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# Family Law Mediation: Process Imbalances Women Should be Aware of Before They Take Part

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There is an ever increasing emphasis on using mediation to resolve family law disputes.<sup>1</sup> Mediation is generally seen as a better form of dispute resolution for family matters because, amongst other things, it is considered to be a more flexible, less costly and less time-consuming dispute resolution option, which also allows for the emotions of the parties to be recognised and addressed.<sup>2</sup>

What needs constantly to be kept in mind, however, is that the two parties to a family law mediation, usually a man and a woman, do not necessarily, nor even perhaps often, meet on truly equal terms. Power imbalances are perhaps the biggest problem for women in family law mediation, especially power imbalances that

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1 For example, see Pts III and VII of the *Family Law Act*, 1975 Cth. Also note the policy emphasis on mediation in Access to Justice Advisory Committee *Access to Justice – An Action Plan*, AGPS, Canberra 1994 and Commonwealth of Australia *Justice Statement* AGPS, Canberra 1995 which has not been altered by a subsequent change in government. Note also the discussion about mediation in the Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975 Aspects of its Operation and Interpretation* AGPS, Canberra 1992 at Chpt 13.

2 “Mediation, where a neutral third person assists the parties arrive at their own solution to their dispute, is regarded as being particularly suitable for parties who need to maintain some kind of relationship, as many parties to family law proceedings do. Mediation, as a dispute resolution process in family law, can provide greater flexibility in the outcomes, as parties are not necessarily constrained by legal remedies. Given the wide variety of individual circumstances in family law disputes, such flexibility is desirable.”: Report of the Joint Select Committee *supra*, n2 at 314. Further, according to Biber, “(m)ediation usually works more quickly than either litigation or face-to-face negotiation. The overwhelming majority of matters will eventually settle but the speed element of mediation means a minimisation of costs ... a better result for the parties and less strain for the participants.”: P Biber “Towards a Working Knowledge of Mediation” (1994) 32(7) *Law Society Journal* 32.

result from the perpetration of domestic violence against them.<sup>3</sup> There are, in addition, a number of *process* imbalances with which women must contend. The focus of this article is on some of these process imbalances. In particular the article addresses the repercussions of the confidential nature of mediation, issues relating to the skills of the mediators, and issues relating to voluntary participation in mediation.

The treatment of issues here does not purport to be an exhaustive analysis of the potential difficulties that may arise for women in mediation as a result of process imbalances. Rather the aim of the article is to contribute to raising the awareness of family law dispute professionals about the reality of women's experience in mediation. This is done in the hope that as women are increasingly pushed towards mediation for the resolution of their family law disputes, professionals in the field will advise women about their participation in the process responsibly and appropriately.

## 1. Confidentiality of Mediation

It is a fundamental tenet of the mediation process, usually embodied in statute,<sup>4</sup> or the policy of a mediation service, that the communications between parties and their exchange of information in mediation are confidential.<sup>5</sup> Confidentiality in

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3 For further discussion of the impact of domestic violence and power imbalances on women's participation in mediation see for example, the Position Paper prepared for the National Committee on Violence Against Women by Dr Hilary Astor, AGPS, Canberra December 1991 entitled "Mediation and Violence Against Women", K Mack "Alternative Dispute Resolution and Access to Justice for Women" (1995) 17 *Adelaide Law Review* 123 and R Field "Mediation and the Art of Power (Im)balancing" (1996) 12 *QUT Law Journal* 264.

4 The *Family Law Act* provides in s19N that evidence of anything said or any admission made in a mediation is not admissible in any court. Section 5.3(4) of the *Dispute Resolution Centres Act* 1990 (Qld) makes similar provision and s5.3(2) extends a defamation like privilege to a mediation session; in addition s5.4 requires that mediators take an oath of secrecy. The 1994 - 1995 Annual Report of the former Alternative Dispute Resolution Division of the Department of Justice, Queensland, describes the confidentiality issue as follows: Mediation "... is conducted in private and the content of the mediation sessions is confidential and privileged. Brief information can be released if the parties give their specific consent to do so or where failure to notify an authority of a threat could lead to serious harm.": at 12. Also, with regard to mediations conducted in the Supreme Court of Queensland under amendments to the *Supreme Court Act* 1991 (Qld) introduced by the *Courts Legislation Amendment Act* 1995 (Qld), evidence of anything said or done or of any admission made in a mediation is admissible in another civil proceeding only if the parties agree.

5 See, for example, on this issue: JP McCrory "Confidentiality in Mediation of Matrimonial Disputes" (1988) 51 *Modern Law Review* 442 and HA Finlay "Family Mediation and the Adversary Process" (1993) 7 *Australian Journal of Family Law* 63 at 74-80. There is also the common law doctrine of privilege which might work to protect the confidentiality of mediated proceedings: see Finlay at 77-79 for a short discussion of this doctrine, and the Australian Law Reform Commission, *Evidence* (Vol. 2) Interim Report No.26, AGPS, Canberra, 1985 at Appendix C: "Differences and Uncertainties in the Law of Evidence". See also the High Court of Australia decision of *Rodgers v Rodgers* (1964) 114 CLR 608 at 614 for the application of this doctrine in the matrimonial context. However, the protection afforded by the common law doctrine of confidentiality and privilege is by no means certain and it is preferable for any assurance of confidentiality to be derived from a legislative source: Finlay at 79.

mediation means first that mediated communications are not generally to be divulged by the mediators or the parties, and are not admissible in later legal proceedings (should they eventuate);<sup>6</sup> and, secondly, that the resolution of disputes through mediation is private, away from the dictates of public values and the interference of public authority.

