Kluwer Mediation Blog

Two speed mediation

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In 1861, the then Secretary to the Education Department, Robert Lowe, addressed the UK House of Commons on the pressing matter of elementary education, in particular on the linked questions of access to education, funding, and quality. His proposal was to introduce a system of "payment for results", designed both to limit the costs of elementary education and to incentivise teachers. His argument, in part was this:

"I cannot promise the House that this system will be an economical one, and I cannot prove that it will be an efficient one, but I can promise that it shall be one or the other. If it is not cheap, it shall be efficient; if it is not efficient, it shall be cheap." [Parliamentary Debates, 1862, clxv, 238]

Tragically, he also noted that "we want not better schools, but to make them work harder" [237] and that he did "not profess to give children an education that will raise them above their station and business in life." [238]

No doubt as a result of the economic success of his programme, in reducing the cost of education to the state, Lowe became Chancellor of the Exchequer in Gladstone's government and was later elevated to the peerage as the first Viscount Sherbrooke. The cost of the experiment, however, was to set back elementary education for years, in a mistaken and instrumental view of the benefits of fiscal and 'efficiency' incentives. Such was the impact of those incentives, certainly for elementary teachers who were not well-paid, that they deliberately held back their 'successful' students in order to ensure sufficient success, and thus payment, in exams in following years.

How can this little historical excursion be of relevance to the modern mediation world? I raise this for two reasons. First, I want to pick up and extend the question raised by Nadja Alexander in her recent blog, in which she invited mediators to ask what their purpose might be in embarking on any mediation. And second, I note that there is a significant thread of discussion about mediation which promotes the case in terms of efficiency gains.

On the first point, Nadja suggested that mediation might be at an inflection point in terms of our not always overlapping consensus on autonomy, standards, legitimacy, recognition and purpose in mediation and as mediators. As an important exercise in reflection, she asks us to consider what our purpose might be in going into mediation (in general) and this mediation (in particular). As the late Bruce Chatwin asked in a collection of his travel narratives, we can ask "what am I doing here?"

While agreeing with that question and Nadja's reasons for the invitation, I'd suggest we can and need to take it a step further. As we consider the last four decades of practice and professional development in mediation, what is inescapable is that we've moved from marginal to mainstream, from experimental to institutional and – as the changing terminology suggests – from "alternative" to "appropriate" or "additional" dispute resolution. As mediation moves or is drawn closer to the Courts, and as agencies, organisations, government departments, corporations and other institutions adopt mediation, for whatever reason, we need to see that our "purpose" in mediation is not always our own: our questions on entry into mediation may not necessarily be those we would ask for ourselves. Anecdotally, I'm aware of a number of colleagues who moved into mediation, inspired by what it is that mediation offered as a "tool for conviviality" (to borrow the title of a small book written by Ivan Illich in the early 1970s, just as ADR was lifting off), and who find now that their reasons for doing mediation have been diverted, subverted and – dare we say – perverted by institutional goals. In the same way that Lowe's institutional and fiscal goals for education ended up defeating the ends of elementary education, so it may be that we can be at least distracted from those original aspirations for mediation.

So, that's a long-winded way of suggesting an addition to Nadja's question, which is to be cognisant of the organisational purposes for mediation, which may be those of economy, efficiency and case management as much as they are of finding that "warmer way of disputing" that we might have in mind.

On the second "efficiency" point, I'd go back to Michael Landrum's Kluwer blog entry [http://kluwermediationblog.com/2014/07/16/top-ten-miscellaneous-observations-regarding-the-decline-of-the-joint-session-in-mediation/] in which he noted not only a degree of cynicism about mediation and the joint session but also a preference for brevity and speed over depth and relationship-building: "cut to the chase" is the message. Equally, Jeff Krivis' blog [http://kluwermediationblog.com/2015/03/20/where-have-all-the-idealists-gone-long-time-passing/] is a sustained overview of the shifts we've seen – or possibly missed – as mediation acquires legitimacy and recognition. What we have, or may be on the way to seeing, is a two-speed world of mediation – the kind of mediation equivalent of fast food versus a restaurant meal: one version rests on the values of engagement, dialogue, inquiry, relationship building and (for the transformative mediators in particular) deep changes in perception and recognition; the other is driven by perceived advantages of speed, reduced cost, cleared court dockets and time saved. For disputants and justice institutions alike, the latter set of goals can hardly be challenged: after all, in the dim recesses of the early ethos of mediation there were the claims or hopes that the informal processes would render justice more accessible by virtue of reduced costs and delays.

