Kluwer Mediation Blog

Rugby World Cup 2011

Geoff Sharp (Brick Court Chambers / Clifton Chambers) · Saturday, October 1st, 2011

We are in the midst of the Rugby World Cup 2011 down here in New Zealand – which may not mean much to those nations not playing the 'great game' but the tournament is the 3rd largest global sporting event after the FIFA World Cup and the Olympics so you can only imagine the impact it has on a country of only 4 million people.

My city in recent weeks has been overrun by Welsh fans in song, Scotsmen with their colourful kilts and no knickers, English from the mother country, Fijians shivering in the Wellington weather and scary looking Russians in sunglasses.

Some wonderful, graceful rugby has been played with more to come as the tournament concludes its pool play and enters the knockout phase this week.

As I watched the suprisingly close South Africa/Samoa game last night I remembered the only other time I had seen the Africans play – a mean-spirited match in the early 90s between the Springboks and New Zealand All Blacks fought out in freezing conditions on a muddy pitch.

In the sanctity of a second half scrum, Springbok prop Johan 'the beast' le Roux took a bite sized chunk out of the New Zealand skipper's left ear for which le Roux received an 18 month suspension commenting "for that amount of time I should have torn the whole thing off".

But the real story for me that day was not Fitzpatrick's missing body part but rather it was, as I stood watching the game on Athletic Park's terraces with my young sons struggling to stay upright in the heave of humanity, a vicious fight breaking out right there in front of us.

I remember seeing a blood spattered tooth arcing through the air and hitting my youngest son as he perched on my shoulders – the situation quickly got quite serious. With no chance of security being able to penetrate the closely packed crowd, those of us around the protagonists instinctively withdrew to protect ourselves as best we could thereby creating space for them to do even more damage to each other.

It was immediately apparent that this would only make matters worse so, in a splendid display of group-think, we innocent bystanders closed in on the men, now three as another had been drawn into the conflict, and effectively pressed them into submission. They simply ran out of room to

swing at each other.

Incredibly, calm followed and we returned our focus to the pitch in time to see a 13-9 victory to New Zealand clinching the 1994 series in the process.

And it is that lesson, ahead of all my subsequent hours of sitting at a mediation table, that convinces me that the heart and soul of mediation is in staying together, each party pressed close enough to see the whites of the other's eyes, existing party-to-party in joint session and not sitting endlessly in separate rooms with enough room to take unrealistic swings at each other.

In those separate rooms, the parties become detached from each other through a lack of opportunity for constructive confrontation, which in turn has them engaging in pointless fighting talk as they sit alone, unnecessarily posturing and making outrageous allegations and offers.

Just like on those terraces almost 20 years ago, being constructively close allows insight into the interaction between the parties and throws up clues about the best way to reach a consensus. That's because when I am in joint session for me it's primarily about the behavioural dynamic although it also presents grand opportunities to ply our craft by setting an appropriate tone, building trust and demonstrating even-handedness.

From a parties' perspective it is slightly different. Whilst many parties would say that the primary gift of a joint session is the opportunity to speak directly to those with whom they are in dispute, and to be sure it is a golden opportunity, the real value for parties in joint is they get to hear and evaluate the other side.

Evaluation in the sense of the legal case, the emotional disposition of decision-makers on the other side of the table, the credibility of those who may give evidence if the matter goes to trial, and importantly, the positions and interests they will need to negotiate around during the mediation.

From a lawyers' point of view, a joint session is really the only place in the process to demonstrate skill and expertise (subject matter knowledge, legal/trial skills and people skills). And it is possibly the only time during the entire period of the litigation (often stretching over years) that lawyers can have direct communication with the opposite decision-maker without the distraction of an intervener, like opposing counsel. Many however have come to see it as a necessary evil ('we know the issues, let's just cut to the chase').

I go into more depth about (and advocate for) joint sessions in my article In Praise of Joint Sessions which is written in the context of mediating the litigated case. In it I deal with the increasing trend amongst mediators to do away with a joint session and adopt a shuttle mediation model – an especially topical debate amongst mediators with some advocating that a purely caucus model saves time and is what the market now requires and others resisting the demise of the joint session, saying it is at the heart of what we do.

> Extract from In Praise of Joint Sessions by Geoff Sharp;
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> *"Why is there a Move Away From Joint Sessions – Could it be the 'F' Word?*
>
> *Whether it is the wish of the 'market' to have a more settlement conference orientated process or it is at the initiative by mediators — we are seeing less joint*

> *sessions because of **FEAR**. Fear by lawyers, parties and even mediators, fear of the uncertainty and lack of control that comes with people in dispute being in the same room at the same time – because one thing we can all agree on; you can't script a joint session, anything might happen. Unlike a courtroom, there are no real rules and once the structure of the opening 'speeches' is spent all those involved will have to react in the moment as a participant in (on one level) an uncontrolled environment.*
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> *After all, I suggest mediation is still very much an oral sport and I believe will remain so if it is to keep its utility ahead of other ADR processes.*
>
> *And it is here that I should make a confession; I am absolutely guilty of getting people in the same room and "seeing what happens" in a commercial mediation setting. Sometimes it goes well, other times – not so much. But the point is our skills as mediators should enable us to manage a joint session in combination with an appropriate mix of private sessions towards a more efficient, more sustainable and safer process and outcome"* [read more]

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