they see value for their clients, both plaintiff and defendant, to mediate disputes. Participants demonstrated a sophisticated understanding of their role in the process with a focus on providing expert advice to their clients:

> As counsel for a plaintiff, you've got to construct an argument. You've got to have them condensed down but constructed so that's [sic] easily appreciated and the other side understand [sic] exactly how you're putting your case. You've got to draw on the bits of evidence that support you and ignore the ones that don't. You've then got to say, you've got to present a scenario for a defendant that they can see that it's a persuasive argument that can be made to the court and a jury might go for it. (Plaintiff Lawyer 7)

> So that's the primary role … to advance the case in a compelling and persuasive manner. I don't just rock up. [I]n some jurisdictions they do do that, because I work in those jurisdictions too. Some people rock up to mediations and just say, '[w]e want 500 grand; what are you going to do about it?' … In medical malpractice, that really doesn't wash and people expect detail and they like to be persuaded. (Plaintiff Lawyer 10)

> My role is to make sure that I can attend fully prepared so that it's not a waste of anyone's time or money because they are expensive, they are time consuming and you have to acknowledge that there are plaintiffs who would be … really building up to that experience. But likewise [the same applies to] doctors and nurses who have had a claim hanging over their head … (Defendant Lawyer 3)

> So the lawyers have an incredibly important role in formulating the thinking of their client, getting their client to sort of look down the slot, making the client understand, '[l]ook there are ranges and damages', that whole sort of picture which is terribly important to paint. And if they've got the confidence [in] the client and if they use that confidence correctly they can say … '[l]ook here are your risks'. (Court Lawyer 2)

Importantly, the advice given by lawyers in this study relates to legal issues and to the parameters of settlement options. Lawyers saw their role to give advice about the law and also likely settlement amounts:

> As a lawyer I feel like my role is really to prepare the case for the mediation as best as I can and give it the best opportunity to resolve … And then on the day of the mediation itself, during the mediation I really see my role mostly as managing the client ensuring that I'm getting their instructions, that they're feeling calm and in control about the process. (Plaintiff Lawyer 2)

> My duty is to do the best I can for the client. And what I say to [clients] is also, you know, '[w]hat we want to do is to leave here today understanding what's the last dollar they're prepared to pay'. You know, we don't want to send them home without money in their pockets, you know. We might take their money, we might not, but what we want to do is get to the point where we know, '[t]his is the most they're prepared to pay'. (Plaintiff Lawyer 8)

> I tell people when I'm acting for plaintiffs that they are welcome if they wish to participate fully in the mediation but I would discourage that because the other side are likely to talk more frankly in their absence … It's the role of the lawyers to encourage a resolution of the matter and to make sure the client fully understands each step of the process along the way. (Defendant Lawyer 1)

These valuable insights from the participants demonstrate that lawyers perceive themselves as playing a central role in mediation. Lawyers' voices dominated the mediation process and the focus is on their advocacy skills to attain the most advantageous settlement in terms of financial compensation for their client.[190] Their focus is not on the emotional dimensions of a dispute, although the area of medical negligence claims is likely to include high emotional dimensions as both physical and mental injury can significantly impact claimants' lives. Significantly, the lawyers reported that few medical personnel attended mediation and more often the insurer and the lawyer for the insurer were the parties engaging in the process.

When asked '[a]re emotional issues a factor in mediation?', 18 participants said it was a factor with 2 not directly answering the question.[191] Four participants said it depended on the circumstances such as whether the emotional issues were from the plaintiff or defendant's perspective. Also, the extent of the injury or whether a death has occurred affected the level of emotion displayed by clients. When asked '[d]oes mediation help with the expression of emotion?', 20 said '[n]o, it does not'.[192] For example, 2 participants commented:

> Emotional issues? I could only guess from the defendants' perspective and I wouldn't like to but from the plaintiff's point of view sometimes I think that the enormity of it becomes overwhelming and sometimes we have to cut mediation short because we're concerned that there's so much information for them to take on and the emotion of that becomes so much that … they may not make the right decision for their case … (Plaintiff Lawyer 2)

> Emotional issues … well, from the plaintiff's point of view, yeah, occasionally it comes into it. But it never gets resolved … In the mediations in personal injury litigation, that never happens, it's always the lawyers in one room talking about it and then we go and talk to our client outside of it. So that tends to be the way.

190 The participants' self-assessment is in line with Rundle's lawyer models of expert contributor and spokesperson: Rundle, 'A Spectrum of Contributions That Lawyers Can Make to Mediation' (n 12) 224–5, 227–8.

