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The importance of timing in dispute resolution

Dispute 'ripeness' and timing in mediation¹

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contents

101	Dispute 'ripeness' and timing in mediation
104	Improvised facilitation – the paradox of being prepared to be spontaneous
107	A bridge over troubled water
110	Mediation in voluntary organisations
118	Boundaries, flows and mediation
121	Letters to a young lawyer
123	Diary and happenings

One of the most challenging aspects of negotiations concerns when they should take place. This is particularly true of referrals to mediation. At the time of writing the consultation period for the UK Department of Constitutional Affairs (DCA) discussion document (*A New Focus for Civil Legal Aid – encouraging early resolution: discouraging unnecessary litigation*, hereafter *New Focus*) has ended and the responses are being considered. A number of the points below have already been included in the National Family Mediation's representations to the DCA. They are reviewed here to explore some of the implicit assumptions of *New Focus*, with particular reference to the academic dispute resolution literature.

In considering if and how family law clients should be funded, *New Focus* examines the timing of referrals to mediation. It asserts that some cases do not proceed to mediation because they are referred 'too early in the process, causing wasteful mediation assessments', while conceding 'on the other hand delaying the point at which mediation is considered will tend to increase legal costs' (3.16). The paper's suggested solution is that there should be 'early diagnostic work by experienced family professionals to direct clients to the most appropriate form of dispute resolution or reconciliation' (3.18).

Underpinning this proposal is a spectrum of unarticulated, and apparently unexamined, beliefs, including:

- the assumption that the appropriateness of mediation can be identified by 'experienced family practitioners' (presumably not by mediators, even less so clients themselves);
- that 'experienced family practitioners' have the knowledge and judgment to make such decisions (apparently based solely on their lived experience);
- that professionals, rather than clients, are best placed to make decisions regarding if or when mediation is appropriate;
- finally, and importantly, that a discernable 'ripe' moment for mediation exists – and that the right person will be able to identify it.

Professional decision-making

At first glance these may seem entirely reasonable suppositions. Surely experienced professionals can weigh up a case and make appropriate recommendations? Privileging professional control of referral to mediation is presumably in line with Davis and Bevan's analogy with healthcare gatekeeping, in which the authors argue for a 'more rational approach to controlling overall expenditure than expecting investment in one service (mediation) to reduce expenditure on another (lawyers)'.²

Therein, of course, is a problem. It is well-established from neurobiological research that no decisions, whether professional or otherwise, are entirely rational. They are always subject to a range of emotional, psychological and other factors, including political – and some of which are unconscious. More seriously, *New Focus* appears not to take account of the UK Legal Services Commission's (LSC) own findings regarding the near impossibility of cherry-picking family law cases susceptible to early

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resolution. In 2000 Maclean wrote on behalf of the Legal Aid Board Research Unit:

Divorce is different from most other areas of legal practice. Divorce, more than most litigation, originates in personal failure and rejection ... it would appear from the Case Profiling Study that it is very difficult to determine near the beginning of a family case whether the case will be straightforward and cheap or difficult and costly. *If the research could not identify any predictors of these characteristics, it is likely that solicitors will find it equally difficult* [emphasis added].³

New Focus does not suggest how, or by what criteria, decisions to refer to mediation should be made. There are no recommendations regarding diagnostic tools or theoretical models. Medicine, by way of contrast, has a well-established foundation of evidence-based practice. A dynamic, international exchange of medical research informs practice globally, with the resultant expectation that clinical decision-making will take account of credible published findings.

The law is not so happily placed. There are of course significant legislative variations according to locality; however, psychological research conducted in the US provides findings which could well be relevant to European judges and lawyers. Examples are the role of cognitive illusions in judicial decision-making,⁴ the impact of social attribute models on legal judgments⁵ and the influence on clients of the advising solicitor's gender where mediation is contemplated.⁶ Scant, if any, attention is paid to these and other findings or to what extent they should be acknowledged within this jurisdiction.

Negotiation ripeness

There exists a body of academic literature regarding what is termed negotiation 'ripeness'. Much is based on international conflicts; however, there are arguably many parallels with domestic disputes – most international and regional conflicts involve entrenched positions, perceived/actual

narcissistic or other injury, scarce resources and high levels of emotion. This literature is at least worthy of attention when considering family law cases.

The ripeness literature falls broadly into four categories.⁷ Citing Zartman⁸ and others, Mitchell proposes four 'ripeness' paradigms:

1. The *Hurting Stalemate* Model – where no party can envision a successful outcome through continuing their current strategies, or an end to increasingly unbearable costs. Zartman describes a 'mutual plateau which must be a flat, unpleasant terrain stretching into the future, providing no later possibilities for decisive escalation or graceful escape'. The model assumes that the actors must make logical, conscious decisions that they have both reached *Hurting Stalemate* before they are able to abandon the conflict unanimously.

2. The *Imminent Mutual Catastrophe* Model – where the parties face an undeniable disaster (for example, a huge increase in costs). The efficacy of this model in ending disputes depends on both sides being subject to the same catastrophe – if disaster threatens only one party, the other will have no incentive to settle.