### (a) Issues of Disclosure in Mediation

It is considered an important "... requirement in mediation that it should operate in an atmosphere of openness and freedom of disclosure, without fear of being subjected to procedures forcing disclosure in any court proceedings, particularly in the event of mediation being unsuccessful."<sup>7</sup> Mediated communications are therefore protected through confidentiality in order to encourage the parties to be frank and honest.<sup>8</sup> Where the parties meet on an equal footing, confidentiality is no doubt effective in achieving this. Where, however, a woman is subject to a power imbalance, for example, confidentiality provides her no protection from a failure on the part of the male party to disclose information, and no protection from his disclosure of false information.<sup>9</sup>

The potential abuse of the confidential nature of mediation is therefore problematic for women participants, and is of particular concern where financial matters are being discussed concurrently with children's issues, as they often are. That is,

6 There are certainly some matters which fall outside the protection of confidentiality, such as issues of child abuse, or a serious threat to a person's life or other criminal offence. Such information may be disclosed, for example, under the *Dispute Resolution Centres Act 1990* (Qld) where there are reasonable grounds to believe that disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property (see s5.4(2)). However, issues of domestic violence are not usually considered divulgable by the mediation community.

7 Finlay *supra*, n5 at 74.

8 In this way mediation hopes to overcome trust vacuums and result in the disclosure of 'feeling states' and goals: Irving and Benjamin *Family Mediation* Carswell, 1987 referred to in MJ Bailey "Unpacking the 'Rational Alternative': A Critical Review of Family Mediation Claims" (1989) 8 *Canadian Journal of Family Law* 61 at 71. Further, Winks has noted that "[t]he most important factor for successful mediation is trust.": PL Winks "Divorce Mediation: A Non-Adversary Procedure for the No-Fault Divorce" (1980-81) 19 *Journal of Family Law* 615 at 644. "Candidates for ADR must genuinely desire to communicate with each other to attempt to achieve a resolution. Unless the parties are prepared to sufficiently disclose their position calmly and clearly, they will not create the requisite climate for ADR to be effective.": K Spencer "ADR - An Introduction" (1991) 65 *Law Institute Journal* 40. Also, related to these issues are other aspects of the informality and non-legality of the process, for example, the absence of any evidentiary rules or safeguards.

9 Bailey *supra*, n8 at 71. For women, open communication can be seen as an advantage because it allows for their own expression of their experiences. But it is a question of whether they feel confident giving voice to those experiences and if they do what consequences may follow. Duffield has commented that "... while women may endorse the principle of open communication, their capacities to communicate, including motivation, willingness to compromise, resources, and capacity and power to modify behaviour are generally not strong.": A Duffield "Of Impartiality, Of Imbalance and Process: Women and Power" (1992) 6(1) *Alternative Dispute Resolution Association Newsletter* 7.

a lack of information as to the true state of the family's financial affairs may contribute to a woman's decision not to pursue certain financial rights; or a woman may decide to compromise on financial issues, in order to ensure she obtains residence of the children, without knowing the full extent of the compromise she is making.<sup>10</sup> It is certainly often the case, in relation to financial matters, that the male partner holds most of the information.

Another danger for women arises out of the difficulty of enforcing confidentiality obligations. Realistically, there is nothing to stop a male party from using the mediation process as an information "fishing expedition", either generally, or for the purpose of obtaining information for use in later legal proceedings.<sup>11</sup> Some commentators believe, although I seriously doubt, that persons with such intentions are able to be weeded out through careful screening at the intake stage.<sup>12</sup>

Mediation's confidentiality principle therefore puts women in a position of having to place trust and confidence in their former partner - both in terms of his being full and frank in his disclosures, and in terms of his not abusing the principle of confidentiality. Such trust is, realistically, a very difficult thing to achieve in circumstances where the parties' relationship has broken down, but even more particularly in a mediation where there is a power imbalance between the parties. And in allowing herself to participate openly, a woman places herself at considerable risk of having her trust betrayed.<sup>13</sup> Additionally, where an abuse of process occurs in relation to confidentiality, its negative impact is exacerbated in that the proceedings

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- 10 On the issue of the tendency of women to make such compromises see for example, LJ Weitzman and M Maclean (eds) *Economic Consequences of Divorce: The International Perspective* Clarendon Press, Oxford, 1992; also see Neely and Sandberg's (independent) discussion of this issue in relation to the primary caretaker preference that operates in some states in the United States with regard to child disputes. They comment that the preference can help protect women from making such compromises as it provides greater predictability of outcome at trial: R Neely "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed" (1984) 3 *Yale Law and Policy Review* 168; K Sandberg "Best Interests and Justice" in C Smart and S Sevenhuijsen (eds) *Child Custody and the Politics of Gender* Routledge, London 1989 at 104.
- 11 However, reliance on the confidentiality principle would require legal argument in those legal proceedings in relation to the admissibility of the male party's evidence obtained in this way. It then becomes a matter of proof as to how the male party obtained the information. Argument on such a point could be lengthy and costly for women. Davies and Clarke have acknowledged that "[p]reserving the confidentiality of ADR processes is one of the most difficult legal issues facing the ADR movement today": I Davies and G Clarke "ADR Procedures in the Family Court of Australia" (1991) *Queensland Law Society Journal* 391 at 399.
- 12 V Massey "Alternative Dispute Resolution - A Private Centre" in J Mugford (ed) *Alternative Dispute Resolution Seminar Proceedings No.15* Australian Institute of Criminology, Canberra, 1986 126 at 126-127. Concerns on this point arise from the writer's experiences as an intake officer at the former Community Justice Program (CJP) of the Department of Justice, Queensland in 1994. The intake process for the CJP was very thorough, however there was nothing in the procedures that would alert us to the specific potential in a male partner to abuse the process in this way. Certain males of this type may not have proceeded to a mediation in any event, for example, because the woman would refuse to participate knowing his capacity for such action. However, the writer does not recall a single matter in which concern about this sort of issue was required to be discussed with the intake manager.
- 13 Bailey *supra*, n8 at 71.

cannot be publicised.<sup>14</sup>

Of course, abuse of the confidential nature of mediations cannot be assumed.<sup>15</sup> Women should, however, be made aware of these potential disadvantages before they choose to participate in a mediation. They should also be assisted in developing a safety or fall-back plan for their own protection.<sup>16</sup> Further, mediators should receive specific training in order to identify when a male party is engaging in an abuse of the confidential nature of mediation. Specific training could also assist mediators to counteract such behaviour by, for example, naming it in the mediation as contrary to the principles of the process in which the parties have agreed to participate.

