

*The Reconstructionist Model of Mediation: A Social
Constructionist View of Mediation as Relational Learning in the
Quest for Meaning to Make Sense of Loss.*

Loss fuels the Meaning we give to Life:
Mediating Loss for a Humane society:

Welcome everyone to Resolution Institute's lunchtime session on ***Mediating Loss for a Humane Society***. My talk today will focus on how aspects of Law and Psychology combine in the process of Mediation to make sense of the loss that gave rise to the dispute and how acknowledging the grief arising from that loss creates a more humane civil society. I use the word 'humane' deliberately and will discuss its significance later in the talk. The argument I make is that the process of dispute resolution is itself a continuum with Law at one end and Psychology on the other and that any act of engaging this continuum becomes, an act for social change. That is, I claim that resolving any dispute changes the actual society in which that dispute arose – hence the cliché for the ever-changing nature of society itself.

As a psychologist with over 40 years' experience and a barrister/ mediator with about 30 years, I realized that there are more significant commonalities between the two professions than there are apparent differences between them. The main similarity is that both Psychology and Law attempt in their own unique way to address the question **of Loss** arising from **shattered expectations**. For instance, the loss could be a loss of self-esteem in psychology for which the client seeks the assistance of a psychologist; or a loss resulting from a breach of contractual obligations for which the assistance of a lawyer is sought.

The answer that both professions have in common to the question 'Why do people go either to a psychologist or to a lawyer? is to **redress the impact of grief they feel in their lives from some perceived or real loss.**' The research around this answer culminated in my PhD in Law majoring in Dispute Resolution, which I have called *The Re-Constructionist Model of Mediation* where I make the claim that *the very reason for conducting any mediation is the quest by the parties to reconstruct meaning around their losses to make sense of their loss. This quest for reconstructing*

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meaning around loss is what I claim to be the theory behind the practice of any mediation such that, I claim that Loss fuels the meaning we give to Life.

As I only have 45 minutes to give the talk, I will present my findings and then take any questions if we have time. So, to begin:

Mediation has often been claimed by notables in the field such as Laurence Boule as a '*practice in need of a theory*'. As a psychologist and barrister interested in Therapeutic Jurisprudence (TJ), I could see that there were many theories being unconsciously used in the mediation process both from the professions of Law and Psychology. So, my initial attempts in my PhD were to describe how those theories could unite, interact, or otherwise contribute to form some major 'theory of mediation'. With further research, however, my attention shifted from just describing how those theories interacted in the micro process of mediation to describing how those same theories became agents for social change impacting the larger dispute resolution continuum of the ever-changing macro process for developing a civil society.

I began by noticing in my clients as a practicing psychologist, barrister, and mediator over the years that the long-term effects of grief suffered from the experiences of loss, changed the very fabric of the society in which my clients lived. This was my first significant point of commonality between the two professions. For example, I noted how parties in the option generation and exploration phases of the mediation process engaged as researchers learning from their own experiences of loss to understand more about how that loss affected not only each other's world view but also affected each other's readiness, and willingness to make an agreement which would minimize loss in the future.

I noted that the experiences of the parties in the option generation and exploration phases actually refined their personal growth skills as they gained more understanding of each other's world views. This learning accorded with the 12 stages of Kathy Charmez's work on grounded theory where she claims that we learn best from events grounded in experience or via 'grounded research'. I demonstrated as part of my theses that the parties unconsciously

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use Charmez's grounded research theory to confirm their grassroots learning around loss – a process which I claim is implicit in any mediation.

This awareness of how Charmez's work is unconsciously used by the parties in the mediation process, to understand more about the impact of their loss on each other, led me to consider how grief and loss also change not only the consequent social relations of the parties on a micro level but change the consequent development of civil society on a macro level. It seemed that there was some sort of holographic relationship between what happens in a mediation on a micro level to make sense of loss and what happens in civil society on a macro level to minimize loss - the one affecting the other; and this awareness subsequently led me to the work of John Dewey's **Pragmatism**.