191 The participants' responses regarding emotion were explored through the lens of therapeutic jurisprudence and restorative justice in Tina Popa, '"No One Gets Closure in the End": Non-Adversarial Justice and Practitioner Insights into the Role of Emotion in Medical Negligence Mediation' (2018) 27(4) *Journal of Judicial Administration* 148.

192 One participant did not directly answer the question while 2 participants stated their response would vary depending on whether it was viewed from the plaintiff or defendant's perspective. Only 1 participant thought mediation assisted the parties to express emotion.

> So those emotional issues don't get addressed in the mediation room. They get addressed where we talk to the client and say, '[y]ou've got to look at this as a commercial operation.' (Plaintiff Lawyer 5)

This focus on the quantum, neglect of non-legal and emotional issues, and use of shuttle mediation, where parties are kept in separate rooms, suggests that participants are using an evaluative model of mediation.

The participants in this study acknowledged the significant role of emotion in medical negligence disputes, yet the style of mediation used by these participants precludes emotional expression. Participants' responses indicated that the mediation model used in medical negligence disputes strays from the purely facilitative model taught in mediation training. Instead, the 'adapted' model is heavily influenced by the shadow of the law so that during mediation the focus is on achieving settlement according to parties' legal entitlements. Parties are kept out of the mediation room, hence their participation is limited. One participant acknowledged that mediation of personal injuries in Victoria differs to the theoretical process based on interest-based negotiation taught in training courses:

> In Melbourne or in Victoria, the personal injuries mediations don't follow the model that the courses train you in. We've adapted our own. And that is, we very rarely would have a plaintiff present during the joint decision, it's an exceptional thing. But usually the doctors aren't present. If it's a hospital involved, you'll frequently get a representative from the hospital. And you'll also have a representative of the insurer for either the doctors or the hospital. But the plaintiff doesn't take any part. So they don't get a chance to unload if they want to. (Plaintiff Lawyer 7)

Interestingly, this participant explained that legal practitioners in the medical negligence jurisdiction have adapted their own model of mediation, so that plaintiffs are not present during settlement discussions and do not take an active role in the negotiations. Even if the plaintiff wanted to confront the doctor, that opportunity is limited because a hospital or insurance representative frequently attends on behalf of the hospital or doctor. Therefore, no opportunity for emotional confrontation is afforded to plaintiffs. Perhaps the unique characteristics of medical negligence disputes lend itself to a tailor-made mediation model.

V DISCUSSION

Analysis of participant responses indicates a high level of engagement with mediation in medical negligence. This finding indicates that mediation is seen by lawyers in this study as a key part of the pursuit of a claim in medical negligence practice. More than half of the lawyers, 16 out of 24 participants, cited legal requirements of the *Civil Procedure Act* or court practice as motivation for

engaging with mediation. The remaining 8 participants pointed to a shifting legal culture that valued mediation for its attributes as a private, speedier, and less stressful experience for their clients. For the majority, it is clear that the mandatory nature of mediation is a powerful tool for the change of culture.[193] Advocates of mandatory mediation contend that mandating ADR increases court efficiency, saves costs, time, and emotions for the parties.[194] The findings in this study suggest that lawyers practising in the Victorian medical negligence jurisdiction have shifted from a traditional preference for litigation to an acceptance of the value of mediation. Insights provided by participants suggest that they believe that mediation of medical negligence claims is conducive to their resolution due to time and cost savings, and because mediation enables party control over decision-making. Expense was a significant factor, with participants emphasising that the complexity of issues and length of expert evidence in medical negligence trials can lead to high fees.

This finding is consistent with previous studies involving lawyers and mediation of medical negligence disputes. In a North Carolina study, 75% of lawyers who were surveyed indicated they would support referring a malpractice case to mediation.[195] A New York study using structured interviews with participants and mediators found plaintiff lawyers were more willing to mediate than defendant lawyers.[196] In contrast, the findings of this research show that *all* 24 participants were willing to engage with mediation, although this willingness was often caused by legislation and court practice directions. These research findings harmonise with findings from a Canadian empirical study of perceptions of legal and lay participants in personal injury disputes, where Relis found lawyers showed strong support for participation in voluntary mediation and did not exhibit opposition to mandatory mediation.[197] Previous studies, and the findings of this research, indicate a trajectory and growing culture of non-adversarial legal practice and a changing legal landscape in medical negligence litigation.