### (b) Privacy

The second element of the confidential nature of mediation is the consequential privacy in which disputes are resolved. Certainly, some women may look to mediation as a way of protecting the family from the public scrutiny that is sometimes felt to attach to litigated proceedings, and they are supported in this by society's belief that family disputes are private.<sup>17</sup> Proponents of mediation are quick to promote the private nature of mediation on this basis, along with other asserted benefits of what is known as private ordering.<sup>18</sup>

However, problems arise for women where family law disputes are resolved away from the public interest yardsticks developed by the courts in relation to, for example, the best interests of the children, and domestic violence.<sup>19</sup> It is undeniable

14 Commonwealth of Australia Senate Standing Committee on Legal and Constitutional Affairs *Costs of Legal Services and Litigation - Methods of Dispute Resolution* Discussion Paper No 4, AGPS, Canberra 1991 at 73.

15 Winks believes that "[i]n mediation, 'things to contest' are fully disclosed to both parties so that they become things to negotiate and to compromise.": Winks *supra*, n8 at 636.

16 That is, women should be encouraged to use any private sessions with the mediators to discuss their fears or concerns on this issue; for example, that the male party is not fully disclosing all financial information or that they are anxious to speak frankly themselves for fear of his possible later misuse of that information.

17 Astor has commented on the likelihood of women being referred to mediation more frequently on the basis that mediation is particularly suited to 'interpersonal disputes' or disputes involving 'ongoing personal relationships' which are of their nature "... disputes occurring in the 'private' and typically women's world of the family and the home ... .": H Astor "Feminist Issues in ADR" (1991) 65 *Law Institute Journal* 69.

18 See RH Mnookin and L Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 950 at 974.

19 See for example, Div 9 – 11 of Pt VII of the *Family Law Act* 1975. Admittedly, there are difficulties associated with the term 'public interest' as it is a term often over-used in a meaningless way. It is not, however, within the scope of this article to discuss the concept in any detail. An important element of public interest is, however, that future disputing parties are prevented from knowing how disputes similar to theirs have been resolved in the past - see, for example, SSCLCA Discussion Paper No 4 *supra*, n14 at 73. To this argument Finlay, who does not accept the point, has asked: "Does the law exist to serve the people, or do the people exist for the purpose of serving the law?": Finlay *supra*, n5 at 63. Nevertheless, "[c]oncern has been expressed regarding the fact that such agreements do not have precedent value and may leave fundamental issues unresolved.": SSCLCA Discussion Paper No 4 *supra*, n14 at 72.

that there is a very public aspect to the resolution of private family law disputes.<sup>20</sup>

It is of particular concern that mediation privatises issues of violence and has no means of properly protecting a victim of violence.<sup>21</sup> In mediation the perpetrator of violence feels further empowered by the private context the process affords his violent behaviours, and the mediation process actively assists him by sanitising and decriminalising the violent behaviour, "... conveying to the perpetrator no message of unacceptability or criminality and reinforcing in the victim feelings of despair, isolation and blameworthiness."<sup>22</sup> The confidentiality of mediation thereby keeps any abuse or inequality issues between the parties safely inside the private arena, avoiding any public disapproval or sanctions.<sup>23</sup>

Whilst there are many concerns about the way that litigation processes family law disputes, it is, however, "[a]n oft-forgotten virtue of adjudication ... that it ensures the proper resolution and application of public values."<sup>24</sup>

The Family Court determines family law issues according to the public interest by balancing the private wishes and autonomy of the parties against the goals of public policy. Judicial adjudicators are by no means perfect in their determinations, and are themselves in need of a greater awareness of gender related issues in the context of family dispute resolution. Their task, however, is not to maximise the ends of private parties but to identify and give force to objective values.<sup>25</sup> Moreover, "[t]he judicial arm of government is constrained by the requirements that proceedings take place under the scrutiny of the public gallery and that judges have to give reasons for their decisions, which are in writing and subject to the appeal process."<sup>26</sup>

Certainly there is the possibility that a judge's ultimate duty to society may result in the prioritisation of the protection of the state's goals, which may not be in

20 Indeed the state has a degree of interest in any dispute concerning children, as it has responsibility for their protection: Mnookin and Kornhauser *supra*, n18 at 954 and 957.

21 Astor has commented that "[a] danger of increased referral to ADR is that issues crucial to women will be returned to the 'private' world of welfare, private ordering and the family which has been their traditional domain. Women's issues could fade from the public agenda and decisions in disputes involving women be made according to norms which are unarticulated and unable to be challenged.": Astor *supra*, n17 at 71.

22 R Alexander "Mediation" Paper Presented at "Challenging the Legal System's Response to Domestic Violence Conference" Southside Domestic Violence Action Group, Brisbane, 23-26 March 1994 at 5.

23 *Ibid.*

24 HT Edwards "Commentary - Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99 *Harvard Law Review* 668 at 676.

25 See OM Fiss "Against Settlement" (1984) 93 *Yale Law Journal* 1073 at 1085.

26 R Ingleby "Catholics, Communists, Alternative Dispute Resolution and Bob Dylan" (1990) 1 *Australian Dispute Resolution Journal* 18 at 19-20. The state also has some interest in preventing the complete by-pass of the courts as this would result in a decrease in the influence of their decisions, the impairment of the development of legal doctrine, and, ultimately, the prejudice of the stability and predictability of the legal system. See for example, the speech of Justice Sir Gerard Brennan given in 1990 quoted in AL Limbury "A Practitioner's View of ADR" Paper Presented to the 9th Annual AIJA Conference, Melbourne 18-19 August 1990 101 at 105.

the interests of women.<sup>27</sup> Increasingly, however, the state's objectives appear to include the protection of women from abuse and violence, and the empowerment of women within families and society.<sup>28</sup>

It is therefore important, in order not to risk the disappearance of legal values which have been established in relation to family law disputes, and issues of violence, that our embrace of alternatives to litigation does not endanger even that modicum of protection for women and children which the law has to date accomplished. That is, mediation should not be allowed to replace established family law principles, and sanctions against violence against women, with private values<sup>29</sup> - especially where those values are likely to be determined, in the mediation, by the person with the power imbalance in their favour. The rights of women must be protected from such jeopardy.<sup>30</sup>

Proponents of mediation make much of the agreement rates achieved by their process.<sup>31</sup> However, the mere resolution of a dispute through mediation is no indicator that the public interest, and through it the individual rights of women, have been properly served. Certainly, this is not to say that private settlements can never produce results consistent with the public interest; but rather processes should perhaps be developed whereby the confidentiality of mediation is overridden in circumstances where there is a departure from the rule of law, and where that departure may result in fundamental human rights being subjugated to inconsistent private interests.<sup>32</sup>

Professors Mnookin and Kornhauser support the notion that public values can be protected along with the mediation of family law matters if settlements are subject to court review.<sup>33</sup> Currently, however, the principle of confidentiality in mediation does not allow for judicial review to occur without the consent of the parties. More importantly for women, there are significant costs implications in seeking a judicial sanction of a mediated agreement.