John Dewey was an American educationalist in the beginning of the twentieth century who believed that democracy was best served in small town America through the cooperation of its disparate groups which together, could educate each other about their respective needs and interests in building a series of functional and peaceful communities within the town. Dewey emphasized the importance of **education** to meet the ever-changing social and economic needs of each of the groups and believed that their rights were already enshrined in the principles of Law and that their rights formed a stable but **malleable** boundary (and I stress the word malleable) in which their ever-changing needs and interests could be met. He termed this process where everybody had a say in balancing the needs and interests of the disparate groups, within a legal framework '**Pragmatism**' which was in essence, an attempt at a **dispute prevention process** in the development of a democratic civil society. I realized from Dewey's work that the process of mediation also deals with the disparate needs and interests of the parties as they co-create an agreement within a legal framework where each could better live with their respective losses; and that the process of mediation was in itself an attempt at a future **dispute prevention process**.

Dewey realized that there was a two-way interaction between the individual and society where the one made up the other as if the interaction was an interdisciplinary response between the psychology of the individual and their needs on the one hand, and the development of Law to administer society on

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the other. He stressed that there was no such thing as the 'individual' outside of the **relations** that contributed to the formation of that individual. Relationship, then, was for Dewey the most important element in any interaction and education was the means to understand the relationship whether that interaction occurred between people, between people and the environment or in any other combination.

Dewey was such an effective educationalist that he influenced the work of George Kelly who applied Dewey's principles to the workings of the inner mind of the individual to develop his **Personal Construct Theory** otherwise termed the individual's 'worldview'. Like Dewey, Kelly emphasized the significance of **relations** whether those relations were with the environment and/or with people and stressed, like Dewey, that it is only through our relations that we can apply **meaning** to the events in our lives as part of our 'world view' i.e., as part of our 'personal constructs'. I realized that each party in a mediation brings with them their own 'world view' or personal construct and that acknowledging that world view is fundamental to the parties feeling that they have been heard and understood. I further realized that educating the parties about each other's world view assists with seeing different perspectives so that adherence to their own rigid perspective may become more malleable.

The views of John Dewey and George Kelly were a forerunner to the views of Kenneth Gergen who in his book '*Relational Being*' defined the way we relate as a 'game in the making' much like children making up rules as they go for the game of 'hide and seek'. Gergen's account of *Relational Being* is best described as the process of 'being' in a world of relations where things are **experienced personally but agreed to, collectively**, to form a higher level of 'truth'. This higher level encapsulates each party's specific version of truth or experience much like the six blind men describe the elephant in the room from their vantage point. Each blind man is correct in their description of the elephant, which is their truth, but none is correct in describing the whole elephant. It is only when we share the information that we gain the bigger picture. So too, the process of mediation can be likened to the 'game in the making' as the parties' come together to explore their personal experiences and share their grief to collectively form an agreement that hopefully minimizes losses in the future. That is, in mediation it is only when we share the information through the

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Exploration of issues, that we can ‘walk a mile in the other’s shoes’ to see the world from a more encompassing ‘higher’ perspective.

In my doctorate the concept of seeing the world from a holistic perspective was best explained by Vago and Silversberg’s mindfulness theory where a framework for understanding the neurobiological mechanisms of mindfulness is explained through the concepts of Self-awareness, Self-regulation, and Self-transcendence (S-ART) – all concepts to maintain the **learning from our personal experiences** – or in Charmez’s terms to maintain the learning from ‘*grounded research*’- about the experience of Loss as we transact with and are made up via our transactions with the world.

Vago and Silversberg’s theory stresses the significance of relations and accords with Gergen’s theory of *Relational Being*. Both Dewey and Kelly would agree with Gergen’s *Relational Being* Theory in which Gergen claims that even the most consummate loner is in relationship with the environment and is therefore intricately connected with it, so that there is no such thing as the individual outside relationship. The act of ‘being’ in the world for Gergen is a holographic experience in that the personal experiences felt on a micro level simultaneously create collective responses on a macro level.