Against the backdrop of increasing use of court-connected mediation to resolve civil disputes and the examination of how lawyers can best contribute to mediation in the literature, it was pertinent to explore how lawyers in medical negligence disputes interact with their clients. Participants' responses indicated a high level of lawyer involvement and control of the mediation process. None of the lawyers allowed their client to have 'free rein' during negotiations. In many responses, participants described their role as 'legal advisor', understanding their purpose as informing their clients on the merits of their case. Some participants described

193 Mahoney (n 80) 120; Hanks (n 2) 929; Redfern (n 2) 11; Venus (n 2) 37; McIntosh (n 2) 286–8.

194 Mahoney (n 80) 126.

195 Metzloff, Peeples and Harris (n 27) 141.

196 Hyman et al (n 107) 804.

197 Relis (n 26) 82.

their role as a 'translator' of the legal system advising on realistic parameters of settlement, whilst others saw their role as 'protector', shielding their clients from the stressful and emotional impact of dispute resolution. These responses fit with Rundle's categorisation of lawyers contributing as expert contributors and spokespersons for their clients.[198]

Analysis of the data indicates that participants in this research tended to dominate the mediation process, with parties frequently absent from negotiations.[199] The focus of lawyers in this study was on achieving the best outcome for their client, but this was constrained to quantum, rather than attending to their clients' possible preference to be engaged in the process. A focus on quantitative objectives meant that non-financial objectives were largely removed from the mediation process. Non-legal objectives of the parties, such as a desire for an explanation or an apology, were sidelined. This finding is consistent with Relis' empirical study of Canadian legal and lay actors in personal injury disputes, in that parties' objectives in mediation are 'emotional, psychological and extralegal', whereas the lawyers' focus was on strategy, tactics, and financial objectives.[200] Relis argues that findings from her study highlight important contradictions in legal policy and initiatives in civil dispute resolution, because the system is not serving disputants' needs.[201]

The approach taken by lawyers in this study was consistent with findings of a study by Sourdin, of mediation use in the County Court and Supreme Court in Victoria, finding that mediation was conducted in the manner preferred by lawyers, as opposed to a style which may best serve their clients.[202] Sourdin's study found that shuttle negotiations with minimal party engagement were most common.[203] These findings are consistent with the evaluative or settlement focused mediation style. Although some studies show that clients may sometimes prefer their lawyer to dominate,[204] this approach is arguably not in line with facilitative mediation model. Lawyers can fail to appreciate that clients may want more than financial outcomes.[205]

The model that participants in this study adopted resembles an evaluative or settlement style of mediation. This 'adapted' model precludes dialogue and negotiation about non-legal interests and constrains the conversation to the sum of money the insurer defendant is willing to pay. Participants' responses

198 Rundle, 'A Spectrum of Contributions That Lawyers Can Make to Mediation' (n 12) 224–5, 227–8.

199 Melville, Stephen and Krause (n 174) 172, citing William LF Felstiner, 'Synthesising Socio-Legal Research: Lawyer-Client Relations as an Example' (2001) 8(3) *International Journal of the Legal Profession* 191, 193.

200 Relis (n 26) 10.

201 Ibid 5.

202 Sourdin, *Mediation in the Supreme and County Courts* (n 154) iv.

203 Ibid 48 [2.11].

204 Melville, Stephen and Krause (n 174) 181. See also Hensler (n 17).

205 Melville, Stephen and Krause (n 174) 187.

indicated that the mediation model used in medical negligence disputes strays from the purely facilitative model taught in mediation training. Instead, the 'adapted' model they describe is heavily influenced by the shadow of the law so that during mediation, focus is on achieving settlement according to parties' legal entitlements. Parties are kept out of the mediation room, so their participation is limited. This 'adapted' model used in Victorian medical negligence disputes requires further empirical investigation, but at its core undeniably resembles an evaluative or settlement style of mediation. Using this 'adapted' model suggests a range of implications around an inability to realise the greatest potential benefits of mediation for users, including the inability to meet the non-financial needs of the parties that can ultimately affect future doctor/patient relations.

Participants in this sample used advocacy skills to persuade the opposing party of the likely success of the case should the matter proceed to trial. Despite the tendency to adopt a 'spokesperson' role at mediation,[206] this cohort of participants did not fully embody a strictly adversarial culture. Rather, they exhibited a cooperative settlement culture in the medical negligence context.[207] The lawyers in this study were repeat players who were highly experienced,[208] and had adapted their own mediation style to suit this niche jurisdiction. The participants created their own mediation culture that was tailor-made for medical negligence, with lawyers handling the complexity of the cases and managing clients fraught with emotion.