The issues concerning the confidentiality of mediation raised above may have a theoretical or academic flavour, but their impact on the reality of women's experience of family law mediation is all too real. For this reason, not only must law and

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27 JE Effron "Alternatives to Litigation: Factors in Choosing" (1989) 52 *Modern Law Review* 480 at 496.

28 For example, the inclusion of the violence provisions in Pt VII of the *Family Law Act* 1975 by the *Family Law Reform Act* 1975. Also, for an articulation of these issues as public objectives in Australia at federal level under the former Labor Government see: *Justice Statement supra*, n1 at 18 with regard to the protection of women against violence and at 75-95 with regard to the National Women's Justice Strategy.

29 *Ibid* at 677. On the issue of the inclusion of violence provisions in the *Family Law Act* 1975 see for example J Behrens "Ending the Silence, But ... Family Violence under the Family Law Reform Act 1995" (1996) 10 *Australian Journal of Family Law* 35.

30 Under current models of mediation mediators are not usually in a position to provide information to parties, particularly in circumstances of a power imbalance, which will protect their legal rights.

31 For example, at intake at the CJP parties were encouraged to participate in mediation through an emphasis of the fact that 89% of mediated disputes result in an agreement.

32 See also, Edwards *supra*, n24 at 678.

33 Mnookin and Kornhauser *supra*, n18 at 993.

mediation practitioners be aware of these things, they also have a responsibility to inform women participants about them before those women engage in mediation.

## 2. Mediator Related Process Issues for Women in Mediation

### (a) Neutrality of Mediators

Whereas litigation claims objectivity, mediation professes neutrality. The mediator is said to be a "third party neutral" who is dispassionate about the disputants, the dispute and the outcome, and mediators claim that they are non-partisan, and non-judgmental.<sup>34</sup> Theoretically, this argument is sustained by the fact that the mediator has no power to make a decision for the parties, as the content and resolution of the dispute lie in the control of the parties. The mediator controls only the process.<sup>35</sup> In practice, however, the possible impact of the personal views and family values of mediators on the outcome of a mediated family law dispute, despite their ostensible neutrality, is an issue of potential concern for women.

The first concern arises because, notwithstanding any theory of mediation process, and notwithstanding any assurances the mediators may give to the parties before a mediation commences, the reality is that "[t]rue neutrality is impossible to attain because of differing individual cognitive schemata."<sup>36</sup> Mediators, as human agents, will necessarily bring certain personal and professional biases to the mediation process.<sup>37</sup> After all, "... if divorce is as frequent among mediators as it is in the national population, many mediators are likely to have direct knowledge that comes from their own divorce."<sup>38</sup>

The myth of neutrality becomes hazardous for women in mediations where it forms the basis of their trust in both the mediators and the process. This trust is misplaced in circumstances where, for example, a mediator who has a preference for, perhaps, shared parenting, unconsciously (or worse, consciously) uses his or her control over the process to create more opportunities for this option to be

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34 "The mediator is not engaged to protect the interests of the parties; each must protect its own when considering any settlement proposal." A Batterby "Lessons to be Learned from ADR Procedures" (1991) 65 *Law Institute Journal* 53 at 54.

35 See for example, L Street "The Language of Alternative Dispute Resolution" (1992) 3 *Australian Dispute Resolution Journal* 144 at 146.

36 GV Kurien "Critique of Myths of Mediation" (1995) 6 *Australian Dispute Resolution Journal* 43 at 52.

37 *Ibid.* See also G Davis *Partisans and Mediator* Clarendon Press, Oxford, 1988 and M Fineman "Dominant Discourse, Professional Language and Legal Change in Child Custody Decision-Making" (1988) 101(4) *Harvard Law Review* 727. Further, Professor Robert Dingwall in an address to the UK Association of Family Court Welfare Officers' Conference on 7 June 1995, is reported as having said that "... the burden of the published research evidence ... is that decisions in mediation are strongly influenced and shaped by mediators." He went on to say: "... what we object to is the pretence that this does not go on.": reported in B Cantwell and M Nunnerley "A New Spotlight on Family Mediation" (1996) 26 *Family Law* 177 at 179.

38 ML Leitch "The Politics of Compromise: A Feminist Perspective on Mediation" (1987) 14/15 *Mediation Quarterly* 163 at 168.



explored, or to steer the parties around obstacles and into the desired direction of thought.<sup>39</sup> An even more significant danger could arise, for example, where the mediator believes that the use of violence against a woman may be justified or appropriate, or where they are a perpetrator of a form of violence themselves.<sup>40</sup>

If true neutrality is not achievable, then how can a mediator preserve the integrity of mediation and avoid the inappropriate imposition of their own values upon the parties? One approach is for mediators to abandon the neutrality jargon and actively seek to curb the extent of their personal influence through identification and acknowledgment of personal biases.<sup>41</sup> This may involve a decision not to proceed as mediator for a particular mediation. A mediator's preoccupation with having to appear neutral will otherwise potentially significantly disadvantage a woman's participation in the process.<sup>42</sup>

The second major concern in this context arises out of the conflict between the theory of mediator neutrality and mediator assertions of an ability adequately to address power imbalances. The mere process of power imbalance identification could be argued as being biased towards one party, usually the woman. Actually to take steps to intervene to redress the imbalance is unavoidably non-neutral.