By noting how the psychological theories implicitly unfold in Mediation, I adapted the Information Session that was developed by Di Gibson and used by the Mediation Unit of the Sydney Registry of the Family Court in the 1990’s, to develop my ‘*Re-Constructionist Model of Mediation*’. The Re-Constructionist model includes an educational platform for the parties to assess their own level of readiness for effective participation in the mediation process. My thesis describes at length how the Re-Constructionist model is used but for the purpose of this talk I will describe the psychological theories that make up its educational platform to assist the parties.

The most effective theory of the educational platform comes from Isolina Ricci who also stresses the significance of relating with ourselves and the environment and accords with Gergen’s theory of *Relational Being*. Her work on the **Four stages of relating** originates from considering the impact of divorce on Children. She explains the first stage to be *Acquaintance/ Business Stage*, the second to be, *Friendship*, the third is called *Positive Intimacy* and the last stage

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is termed *Negative Intimacy*. These stages offer a road map for each party to know where along the 4 stages they currently stand. She claims that whether the transactions are in Family Law or Commercial Law, the best stage that allows the parties to move forward from their loss is when they are ready to move from *Negative Intimacy* back to *business or acquaintance* stage and that that is easier said than done. She also claims that **both parties** must have passed through the stages of shock and grief before they can return to the *business/acquaintance* stage in a **constructive frame of mind**. Conducting the mediation at a stage where the grief for one party is still high will not only be unsuccessful, but could also be harmful, hence highlighting the significant role grief plays in resolving disputes.

From Gergen's work I realized that the process of mediation, as stated before, could similarly be described as a 'game in the making' – ie as a way of mindfully dealing with the reality of the moment as it constantly unfolds. I then further realized that the implementation phase of the parties' agreement which I have termed **Observer-Self** in my thesis, is where the parts of the agreement are thoroughly reality tested to include contingency plans if the expected outcomes are not met. This Observer-Self phase can be described as the process of constructing a public social order from the terms of a private contract.

I realized that the micro perspectives of theories like the grounded research of Kathy Charmez and macro perspectives like John Dewey's 'Pragmatism' represented a **holographic aspect of society** where the micro world of mediation **reflected** aspects of the macro world of civil society. That is mediation could be better understood not just as a micro settlement process for a specific dispute but also as a **macro social change agent** where the parties as individuals are better accommodated into a society of **experienced relations**.

The focus on the interdisciplinary theories of law and psychology when engaging the mediation process led me to make the following claims that formed the foundational elements of my thesis:

1. The first claim is that disputes are a common part of everyday life and occur whenever our *expectations are shattered*, and an attempt is made to redress the loss.

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2. The second claim is that we *attribute meaning* to every event of our life and we do this either consciously or unconsciously. The meaning we give to events arises from our value base or beliefs, which in turn arise from the shared *assumptions* we make about how things relate.
3. The third claim is that the impact of grief on decision-making proportionally affects the outcome of the dispute such that the greater the grief felt, the less likely that a settlement will occur.
4. The fourth claim is that the series of exercises offered by the educational platform in the RM termed the Normative Information Session (NIS) enables the parties to determine whether they are ready willing and able to address each issue of a dispute to the point of resolution. My claim here is that any dispute can be resolved provided BOTH parties are ready, willing, and able to do so.
5. My final claim is that an interdisciplinary approach to mediation otherwise termed, a social constructionist approach enables the essential organic nature of our **humanness** to be fully experienced as it arises out of grief from the Loss. I further claim that this essential nature of humanness cannot be recreated or supplanted by Artificial Intelligence (AI) in an exponentially advanced digital world but can only be **experienced** and **felt personally** to enhance a cherished life of relations with the world as well as a life of cherished chosen relationships because of the suffering of grief from loss. As stated at the outset of my talk, this is why I claim that Loss fuels the meaning we give to life.