However, we can also note the recent insights of behavioural economists (and ethicists) such as Dan Ariely whose empirical work demonstrates the rather gloomy conclusion that, when experimental participants are given the choice, economics will usually crowd out ethics. [See, for example, <https://www.ted.com/talks/dan_ariely_on_our_buggy_moral_code?language=en, or any of his highly readable books]. The risk then, is that the idealistic or humanistic goals that Jeff Krivis is concerned with may be lost in the scrum with efficiency goals.

A quick search on the terms and will readily demonstrate the degree to which this attribute of mediation has captured as much attention as, if not more than, the civic and humanistic goals of the original Pound conference. For a brief sampling, see:

• http://www.mediate.com/articles/sgubinia5.cfm – on promoting awareness of mediation as a tool

for business efficacy;
• http://www.mediate.co.nz/cost-efficiency – on the cost effectiveness of mediation;
• http://www.lexology.com/library/detail.aspx?g=b634a9a5-a10f-404b-9f53-efba742d55a4 – on efficiency as a criterion for choosing between arbitration, litigation or mediation.
• http://www.jstor.org/stable/25740428?__redirected&seq=1#page_scan_tab_contents – an article on efficiency, therapeutic justice and mediation in the family courts

. . . and so on. Perhaps at the pinnacle of this pyramid of inquiry is the work of the European Commission for the Efficiency of Justice: http://www.coe.int/t/dghl/cooperation/cepej/mediation/default_en.asp.

Again, none of this is, in itself, contentious: in times of austerity (as the recent Justice Report considers) efficiency is imperative, as indeed it may also be for those jurisdictions that are less cash-strapped. There's even a strong thread that suggests we might think of efficiency instead of justice, as Klaus Mathis argues in a book of that title. But what we may – ironically – have is two kinds of moral argument for mediation: one, from the perspective of efficiency, the other from the perspective of collaboration. This looks like another paradox to add to the collection that Bernard Mayer discusses in his most recent book, *The Conflict Paradox: Seven Dilemmas at the Core of Disputes*. [Jossey-Bass, 2014]

If, however, the fundamental driver, the tinder that lit the fires of enduring "movement", was that of access to justice (with as much emphasis on justice as on access), then efficiency is only part of the story. While efficiency might well be laudable, where it misses the mark, I suspect, is in the normative value of participation and dialogue: indeed, efficiency is probably measured by the degree to which mediation allows disputants to withdraw from participation in civic life and pursue private goals of dispute resolution. And this too has been the radical shift in the idea of mediation – while it might have been naive in its early articulation, there was a sense in which mediation's founders sought to capture something more important about social and civic life than just the private resolution of disputes. Indeed, if we look at those earlier societies from which we drew inspiration, mediation was never a stand-alone process of efficient dispute processing, but rather an integral part of the normative structure of life. We cannot of course replicate those societies, and that was never the expectation; and in fact there will be some aspects of those other societies that we will find deeply unappealing.

As the editors of n+1 magazine commented in their article "Too Fast, too furious" [https://nplusonemag.com/issue-21/the-intellectual-situation/too-fast-too-furious/] the emphasis seems increasingly to be on our circumstances as time poor but not always resource rich. Ironically, technological and social developments are pursued or offered to help us overcome this imperative of a world of relentless acceleration; but these seem to add only to the fog of speed. Indeed, we can now speed up our enjoyment of sports by watching faster versions of cricket or, more recently, tennis – the latter with the advent of "Fast4 Tennis", "the way to play tennis in our time deprived lives".

Maybe the mediation ethos is falling into that same trap, of seeking its primary justification not in the quality of engagement, the prospects of civic and engaged dialogue, or the transformation of relationships but rather in the speed with which matters can be disposed of. Thus, the focus on efficiency risks missing the mark on justice – and underscores Dame Hazel Genn's argument that mediation risks being less about just settlement than just about settlement. Justice, as one part of the access equation, is far more than the efficient disposition of cases and allocation of resources; it

is instead a fundamental concern with what it means to live together, to share some small corner of the planet. Mediation, like "citizenship [may be] a way of making concrete our ethical commitments of care and respect, or realising in action an obligation to aid fellow travellers – in short, of fostering justice between persons." [Mark Kingwell, *The World we Want*, p5]

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