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# Kluwer Mediation Blog

## The Joy of Fish

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Below was a conversation between two Chinese philosophers, namely, [Huizi](#) (“Hui”) and [Zhuangzi](#) (“Zhuang”) on the Joy of Fish when they were strolling on a bridge over River Hao more than two thousand two hundred years ago.

*Zhuang : That minnow swims leisurely and it must be joyful.*

*Hui : You are not that fish; how can you tell it is joyful?*

*Zhuang : You are not me; how can you tell that I don't know the fish is joyful?*

*Hui : I am indeed not you and as such, I can't tell I know you. By the same token, as you are not that fish, it is a prudent conclusion that you have no knowledge on its ?joyfulness.*

*Zhuang : Let us go back to where we started the conversation. By asking me “how you can tell it is joyful”, you had already accepted that I had knowledge on the joy of fish. I knew the joy of the fish when I was on the bridge over River Hao.*

While different readers may have different thoughts on the wisdom and debating skills displayed by Hui and Zhuang, I, being a practising mediator and mediation trainer, am deeply impressed by the conversation because it helps to illustrate “empathy”, which is an important skill of mediation as well as “self-determination”, which is a fundamental principle of mediation.

### **Empathy**

Those who have attended my mediation training know that I hold a very strong view against the saying of “I understand you” or ” I understand your feelings” on the part of a mediator to the party(ies) during the mediation. For those students having the idiolect of saying “I understand you” or ” I understand your feelings”, I tend to ask them the following questions: –

1. Does an oncologist really know how cancer patients feel?
2. Does a criminal defence lawyer genuinely understand the mindset of those who are being convicted?
3. Does a mediator have the ability to tell with certainty about the emotional dimensions of the parties sitting in front of the mediator?

By saying “I understand you”, a mediator may subconsciously have sent the wrong message to the speaker that “You don’t need to tell me more as I have already understood you.” As such, the connection between the mediator and the party(ies) will be blocked or diminished.

Besides, mediators should know very well that the parties and in particular those who have been going through a litigation for some time under an adversarial system may not be able to give an unbiased account of facts to a third party. As such, the saying of “I understand you” or “I understand your feelings” on the part of a mediator may easily convey the wrong impression that the mediator is agreeable with the speaking party.

For the purpose of connecting and building up rapport with each of the parties, a mediator may, bearing the conversation on The Joy of Fish in mind, tell the party that the mediator, not being that party, will not be able to truly understand the party or the party’s feelings. However, the mediator is willing to step into the shoes of the party with an attempt to feel how the party feels. In this regard, the mediator may make use of a wide range of vocabulary, especially adjectives and adverbs to describe the feelings of that party. If the mediator manages to deal with this “mission impossible” by appropriate description of the party’s feelings to the extent of touching the heart of the party, the party will have the validation of being understood and that will certainly be more powerful than a bare assertion on the part of the mediator of that effect.

I keep reminding myself of the conversation on The Joy of Fish in my practice and taking note that no one can tell with certainty what exactly another person feels. Conducting a mediation is not a one-size fit job and thus, it is always prudent to assume we know very little and then, chart the way forward with a caring humble heart rather than using our subjective mind to assume that we are able to tell what others feel.

### **Self-determination**

If mediators accept that they are not the parties, how can they tell the parties or one of them that one set of settlement terms is preferred to another set of settlement terms? If mediators accept that the parties may not be able to give a true and accurate account of the facts, how can they assess the evidence of the disputes without the benefit of cross-examination and re-examination by counsel? If mediators accept that there is a possibility that those not in the room could have bigger influence on those who are in the room, how can they be certain that a particular settlement direction or

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option will adequately accommodate the needs and concerns of the parties?

By accepting that nobody can tell whether the minnow in the pond is being joyful, mediators must accept that they are not in a position to tell whether and to what extent a party derives pleasure out of the litigation. By the same token, mediators cannot tell whether and to what extent a party derives pleasure out of a settlement.

The lack of authority on the part of a mediator to impose any terms of settlement on the parties is the cardinal principle of mediation. With the principle of self-determination and bearing the conversation on The Joy of Fish in mind, mediators regardless of their standing are duty bound to treat a humble minnow party as the king of fish when it comes to issues relating to settlement because they ought to know that they do not know enough to make any decisions for a party even if that party is of a very humble background similar to that of a minnow.

It is my hope that the introduction of the interesting conversation on The Joy of Fish conducted more than two thousand two hundred years ago on this blog may assist those readers who are also mediation practitioners to register the importance of the empathy skill and self-determination principle in their mind so that all of us will have an even better mediation practice to make peace.

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