Of these five findings, the second finding, *that meaning only arises from the shared assumptions about how things relate* forms the crux of the thesis. For example, if we accept that we attribute meaning to every event in our life, then the process of relating is itself a process where the parties attribute meaning in the form of a social contract based on their agreements about what they believe/*assume* to be **shared meanings** or ‘terms of the contract’ between them. This understanding follows the work of Neimeyer and Sands on *Bereavement, Loss and Suicide* where reconstructing a world of meaning that has been challenged by loss is crucial for the parties to move forward after a tragic event. It also accords with the five stages of Grief by Elizabeth Kubler-Ross in her model for dealing with *Death and Dying* which although a little outdated, still forms an easy scaffold for the parties to address their own levels of grief.

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By engaging as grounded researchers, and using a framework of exercises for asking questions about the reality in which they live (a framework I have termed Normative Information Session (NIS)), the parties are offered an opportunity to re-consider and/or change the original meaning given to the impact the loss has made on their life to a meaning that can be better endured as they continue to live with the loss.

I will not have time to go through the framework of the NIS which can be the topic for another time, but suffice it is say that the NIS constitutes the main difference between my RM and every other type of mediation. Traditionally, the problem-solving mediation processes –ie the facilitative, evaluative and settlement models– all place their emphasis on settlement and not on the **relational aspects between the parties**. These models, therefore, I claim, need to be rethought and re-conceptualized to allow for a social constructionist approach that can inherently deal with the loss through the process of *relational learning* where *parties* can better accommodate each other's perspectives to co-construct a new reality together.

Mediation can be seen to be an organic process when both parties are encouraged to accept, that any misunderstandings between them can only be clarified when the grief is set aside sufficiently for the same meaning to be *accepted by both sides* as being the *common facts of the case*. If for example in a personal injury matter, the applicant sees him/herself as the victim of psychological bullying in the workplace, and the insurer claims that the applicant was in fact being the bully, the matter is unlikely to resolve until both parties can accept that there is a such a major difference in the interpretation of the facts for which a major compromise on both sides is required to re-interpret the facts of the case in a common light based on the evidence on the file.

My claim in the thesis is that *meaning reconstruction following loss* is an inherent, albeit invisible/unconscious, part of a social constructionist interpretation of mediation and that such an interpretation extends the dispute resolution continuum to include law at one end and psychology on the other as helping professions that assist parties make sense of loss on an individual and societal level respectively. This process makes the resolution of disputes a process for social change. My further claim is that every mediation

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unconsciously offers parties that same opportunity for social change, but a social constructionist model consciously offers parties that opportunity as does each of the professions of psychology and law.

For instance, each profession – law and psychology - has a distinct set of protocols and criteria with which to assist the public to resolve or settle their dispute/issues. Psychology deals with the idiosyncratic and unique interpretations of *individuals* when attempting to fulfil their own *needs* by making sense of their loss; and law definitively deals with the individual's *rights* following loss to establish a fair *society*.

As inherently understood, the function of law is to set rules/principles with which to regulate behaviour and determine when we have come into conflict. Law tells us exactly what is 'lawful' and what is not.

The function of psychology, however, is to explain the human psyche. Like Law, psychological research similarly demands a degree of empirical correspondence between ideas and data to be definitive about the nature of the human psyche. In its pursuit to explain the human psyche, psychological research is walled off from the messy reality in which we all must live. In practice however, the¹ clinician in real life cannot always rely on a broad set of principles that states definitively what to do or say, let alone when to do or say it.

So, in its attempts to be scientific via an evidence-based approach, the aim of psychological research is to assist clinicians/psychologists in their daily practice, to **ask difficult questions when doing their work** so that they can remain *sceptical of oversimplified explanations* about the human psyche and can also remain sceptical of reductive answers to complex questions. In this way, psychological research, like legal research serves **as a corrective to maintain our humanness and not be reduced to a digital number.**

¹ The clinician/psychologist faced with the idiosyncratic circumstances and unique demands of a client's situation daily, on a case-by-case basis, notes that it is not always desirable to be bound by a level of definitiveness that is empirically demanded by an evidence-based approach.