Mediators must therefore acknowledge the reality of their position. Either they are neutral and unable to redress imbalances,<sup>43</sup> or they make no claim as to neutrality and recognise that "... affirmative action on behalf of the woman is required in order to achieve a balanced agreement."<sup>44</sup> That is, "... if one has been systematically subordinated, one must be systematically superordinated in order to achieve balance."<sup>45</sup> Maintenance of the myth of neutrality will work only to prevent the appropriate and sensitive superordination of women who are otherwise disadvantaged by power and process imbalances in family law mediations.<sup>46</sup>

39 Astor *supra*, n3 at 9.

40 Astor has remarked upon the continued wide acceptance of violence in family relationships in Australia and mentions research that reflects that 1 in 5 Australians thinks that it is acceptable for a man to use violence against his wife: Astor *supra*, n17 at 70.

41 Kurien *supra*, n36 at 52.

42 In this way the woman's disadvantage is emphasised in that "[p]ositions of neutrality or balance in mediation that focus on attainment of agreement through compromise have a high risk of replicating existing conditions of inequality supported by patriarchy.": Leitch *supra*, n38 at 169.

43 Bailey *supra*, n8 at 93.

44 Leitch *supra*, n38 at 169. The notion of superordination conflicts, however, with mediation's commitment to formal equality. Grillo has commented on this point: "Equating fairness in mediation with formal equality results in, at most, a crabbed and distorted fairness on a microlevel; it considers only the mediation context itself. There is no room in such an approach for a discussion of the fairness of institutionalised social inequality." (for example, differences in earning power, and differences in attitudes to parenting and its associated responsibilities): T Grillo "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale Law Journal* 1545 at 1569.

45 Leitch *supra*, n38 at 170.

46 However, where the neutrality fallacy is maintained mediators may be tempted "... to put pressure on the weaker and more compliant party to do the compromising - to meet unreasonable demands half-way.": Astor *supra*, n17 at 71.

### (b) Reliance of Women on Skill Levels of Mediators

The issue of neutrality and the mediator's ability to cope with the ethical and practical dilemmas it raises leads to a more general concern for women engaged in mediation arising from their dependence on the skills of the mediators. In this context, it is important to note that the mediator is in a special position of power because they are the controller of the process, and because the parties look to him or her for cues throughout the mediation.<sup>47</sup> As yet, however, the profession remains unregulated with no consistent or federally applicable means of accreditation.<sup>48</sup>

Whilst the presence of a professional background is not a legitimate prerequisite for becoming a mediator,<sup>49</sup> it is generally agreed that to ensure adequate skill levels in mediators their basic qualification must include training in mediation techniques. In addition, however, there should be continuing training and monitoring of a mediator's performance.<sup>50</sup> Certainly the former Community Justice Program's (CJP, Department of Justice, Queensland) model was an excellent one, consisting of a 72 hour course with the requirement that mediators satisfactorily complete three monitored mediations prior to accreditation, along with annual auditing processes.<sup>51</sup> However, many mediator training courses follow only a short workshop format - with much reliance being placed on the course "manual" - and involve no follow up after "accreditation".<sup>52</sup> Further, some training providers do not even ensure competency levels in persons having completed their course, merely providing them with a certificate of training completion.<sup>53</sup>

It has been said that with the necessary skills a mediator should be able to "... adapt the process to suit the individual needs of the parties in conflict."<sup>54</sup> Women involved in family law mediations have very particular needs, most particularly where there is a power imbalance.<sup>55</sup> Even where the mediator has a high level of mediation

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47 Grillo *supra*, n44 at 1556 and Astor *supra*, n17 at 9.

48 Note recently, however, that a National Accreditation Committee has been established and strict requirements are now imposed under the *Family Law Regulations* on mediators who wish to undertake mediations pursuant to the *Family Law Act* provisions. See Pt 5 of the Regulations, Div 2 - "Family and Child Mediators", in particular, regs 59 and 60.

49 See D Gibson R Hazelwood D Brustman B Rogers and M Lewis *Primary Dispute Resolution in Family Law - Summary of Findings Arising from Four Pilot Programs* Legal Aid and Family Services, Commonwealth Attorney-General's Department, AGPS, 1995 at 14. Note also the former CJP's policy of not requiring any formal qualifications prior to training: Department of Justice and Attorney-General, QLD, Community Justice Program Brochure: "We Can Work It Out", September 1995 at 1.

50 Gibson et al *supra*, n49 at 14.

51 See the Annual Report for 1994 -1995 of the Alternative Dispute Resolution Division, Department of Justice and Attorney-General, QLD at 19 and Community Justice Program Pamphlet: "Some Often Asked Questions - 'How do I become a mediator? What qualifications do I need?'"

52 For example, LEADR (Lawyers Engaged in ADR) runs a four day course and Bond University's course is only three days long.

53 For example, LEADR.

54 Kurien *supra*, n36 at 50.

55 Mediators without adequate training will not have the necessary skills to assess whether a person is a victim of violence or to identify circumstances where there is a power imbalance. Necessary

training, women are vulnerable to the quality of that training and to the mediator's personal views on, and responses to, conflict,<sup>56</sup> and also the larger social, economic, and political context of family functioning and family values. And it is of particular concern that some mediators, as a result of their training,<sup>57</sup> may believe that they can "package away" violence or power imbalance issues.

One commentator believes that "[t]he importance of training of the mediator derives from the simplicity of mediation."<sup>58</sup> However, the mediation process is deceptively complex, particularly if women are not to be disadvantaged by it. Moreover, realistically, mediation is more than its process - it is also the parties and their dispute; and it is the complexity of both the issues in, and the dynamics of, a family law mediation, particularly the issues facing the woman, that make sophisticated, thorough gender appropriate training necessary for the protection of women's rights.

### **(c) Potential for Mediators to Focus Excessively on Achieving Agreement**

Another issue of concern for women engaging in mediation is the tendency for some mediators to place personal and professional standing on whether they have been able to lead the parties to some sort of agreement.<sup>59</sup> Mediators are only human after all, and their desire to see a resolution may encourage them to take a more interventionist role. Studies show a highly interventionist style on the part of the mediator to correlate with the reaching of an agreement at the conclusion of a mediation.<sup>60</sup> Driven by their own opinions and family values, such intervention is not only (again) a contradiction of their "neutrality", but is potentially contrary to the interests of the woman party.