The lawyers interviewed were highly skilled and concerned for their clients. They valued protecting their client from further harm, but that protection was at times expressed through control and dominance over the process, particularly by preventing their clients from expressing emotion. The focus of mediation tended to be about achieving the best financial outcome for the client because lawyers viewed that as a primary remedy to help their client. Consequently, they missed out on opportunities to explore non-legal interests of the parties. Lawyers in this study dominated the discourse of the mediation so that it became a vehicle for them to bargain and thus attempt to achieve the most desirable settlement for their client. This had the effect of sidelining self-determination: parties had little opportunity to contribute to the process and thus experience procedural justice. Crucially, in the context of court-annexed mediation in medical negligence, doctors' reluctance to attend mediation and insurance representatives' domination of the process to focus on financial objectives are barriers to altering the style of mediation that has been adapted in this field.

206 Rundle, 'A Spectrum of Contributions That Lawyers Can Make to Mediation' (n 12) 227–8.

207 See Julie Macfarlane, 'Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation' [2002] (2) *Journal of Dispute Resolution* 241 ('Culture Change?'); Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (University of British Columbia Press, 2008) ('*The New Lawyer*').

208 Riskin and Welsh (n 173) 864–5.

The findings of this study indicate that the style of mediation used by Victorian medical negligence lawyers has departed from a purely facilitative model, and strongly resembles an evaluative or settlement model. With their understanding that trial can be protracted, complex, and stressful,[209] lawyers in this study showed empathy and sympathy for their clients. Most participants were protective of their clients and focused on achieving the best outcomes in the circumstances. Legal training equips lawyers with advocacy skills for trial, rather than collaborative and communicative skills for mediation.[210] Participant responses demonstrate an evolved mediation process, which allows lawyers to use their advocacy skills in mediation. This dispute resolution adaptation reflects a traditional legal culture, rather than adopting more non-adversarial approaches that might include procedural justice and party engagement.

The findings of this study capture one particular culture of lawyers that may differ from other practice areas.[211] These lawyers showed an understanding of the emotional needs of their clients, but did not think it was appropriate to allow engagement with those needs in the mediation. This attitude stymies the opportunity to address non-legal interests in this context of practice.

VI CONCLUSION

In summary, the findings of this study provide deep insights into the value of mediation from the perspective of lawyers in medical negligence disputes. The reflections of participants in this study show that lawyers highly valued engagement with mediation for the resolution of medical negligence disputes, with a participant stating that mediation was 'best for the protagonists involved'. This culture of medical negligence lawyers can be traced to legislative endorsement and court practice directions concerning mediation and to a genuine appreciation of the attributes of mediation.[212] Participants valued cost savings, speed, and the reduced emotional stress of mediation. In the mediation process, lawyers tended to dominate, acting as spokesperson and expert contributor/advisor. The focus was on legal rights and financial objectives with the client rarely actively involved in the process and thus there was a reduced opportunity for procedural justice and party engagement. Lawyers reported that the defendant was typically not present and was represented by an insurer. This presented little opportunity for an explanation and apology from the defendant. The impact of emotional concerns on their clients was acknowledged by the practitioners, but their focus was on

209 Michael King and Robert Guthrie, 'Using Alternative Therapeutic Intervention Strategies to Reduce the Costs and Anti-Therapeutic Effects of Work Stress and Litigation' (2007) 17(1) *Journal of Judicial Administration* 30, 35.

210 Macfarlane, *The New Lawyer* (n 207) 30–46, 223–4.

211 Macfarlane, 'Culture Change?' (n 207).

212 See, eg, legislative endorsement of ADR through legislation such as the *Civil Procedure Act* (n 37). See also ibid 241, 244.

avoiding the emotional turmoil caused by a trial. The lawyers did not see value in allowing clients to speak about the emotional impact of their injuries in the mediation.

The high value that lawyers in this study placed on mediation is encouraging, as it indicates a significant change in the legal culture. For this group of practitioners, mediation is a welcome opportunity to provide their clients a positive outcome. This represents an important shift in the ways that lawyers see the mediation process, and their role in representing their clients. To build on this shift it would be advisable to develop legal education and continue professional development opportunities that might assist lawyers to understand the advantages of non-legal issues, including addressing emotional concerns in mediation.[213] Further, it is advisable for lawyers to understand more about procedural justice and the ways that party engagement in the mediation process can assist with party satisfaction. Overall, this study of Victorian medical negligence lawyers is an encouraging sign that mediation has increased acceptance in some parts of our legal community. As discussed, this study provides fertile ground for further research into mandatory and voluntary use of mediation in medical negligence disputes, as well as exploring the use and impact of apologies in this context. Given the continued endorsement by government of the use of mediation and other ADR options,[214] the findings of this study show that lawyers can make a cultural shift that values the positive impact of the mediation process on their clients.

213 Douglas and Coburn (n 11) 143–4.

214 See, eg, *Access to Justice Review: Volume 1* (n 4); *A Strategic Framework for Access to Justice* (n 31).