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By using psychological and legal research as correctives, clinicians and lawyers can guard against the pervasive human temptation to *construct a narrative that matches their own preconceptions* and can guard against the human temptation to *construct a narrative that* further matches their unexamined biases in their attempts to ‘cure’ or acquit their client. These measures, I claim offer a social constructionist view of the holistic approach required by both psychologists and lawyers when helping the public to resolve their disputes and offers parties an opportunity for personal and social change.

Where then does mediation sit along this Dispute Resolution continuum in its attempts to resolve disputes?

I have made the claim that the uniqueness of any mediation process, unlike other social process, considers the individual’s *needs* (including psychological) in the context of their legal *rights* to serve the individual’s best long-term *interests* in a structured format that results in an interplay for mutual social exchange best described as the interplay of ‘*the individual in society*’.

I claim that an organic social constructionist interpretation of mediation, places it uniquely between the two professions of Psychology and Law in the extended dispute resolution continuum – something like a ‘marriage’ between law and psychology where mediation utilises intrinsic elements from both.

The RM, however, unlike other mediation processes, attempts to make the parties and the mediator ***consciously aware*** of that interplay of processes in which they are simultaneously engaging as relational learners. That is, in a social constructionist version of mediation, the parties engage consciously as joint researchers grounded in their unique experience of loss, exploring the meanings with which they can best accept their loss and still enable a functional world view that can at least be *tolerated and managed*, if not preferred into the future.

That is, a social constructionist approach to mediation such as the RM offers an exercise to the parties via its **educational platform of the Normative Information Session** (NIS) presented in the mediator’s Opening Statement, for

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the parties to measure their own levels of readiness, willingness, and ability to move forward against the norm. The RM also offers the mediator the opportunity to similarly become a relational learner with the parties, exploring their unique world views as grounded researchers and encouraging the parties to be consciously aware/mindful, of their feelings and thoughts in a responsive not a reactive way so that each can *'walk a mile in the other's shoes'*.

Throughout the whole social constructionist process the mediator engages as a 'mirror' reflecting to the parties what they are experiencing at difficult moments in their 'game-in-the-making' and confirming with the parties if the mediator's interpretation is the intended or desired interpretation. The mediator's role is to prepare, to anticipate, to notice reactions of self and parties, to respond, to strategize, and to adapt to whatever is required or whatever unfolds in the *'game in the making'*. And, by so doing, becoming a constant mindful relational learner in teamwork with the parties, ever willing to consider each party's microscopic variations of understanding evident in their interpretation of the terms.

In other words, the mediator highlights the distortions in understanding of the parties and refers to them as a "communication problem" which may result from a simple misunderstanding of fact(s) or could be indicative of differences not only in the parties' relational style (or transactional analysis state²) but, more deeply, it could be a difference in their value structure.

A difference in fact can easily be remedied such as for example when both parties in a job interview, agree on a figure of \$75 to be paid, and find at the time of signing the contract that one party understood \$75/hour whilst the other understood \$75,000/annum. A difference in relational style however is much harder to overcome as it includes the assumptions forming the values and beliefs of each party which may not be consciously obvious to the parties themselves.

² Eric Berne, Transactional Analysis....

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The difference in values is best described by **Eric Berne's Transactional Analysis** Theory where he claims that human transactions occur in one or more of three ways, that is, through the Child or the feeling/creative Channel, or the Parent i.e., the Moral/thinking channel, or the Adult i.e., the empathy/compassion channel where we experience humour which Berne claims is the best form of learning. He confirms that the best communication styles occur when the Adult of one party communicates with the Adult of the other and the worst communication occurs when the Parent of one communicates with the Child of the other or the Parent of one communicates with the Parent of the other and both take a positional Mexican standoff stance where neither is willing to give way.