3. The *Entrapment* Model – here, in contrast to *Hurting Stalemate*, the parties are motivated by an apparent trap, that is the continued pursuit of victory because they perceive their conflict costs as having been transformed into 'investments'. Mitchell posits that the greater the costs incurred, the more reasons exist to justify prolonging the conflict and for refusing to give up for less than complete triumph.

4. The *Enticing Opportunity* Model – This envisages the rewards to parties of searching for and adopting alternatives instead of focusing on sacrifices for which they each have to be compensated. The most diverse of the four models, it is multi-faceted and creative, anticipating a wide variety of possible factors that may generate opportunities for new ideas and solutions. Mitchell cites Crocker,⁹ who asserts that in this model 'third party peacemakers can play major roles in the creation of appropriate circumstances for resolution'.



Timing in family law disputes

The analogies with family law are obvious. *Hurting Stalemate* may be evident in embittered child contact disputes, including those persisting long after an order has been made. *Imminent Mutual Catastrophe* may terminate disputes only when both parties are at risk – thus a publicly-funded client may be able to continue proceedings which the paying party can no longer afford, with a potentially skewed outcome as a result. Private law child cases often fall within this model. Clients may easily become engaged in *Entrapment*, especially where there is early, and heavy, investment in costs such as that demanded by the Form E ('Financial Statements') process in ancillary relief proceedings in the UK. As a client attending her individual mediation assessment meeting remarked, 'I've gone this far and spent £2500 so I can't go back now'. She chose not to mediate.

The *Enticing Opportunity* model offers help in diverting the parties and assisting them to resolve matters without resort to litigation. Acknowledging that it is the most optimistic model, Mitchell suggests that the prime determining condition for *Enticing Opportunity* appears to be that 'both sides should be able to see major rewards on offer through the pursuit of some negotiated settlement'. It is precisely this incentive that mediation offers.

Matters are not, of course, that simple. Mitchell concludes:

This and other recent work suggests that we are faced not with a need to choose among the four models of 'ripeness' currently dominating the debate about appropriate conditions for conflict resolution. Rather, it seems that all four models present interesting aspects of a complex and problematic process and all can be extended and improved ... we simply do not know enough about how various types of conflict begin to terminate ... we need much more evidence before anyone can provide a convincing answer to any question ... that concerns the timing of de-escalation initiatives, or of conflict resolution

processes ...

Mitchell's work reinforces earlier cautions by Rubin against the 'delusion of the "right" moment'.¹⁰ He argues that most conflicts have multiple ripe moments rather than only one, and that there is no such thing as a wrong time to attempt de-escalation. If Rubin is correct, and there is no reason to suppose otherwise, pivotal diversions into mediation based on the subjective value-judgments of

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professionals, rather than the decisions of the parties now triggered by the section 11 (orders in relation to parental rights and responsibilities) process, are unlikely to be consistently or accurately determined. They will also not be based on empirical research.

The way ahead?

So what is to be done? Given that there is yet no reliable assessment tool regarding ripeness in any conflict domain, there seems little prospect of experienced family practitioners being able to do more than intuitively direct clients to what they consider the most appropriate resource – which is hardly evidence-based practice. There is also a danger that professional decisions may be based on client misperceptions. Clients who might otherwise reject mediation out of hand frequently change their minds once they have met with a mediator and learned of the opportunities mediation provides.

Further, underlying apparent client entrenchment may be misperceptions regarding achieving justice. There remains a public view of the courts as battlegrounds where fights are won or lost. Melamed,¹¹ refers to this belief set as the 'myth of justice

and truth' and explores some of its fundamental assumptions, for example that a judge will always believe you and not your opponent. The notion of gladiatorial conflict lingers on, sometimes perpetuated by the media (for example, television soaps where the protagonists triumphantly claim 'I'll see you in court').

Zaidel argues forcibly for radical change. Critiquing the adversarial system as defective, she dismisses the various attempts at what she terms

'renovation', including the more conciliatory approach to divorce currently adopted by practitioners.¹² She argues for an overhaul of the entire system, even if this will 'inevitably disturb the status quo'. In support she cites the Danish divorce procedure, describing it as an administrative joint problem-solving and decision-making process, often without court involvement at any stage. Kay also calls for reformation, offering a trenchant analysis of the current system's failings from a human rights perspective.¹³

The issue of whether reforms will take place within this jurisdiction is beyond the scope of this article. The suggestions in *New Focus* regarding referrals to mediation are an attempt to control costs and gate-keep resources but appear to have no foundation in conflict resolution theoretical models as currently understood. Wasting public money is of course always highly undesirable – however, proposals regarding public spending which do not take account of the academic literature (and the LSC's own research unit's findings) are surely of very dubious worth. ❖

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Endnotes

1. This is an updated version of an article first published by the author in *Family Law* February 2005; Vol 35, pp 162–5 (published by Jordan Publishing Ltd, Bristol, UK). It is printed here with permission of Elizabeth Walsh, Editor, *Family Law*.

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