Ingleby has acknowledged the high value placed on settlement rates in alternative processes such as mediation, and the resultant concentration on the parties reaching some form of agreement.<sup>61</sup> His view is that "... although social administrators, with their concerns about the costs of processing disputes, revel in quantitative analysis such as settlement, processing and take-up rates, sociologists'

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skills in this area constitute more than good communication skills, a sense of empathy, acceptance of the worth of other people, and toleration of a wide range of personalities and behaviour. There are, the writer believes, at present insufficient mediators who are skilled in recognising and dealing appropriately with domestic violence situations: Field *supra*, n3.

56 M Kirby "Mediation: Current Controversies and Future Directions" (1992) 3 *Australian Dispute Resolution Journal* 139 at 146.

57 Some training programs associate such skills with notions of neutral integrity and tolerance.

58 Kurien *supra*, n36 at 50.

59 "The mediator's role is to achieve settlement.": Batterby *supra*, n34 at 54. However, consideration of issues relating to the long-term success of mediated agreements has found that contrary to the beliefs of many mediators, the long-term success of a settlement is not a simple function of reaching an agreement, or even the quality of that agreement: see DG Pruitt RS Peirce NB McGillicuddy GL Welton and LM Castrianno "Long-Term Success in Mediation" (1993) 17(3) *Law and Human Behaviour* 313 at 325.

60 See K Kressel "Clinical Implications of Existing Research in Divorce Mediation" (1987) 15(1) *The American Journal of Family Therapy* 69.

61 Ingleby *supra*, n26 at 20.

qualitative analyses have seen coercion rather than consent as a dominant feature of informal processes."<sup>62</sup>

There are, consequently, significant concerns for women that what may in fact be coerced capitulation in a mediation (resulting perhaps from a desire to end the dispute, or to escape the pressures being placed on her by either, or both, her former partner and the mediator) is restructured with the label "successful resolution" or "agreement" and then statistically analysed as consent.<sup>63</sup>

It is therefore possible that the identification of settlement as the proper target of mediation places women and their interests in jeopardy. This jeopardy is even more disquieting in that it potentially arises out of the personal goals and professional ambitions of the mediators themselves. The absence of any protections afforded by legal formalities increases the risk of an inequitable outcome.<sup>64</sup> And whilst the writer would not subscribe to the assertion of Fiss that settlement always amounts to a capitulation and should neither be encouraged nor praised,<sup>65</sup> the writer believes that the dangers of a mediator's potential preoccupation with settlement must be acknowledged and addressed.

Even where proponents of mediation acknowledge that mediations do not always succeed, they nevertheless assert that "... the prospect of success [is] normally ... sufficiently good to require serious consideration to be given to implementing this mechanism."<sup>66</sup> Settlement statistics are then used as indicators and evidence of mediation's ability to "produce results".<sup>67</sup> And despite the fact that high settlement figures are inevitably based on self-selecting samples (in that those who choose to enter mediation might be said to be more likely to produce an agreement<sup>68</sup>), they are nevertheless used to outweigh or override identified disadvantages for women in family mediation, particularly problems arising from violence or power imbalances.<sup>69</sup>

62 *Ibid.*

63 *Ibid* where he questions the restructuring of the reality of mediated outcomes in this way.

64 R Ingelby "Why Not Toss a Coin? Issues of Quality and Efficiency in the Evaluation of Alternative Dispute Resolution" Papers Presented at the 9th Annual AIJA Conference, Melbourne 18-19 August 1990, 51 at 56.

65 Fiss *supra*, n25 at 1075.

66 L Street "The Philosophy of Mediation", Paper Presented at the Fifth International Criminal Law Conference, Sydney 25-30 September 1994 at 10.

67 Ingelby *supra*, n64 at 55. Note also the CJP assertion that 89% of mediated disputes at the program result in some form of agreement: ADRD Annual Report 1994 -1995 *supra*, n51 at 16.

68 Ingelby *supra*, n64 at 56.

69 For example, an article about Relationships Australia's mediation service in South Australia relied on agreement rates to assert that their policy of allowing as few barriers as possible to be put up to parties wishing to engage in mediation was successful and appropriate: N Fuller "Outcomes of Family Mediation - Rates and Types of Agreements" (1995) 6 *Australian Dispute Resolution Journal* 262 at 272. Included in the meaning of the term "barriers" was the screening of parties from the mediation process on the basis of power imbalances or domestic violence. In the study of 182 cases an agreement rate of 86% was found to have been achieved. This result was used to support "... the belief that mediation is likely to be suitable for the vast majority of couples who are willing to attend a mediation session together.": *ibid* at 270. The study noted that "[a] greater proportion of issues relating to children resulted in agreements ...": *ibid* at 271-2. And asserted that this was because, whilst custody and access (now known as residence and contact) disputes are highly

Consequently, women may be convinced, without being apprised of the potential disadvantages for them in mediation, that they should “give it a go”,<sup>70</sup> because at least some form of agreement is likely to result.<sup>71</sup> This, in the view of the writer, is not only an inadequate rationale for a woman to choose mediation as a dispute resolution method for a family law dispute, in the light of the complexity of the issues involved, but is fraught with danger for women who are likely to be significantly disadvantaged in the process itself.<sup>72</sup>

### 3. Consenting to Mediation

The scope of this article cannot extend to a full discussion of all process issues that may arise for women in mediation, but one final matter warrants some discussion, and that is, the reality of whether women really do have a choice when it comes to being “voluntary” participants in the mediation process.