To this I have added the concept of **Observer Self** in my thesis where the best reality testing for the proposed agreement takes place and where the agreement turns from being a private contract between the parties to an implemented public social arrangement.

The input from the mediator to explain the forms of relational learning between the parties can therefore empower the parties to recognize that their loss - be it in the form of the family trouble, the emotional disturbance, the bad business deal etc - which is brought into meaningful existence by being 'talked into being' in everyday life, is in fact, a construct that has been 'talked into existence', and as a construct, it can also be changed- ie 'talked out of existence'. The practical workings of *what* is constructed and *how* the construction process unfolds, constitutes the 'game-in-the-making' and constitutes the beginnings of an altered world view with its consequently altered social order. The RM therefore offers parties the opportunity both jointly and severally, to play a critical role as co-creators of their future in every dispute and it offers every such mediation an opportunity to change society.

In other words, like psychology, the RM, or a social constructionist approach to mediation offers the parties an opportunity to correct against their own preconceptions and unexamined biases through the assistance of a mediator

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who is *invited*, whether voluntarily or otherwise, into the parties' respective messy worlds. Set within a framework of legal rights, parties in mediation can choose *jointly and/or severally* to forgo their rights to pursue what is in their best long-term interests within the parameters of the Law *prompting them to change the way they relate to form new functional groups* - hence combining aspects of both psychology and law that work best for the parties under their specific circumstances that becomes a social change in the process.

The RM can, therefore, identify the ways of relating that led to the losses and can create an opportunity to form new ways of relating to avoid any further loss. In social constructionist terms, the process of organic mediation is not only mindful of the impact of law on the psychological well-being of the parties, but becomes a social change agent, when it implements the agreement of the parties changing forever the foundation of their relationship to a form that both parties can better live with.

Through the RM, the parties are encouraged to consciously be aware of their feelings and thoughts as they constantly weigh their individual needs against their rights to determine what is in their respective best practical interests as they make sense of their losses. And, by implementing their final agreement, the result from their 'game in the making' not only makes sense of their losses, to the best of their ability at that point in time, but also contributes to the evolution of a fairer society, *hence again, I claim that Loss fuels the meaning we give to Life.*

As an interdisciplinary process, social constructionism in constant action can therefore be seen as the ongoing and evolving interaction of the way the individual relates with others in society and with his environment to maintain humanness. An organic social constructionist interpretation of disputes as the 'game in the making', could therefore do for the helping professions of law and psychology what the natural sciences of physics and chemistry have already done for engineering and biomedicine.

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The RM (A social constructionist approach) focuses on the impact the loss has made on the emotional, financial and psychological well-being of the parties. For instance, the *emotional impact* associated with loss affects the parties' *ability* to let go of the original meaning(s) attributed to the loss or to original terms of the contract. As the emotional impact of the loss varies for each party it affects their readiness to move forward, which in turn has a direct financial bearing on the outcome of their contract.

This is most obvious in personal injury claims where the financial expectations for damages claimed by the applicant are directly linked to their understanding of fairness for the loss of their previous lifestyle. If the grieving for that loss of lifestyle is still very raw the financial expectations for damages will be very high with a consequent inability to realistically assess the constraints of the legal process. It is only once the grieving has been reconstructed into a more viable form to honour the loss suffered that the constraints of the legal process can be realistically assessed to gain an outcome that suits the needs of both parties.

Under an organic social constructionist interpretation, such as the RM offers, the conscious and open acknowledgement of the losses of one party by the other, on a substantive and emotional level, creates an opening for the shift of meaning to occur for each party. In other words, acknowledging the existence of the other party's construction of 'truth' or 'reality' without necessarily accepting it, creates more *willingness* to settle/move forward, as principles of right and wrong (inherent in legislation) give way to pragmatism and practicality.

