

“I’M NOT BIASED, THEY ARE”

By Mark Kelly, Barrister & Commercial Mediator

“*Yet he hath ever but slenderly known himself*” says Regan to Goneril of their father Lear, before they set about robbing him blind. She’s right. Lear does not know his own weaknesses; vanity, hubris, neediness. That ignorance feeds his biases, and ultimately drives his doom. But you do not have to be prone to wandering moors at night in your pyjamas to suffer from similar problems. None of us know all that we should, and we all have biases.

In legal disputes, biases can come to the fore. In this context, by biases I mean “*tendencies to think in certain ways that can lead to systematic deviations from a standard of rationality or good judgment*”. It can also be known as “*why people do dumb stuff*”.

Mediators get a unique and privileged window into how parties see legal disputes. We often see all manner of biases swirling around. One of the most common is hostile attribution bias – the tendency to wrongly perceive hostility as the other party’s driving force. As a mediator, you know this bias is in play because you hear the same thing privately from both parties – a riff on “*the only reason we are here is because XXX is a complete jerk, who is out to get us*”. Sometimes people actually do use the same obscenities to describe each other; cue mediator chuckling internally at the dark humour of his day...

Confirmation bias is also common amongst disputants. This is the tendency to search for, interpret, focus on and remember information in a way that confirms your preconceptions. People perceive reality, past and present, through a prism of self-interest. Or, as the old saying goes, “*people hear what they want to hear*”.

Optimism bias is a major impediment to settling any case. This is the tendency to overestimate the prospect of favourable outcomes. It is essentially wishful thinking. But this can hide behind quite sophisticated self-justifications in legal disputes. As a mediator, you can get a sense of whether optimism bias is at play when, in a win/lose dispute between two parties, you ask both privately what they think their percentage chances of success are. Often, they give you numbers that add up to much more than 100%. In fact, around 150% is common. Granted, part of this will be about gaming the mediator. But still, the exercise tends to suggest that one party, or both, is/are kidding themselves to an extent.

Memory errors and biases are also an issue. There is a wealth of evidence on the extent to which our memories play tricks on us. The “*misinformation effect*” can be important, when memories become less accurate because of interference from post-event information. I think that sometimes people’s recollections of key events can be twisted by the legal framework that their lawyer applies to them. So a conversation about a project being late becomes a time extension application. Egocentric bias in memory is also common. People gain confidence from recalling the past in a self-aggrandising way. More than 90% of college professors say they do above-average work. One quarter of high school seniors say they are in the top 1% in terms of their ability to get along with other people.

It is important for a mediator to ameliorate bias; to help disputants listen to, and get an understanding of, the hard stuff, the information that runs contrary to their positions. The better disputants understand that information, the better they are able to make rational judgments about whether and how to settle.

This “debiasing” is a tricky business. It is a battle that can never be completely won. Success is measured in increments, and may never be acknowledged. I for one have never been in a mediation where anyone had a Jake Blues at the Triple Rock Church moment, and cried “*I can see the light!*”! But then again I am plainly not James Brown.

Recognition is the key. Recognising that someone’s reaction is part-sourced in a bias, rather than having a fully rational foundation, allows you to start work on debiasing. And to shape your approach.

Approaches to debiasing can include incentives, “nudges” and training. Incentives can be as simplistic as “*if you will spend 10 minutes talking about issue A which is important to X, X has agreed to spend 10 minutes talking about issue B which is important to you*”. “Nudges” can involve changes in how information is presented, or who presents it. Sometimes a message is more palatable if it is delivered by a friendlier face, or in a side-meeting. Training can take many forms. Often an important job for the mediator during a settlement “haggle” will be to guide the parties on the most effective way to present an offer.

By recognising bias, and utilising the best approaches to debiasing, mediators can and do help parties to reach rational and enduring settlements.

Lest all of this sound smug, I hasten to acknowledge that we mediators are also of course riven with bias. And no doubt associated hubris. My kids have not sent me out on to the moors yet, but I think they are subtly stealing all of my stuff. They do also work assiduously to help me keep it real. My 13 year-old-daughter said to me the other day: “*Dad, it’s hilarious that you’re so into that mediation thing, because you’re useless at it at home*”.