Family mediation is in all contexts in Australia, except for Legal Aid Conferences in Queensland and New South Wales, an ostensibly voluntary process. That is, each party must agree to participate, and either party can terminate the mediation at any time. In fact it is generally considered a hallmark of Australian mediation that it is a consensual process whereby the parties are helped to reach their own agreement, and that consequently anyone compelled to submit to mediation is unlikely to participate in a frame of mind conducive to the settlement aims of the process.<sup>73</sup>

Even where participation in mediation is ostensibly voluntary, however, one might query whether women have a realistically free choice to accept or reject the process.<sup>74</sup> That is, a woman’s decision to mediate may often result from economic pressures, such as prohibitively high legal costs but ineligibility for legal aid, or a

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emotive, parents have a tendency to place the interests of their children above their own interests, and may therefore be more willing to compromise their own interests for the sake of the children: *ibid*. The writer is not in a position to contradict these claims. The concern, however, is that the high agreement figures may have come at great personal cost to the women involved. The issues raised in this article are ignored at the peril of women’s rights, and cannot be overridden by enthusiasm for the professed success of the mediation process. Further, surveys such as that conducted by Relationships Australia (SA) are compromised by the fact that parties pay for their services. There is, therefore, very little incentive for them to acknowledge the dangers and difficulties with the mediation process and much incentive for them to focus on promoting their business.

70 See the conclusions made on this issue in section 4 below.

71 It should be acknowledged that partially successful outcomes may benefit a woman where agreement is at least secured on one issue if not on all. See also S Gribben “Mediation of Family Disputes” (1992) 6 *Australian Journal of Family Law* 126 at 130.

72 It is also concerning that it results in part from the prioritisation of the need of mediators and proponents of mediation to create the impression of demand for their services: Ingleby *supra*, n64 at 55.

73 Limbury *supra*, n26 at 112. Gibson et al also acknowledge that “[t]he ideal circumstances for mediation are where both parties voluntarily attend without compulsion from an external influence.”: Gibson et al *supra*, n49 at 12.

74 See Mack *supra*, n3 at 135.

desire to channel whatever resources there are into the children and housing rather than into litigation.<sup>75</sup> The new focus on mediation in the family law context, found in Pts III and VII of the *Family Law Act*, merely heightens the pressure women will be under to agree to participate in mediation.

In addition, however, it is of particular concern that it is the policy, for example, of the Legal Aid Commission of Queensland to make participation in a mediation-like conference a compulsory step in accessing aid in residence and contact matters.<sup>76</sup> The rationale behind the policy is clearly an endeavour to have as many disputes as possible "resolved" for the least financial outlay.<sup>77</sup> For many women in Queensland, the realistic result of their financial reliance after separation on legal aid funding for the resolution of any residence and contact dispute, is that they are forced into mediating with the children's father, even where they may not feel comfortable doing so, and even where it is sometimes inappropriate that they do so.

In this way women are required to engage in a process which is potentially extremely disadvantageous to their interests. Additionally, however, the woman's attitude in the conference to compromise and consensus are part of the assessment as to whether she is deserving of continued legal aid. So not only is she compelled to mediate, but she will be denied an opportunity to engage in a more suitable formal process if she is not sufficiently compliant with the male party's demands in the mediation. That compliance may, however, result in an agreement as to contact, for

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75 Australian research has established that women are worse off financially after separation than their former partners: P McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* AIFS, Prentice-Hall, Melbourne, 1986 at 127-128. This has consequences in terms of the ability of women to afford litigation and is a contributing factor to the heavy reliance of women on legal aid for family law matters.

76 The Legal Aid Commission of New South Wales has a similar policy. Grillo has said of mandatory mediation that it "... provides neither a more just nor a more humane alternative to the adversarial system of adjudication of custody, and, therefore, does not fulfil its promises. In particular, quite apart from whether an acceptable result is reached, mandatory mediation can be destructive to many women and some men because it requires them to speak in a setting they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be.": Grillo *supra*, n44 at 1549-50. For other assessments of compulsory mediation, although not always with women's issues in mind, see: A Cleary "Coercive Mediation" (1991) 21 *Family Law* 121; NG Maxwell "Keeping the Family Out of Court: Court-Ordered Mediation of Custody Disputes Under the Kansas Statutes" (1986) 25 *Washburn Law Journal* 203; BJ Moline "Court-Ordered Mediation: New Opportunities in Family Practice" (1985) 54 *The Journal of the Kansas Bar Association* 97; Note "Mandatory Custody Mediation: A Threat to Confidentiality" (1986) 26 *Santa Clara Law Review* 745; Note "California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes" (1985) 1 *Ohio State Journal on Dispute Resolution* 149; L Silberman and A Schepard "Overview. Court-Ordered Mediation in Family Disputes: The New York Proposal" (1986) 14 *New York University Review of Law and Social Change* 739; and NA Welsh "Court-Ordered ADR: What are the Limits?" (1991) 12 *Hamline Journal of Public Law and Policy* 35.

77 It must be acknowledged that Legal Aid has significant funding problems with which to contend. Legal Aid's strategy with regard to compulsory mediation is partially a result of its having to be as economically rationalist as the governments on whom it is dependent for its financial resources.

example, in which her own safety may be significantly jeopardised.<sup>78</sup>

An assessment of a number of Australian mediation service providers, including the compulsory conferences of Queensland, has concluded that “[i]t is difficult to evaluate the impact of “voluntary” as opposed to “compulsory” schemes at this stage, because of the significant difference between all the mediation programs.”<sup>79</sup> The issues raised in this article confirm, however, that any compulsory form of mediation for women is highly inappropriate. Women must be given the opportunity to assess the mediation process, its advantages and disadvantages, and to arrive at their own free decision on whether to participate.

#### 4. Reality Testing Mediation - Is it Always Worth “Giving Mediation a Go”?

It has been said that “[i]t is much easier to mediate before a matter gets into the court system ... . Let the new motto and culture be: ‘Try mediation before litigation’.”<sup>80</sup> In the light of the issues addressed in this article, this section now turns to the question of whether it is in fact appropriate always for women to try (or to be encouraged to try) mediation before litigating their family law dispute. Certainly this is the position many women will now be in as a result of the current provisions of the *Family Law Act*. Further, many women simply do not have the option of litigating, and mediation is perhaps one of the only third party assisted dispute resolution process options readily available to them.<sup>81</sup>

In a survey of Queensland family law practitioners and mediators conducted in 1994<sup>82</sup> responses endorsed the approach adopted in Pts III and VII of the *Family Law Act*, to encourage disputants to mediate before litigating. This reflection of a

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78 The writer has heard anecdotal evidence from lawyers that conferences often proceed even where there is documented history of violence on the part of the father - for example, copies of protection orders on file.