In other words, acknowledgement of the other party's truth, removes the need for each party to persist as rigidly to holding onto their own social construct of 'the truth' as if there was no other, and allows an opportunity for the *co-creation of new meaning* to overcome the emotional and substantial impact of the loss that is often termed '*making a commercial decision*' or cutting your losses as a lesson learnt to move forward. To that effect, adopting an organic social constructionist approach such as the RM, to *appreciate every-day reality*

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constructing practices can effectively explore the meaning we attribute to the loss thereby making sense of it.³

Some studies⁴ view mediation and litigation as theoretical constructs which occupy opposing ends of the same 'procedural continuum' of dispute resolution rather than seeing the continuum between Psychology and Law. A social constructionist approach such as the RM however, contends that any examination of dispute resolution calls for a re-examination of certain underlying assumptions regarding the nature of Law, as it heads the public end of the dispute resolution continuum, and the nature of mediation at the private end of third-party interventions for dispute resolution.

In social constructionist terms, Law can be seen as the⁵'game which aims for fixed rules' as opposed to mediation which is seen as the 'game in the making'⁶. As mentioned above, Law is characterised by procedural fairness, openness, and transparency of proceedings for the sake of natural justice. Mediation is characterised by flexibility of procedure, confidentiality, and closed proceedings for the sake of privacy which does not necessarily include natural justice. Law contributes to the principles of justice that comprise the Rule of Law by which nation states are publicly governed, whereas mediation contributes to the private arrangements between individuals that allow pragmatic and practical

³ Using a social constructionist interpretation of mediation such as the RM, enables the parties to explore their ideological foundations within the dispute resolution continuum and offers an opportunity for a more fluid interpretation of the interplay of factors that comprise the public and private ends of that dispute resolution continuum.

⁴ IAIN D FIELD, '*Judicial Mediation and Chapter III of the Commonwealth Constitution*' A thesis submitted in fulfilment of the requirements for the award of the degree of Doctor of Philosophy FACULTY OF LAW, BOND UNIVERSITY, 2009.

⁵ Gergen, September 2010, 'the most exciting and creative movement in any given field takes place at the margins. At the edge one is not playing by fixed rules, but borrowing, melding, and re-shaping. In a word, one is playing.....are we turning the "game in the making" to a game with fixed rules? Are we generating a new box, without the means to recognize that it is a box?' <http://taos.publishpath.com/a-message-from-the-taos-institute-president-cited-on-11.05.2011>.⁵

⁶ Gergen, September 2010 'Nor, from a constructionist standpoint, does one look to the work of others with an eye to a transcendent truth. Most important is what follows in practice. "If we take this idea on, what happens next?" we ask' This is the 'game in the making' <http://taos.publishpath.com/a-message-from-the-taos-institute-president-cited-on-11.05.2011>.⁶

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solutions to unfold as concepts of day-to-day justice which emerge as the ‘way business is done here’.

From a social constructionist perspective, concepts of day-to-day justice similarly call for a re-examination of the broader practical principles of access to justice within the legal system. Access to justice principles are commonly referred to as ‘third-wave reforms’⁷ - otherwise termed Alternative Dispute Resolution (ADR) of which mediation (in its various forms) as stated above, comprises the private end of the dispute resolution continuum of third-party interventions.

Models of therapeutic jurisprudence (TJ), individual case management (such as pre-hearing conferences) and court connected ADR are all access to justice measures adopted as part of the ‘third wave reforms’ of the legal system – all of which have varying degrees of public/private exposure; and all of which, like mediation are examples of non-adversarial justice.

A comparison between TJ as an ADR measure at the public end of the continuum, and mediation as an ADR measure at the private end of the dispute resolution continuum, shows that both share a common vision to engage a *holistic* approach to deal with the impact of law on the psychological well-being of the clients; and both aim to implement a broad framework for *appreciating* not critiquing every-day reality constructing practices. To that effect, and as mentioned above, adopting a social constructionist approach to *appreciate every-day reality constructing practices* can effectively explore the concept that meaning reconstruction following loss is an inherent, albeit

⁷ Iain D Field, above n.1, 22. “First wave reforms seek to achieve effective access by removing economic barriers through the introduction of programs such as legal aid and ‘judicare’”. In Australia, legal aid as we recognise it today was first introduced by the *Commonwealth Legal Aid Commission Act 1977*. Legal aid has been available to Australian servicemen since the beginning of the Second World War. The Law Institute of Victoria provided legal aid to servicemen from 1940 onward, and other States quickly followed suit. The Commonwealth Legal Services Bureaux was established in 1942. See generally: Don Fleming and Frances Regan, “‘Evatt’s Bastard Child’: The Commonwealth Legal Service Bureaux 1942 – 51’ (2003) *Australian Journal of Legal History* 15; The second wave responds to ‘the problem of representing group and collective – diffuse – interests other than those of the poor’ through (amongst other things) the introduction of ombuds systems and the recognition of class action suits (or ‘representative proceedings’). See generally Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the World-Wide Movement to Make Rights Effective’ (1978) 27 *Buffalo Law Review* 183, 186-190; The third wave represents attempts to ‘attack barriers in a more articulate and comprehensive manner’ and includes the development of ADR processes and the introduction of case-management – See generally Cappelletti and Garth, above n 3, 197.

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invisible/unconscious, part of every dispute resolution procedure which extends the dispute resolution continuum to include law and psychology as helping professions to resolve disputes. Mediation can therefore be seen as an interdisciplinary process- the purpose of which is to balance the rights and needs of the parties with what is in their best interests.

In considering the claim made by Boule and others that mediation is a practice in need of a theory, I claim that a social constructionist interpretation of mediation offers such a theory as it enables the various processes engaged in mediation to be *consciously* experienced by the parties.

By engaging a social constructionist approach with an educational platform such as the NIS the parties become conscious of and engage in the micro process with the following theories:

1. Kathy Charmaz's – grounded research theory where we learn from events grounded in our experience
2. Kenneth Gergen's— game-in the making theory – where there is no such thing as the individual outside relationship.
3. Isolina Ricci's – 4 stage Relational Table, from her greater study of the impact of divorce on Children (Acquaintance/Business, Friendship, Positive Intimacy, Negative Intimacy)
4. Neimeyer and Sands's – meaning reconstruction theory
5. Eric Berne's— Transactional Analysis theory
6. Vago and Silversberg's - Mindfulness theory
7. Elizabeth Kubler-Ross's – 5 Stages theory from her work on Grief and Loss in Palliative Care studies.

The second half of my thesis discusses the macro perspectives of dispute resolution in the work of:

1. John Dewey's Pragmatism where the needs of the disparate groups that make up a town can be understood and accommodated for by the townspeople via education to implement democracy.

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2. George Kelly's Personal Construct Theory which took the concept of Dewey's Pragmatism on a macro scale and applied it on a micro scale to the individual's various psychological needs. Kelly's **Personal Construct Theory** describes how the individual's disparate needs can be constantly refined through the individual's education to make up their world view or personal constructs.
3. In addition, a fuller analysis of the RM discusses how the micro analysis of the mediation process can assist the macro analysis of how social changes can be institutionalised to change the very fabric of society.

Both Dewey and Kelly would agree with Gergen's Relational Being Theory, resulting in his statement that there is no such thing as the individual outside relationship – a concept which brings us back to the significance of relating with our humanity intact as we give meaning to the events of our life that cause grief from loss. This takes us back to the beginning of my talk to confirm that **Loss fuels the meaning we give to life.**

Time does not permit me in 45 minutes to go any further, but I will provide these notes to further explain what I have presented. To conclude a social constructionist approach to mediation such as the RM, offers a theory for mediation where it is no longer just a practice in need of a theory, but a practice to enhance a cherished life of relations with the world, as well as a life of cherished chosen relationships arising from grief through loss. As stated at the outset of my talk, this is why I claim that Loss fuels the meaning we give to life and why mediating Loss offers the opportunity to develop a more humane society.

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