79 Gibson et al *supra*, n49 at 12. They conclude that “[m]ore education that leads to an acceptance of the value of these processes in resolving disputes will result in greater use of these services.”

80 J Weingarth “Mediation Before Litigation” *Financial Review*, 11 September 1995. It has been said that “[t]he earlier the application of ADR procedures the greater the likelihood of settlement. This is largely due to the savings in legal costs and the minimisation of unproductive time.”: Batterby *supra*, n34 at 53. And Sir Laurence Street believes that “[e]ven if [mediation] does not wholly resolve the dispute it will build a bridge of communication and hopefully a bridge of understanding between the parties. Moreover it will almost certainly assist in confining the area of the conflict between them.”: Street *supra*, n66 at 10. Further, an American commentator hopes “... we will again make litigation an exception, a last resort, a necessary evil at the margins of our common life.”: WK Olson *The Litigation Explosion - What Happened When America Unleashed the Lawsuit* Truman Talley Books, New York, 1991 at 348.

81 See the discussion in section 3 above, for example, in relation to financial pressures on women to mediate.

82 The survey was conducted as a part of a Masters thesis by the writer entitled *The Use of Mediation and Litigation for the Resolution of Custody and Access Disputes: Some Issues for Women*. The thesis was supervised by Assoc Prof P Tahmindjis of the QUT Faculty of Law and the degree was awarded with honors.

professional commitment to mediation in the family law context makes it all the more important that such professionals are encouraged to keep the limitations of the mediation process for women constantly in sight, particularly if mediated outcomes to family law disputes are to be equitable in terms of the women participants.

From the perspective of women, mediation is not always, or even necessarily usually, a dispute resolution option that should be "given a go" in order to resolve a family law dispute. Much depends on the individual circumstances of the participants, and the level of awareness they have about the process and their part in that process. For this reason mediation services must be far more scrupulous in checking whether matters are suitable for mediation, and practitioners must be far more discerning in referring matters to mediation.<sup>83</sup> This is because the recent focus on encouraging the mediation of family law disputes creates the danger that many women will be subjected to the process imbalances outlined here, consequently denied procedural protections and ultimately perhaps forced to accept inexpensive and ill-informed outcomes.<sup>84</sup>

In short, the concern for women is that the emphasis on mediation may result in their being directed towards a form of second-class justice. Inexpensive, expeditious, and informal dispute resolution is certainly not necessarily synonymous with fair and just dispute resolution.<sup>85</sup> Mediation may be appropriate and successful in some circumstances, but care must be taken to avoid the provision of "quick and dirty" justice for women because they cannot afford to litigate, "... while 'real' justice is reserved for those who can afford to go to court."<sup>86</sup> If that were to occur, mediation would have become a tool for diminishing the judicial development of women's legal rights; and the opportunities for legal redress of wrongs suffered by

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83 The Family Law Council has recommended that government-funded mediation services adopt guidelines on the suitability of mediation in certain circumstances. For example, that mediation is not appropriate where a party is unable to identify his or her needs or interests, and/or is unable to act rationally in accordance with them; where a party is treating mediation as a delaying tactic or other abuse of court process; where there is a serious inequality in the parties' capacity to negotiate; or where there is fear or threat of violence or abuse, or where violence or abuse is occurring." : Family Law Council *Family Mediation* AGPS, Canberra, 1992. See also, Note "Developments and Events: Family Law Council *Family Mediation* AGPS, Canberra, June 1992" (1993) 7 *Australian Journal of Family Law* 6 at 6-7.

84 Edwards *supra*, n24 at 679.

85 *Ibid.* In particular, it has been said of family law that it "... offers one example of this concern that ADR will lead to 'second-class justice'. In the last ten years, women have belatedly gained many new rights, including new laws to protect battered women ... . There is a real danger, however, that these new rights will become simply a mirage if all family law disputes are blindly pushed into mediation." : *ibid.* However, de Jersey J amongst others, believes that it is difficult logically to assert that a mediated, consensual agreement is not just: P de Jersey "ADR: Why All the Fuss?" Papers Presented at the 9th Annual AIJA Conference, Melbourne, 18-19 August 1990, 67 at 70. And the Standing Senate Committee on Legal Costs concluded that it was "... not convinced that assisted dispute resolution mechanisms provide second class justice." : SSCLCA Discussion Paper No 4 *supra*, n14 at 67.

86 *Ibid* at 66.



women would have been sacrificed to a policy commitment to cheaper dispute resolution.

## 5. Conclusion

This article discusses a number of process imbalance issues for women in mediation which are related or additional to those regarding power imbalances. Many of these issues result from the fact that the rhetoric and theory of mediation, both of which often sound convincing and satisfactory, have not been developed with the reality of women's experiences in mind.

The problems arising for women as a result of the confidentiality of the mediation process are unlikely to be addressed in the near future. For example, the Standing Senate Committee on Legal Costs concluded that "... all the evidence received by the Committee regarding this issue has favoured the retention of mediation confidentiality."<sup>87</sup>

The problems arising for women as a result of the neutrality jargon of mediation can only be addressed if the jargon itself is abandoned. There is a need therefore for a feminist re-evaluation of mediation theory, as well as a commitment to training mediators to better understand the realities of experience for women participants in mediation. There must also be a national commitment to quality assurance with regard to mediation service providers, and a concomitant rejection of any undue emphasis on mediation settlement rates.

Finally, women should not be compelled to mediate in any circumstances. Not by virtue of their financial circumstances or by virtue of the public and legal policy of the day on family dispute resolution.

It is crucial for women that family dispute professionals develop an understanding of the issues raised in this article. Equally importantly, women themselves must be fully apprised of these issues, and those relating to domestic violence and other power imbalances, before they decide to engage in mediation. If justice is to be achieved, women involved in family law disputes must be allowed access to an appropriate procedure, based on an informed decision resulting from access to adequate information. Family dispute professionals have access to the necessary knowledge, and they also have the responsibility, to work towards the protection of women in this regard.

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87 *Ibid* at 73.