

## **Mediation Quest: Making Sense of Loss.**

### **The RE-Constructionist Model of Mediation: an Example of Democracy in Action in a Relational World.**

The theory and practice of mediation is multidisciplinary with many models developed that are based on conflict resolution theories and those from the fields of law, psychology and social work. This book offers such a multidisciplinary insight into the process of disputes by focusing on a social constructionist approach to resolution by understanding loss as experienced by disputing parties and how that understanding may be reconstructed to create another reality which makes effective resolution more plausible. The model is therefore termed the Re-Constructionist model (RM) of mediation. It encourages relational learning which in this mediation model occurs through recognition of the importance of intersubjectivity in dispute analysis and enables a party to take responsibility for their own loss rather than solely blaming the other party. By so taking responsibility, a path is paved for resolution and ultimately for social change to improve parties' access to justice. The book presents five proposals:

- Disputes occur when expectations are not met, and one party makes a demand on the other to redress a sense of loss that cannot be endured (p 7).
- The principal reason for conducting any mediation is to make sense of the loss (p 7).
- The first step towards making sense of loss is to analyse the meaning of loss as it is experienced in the parties' worldviews (p 9);
- The process of moving forward from a dispute occurs when both parties accept responsibility to change their belief systems regarding the loss so that the loss can be better endured (p 9).
- Using relational learning in any mediation can raise the consciousness of parties to actively engage in their 'game in the making' to analyse the effect of their loss (micro-elements) on the outcome of their dispute (macro-elements) (p 10).

The way the book draws on theory from various disciplines to understand the reality of disputing and its resolution stands out. From social constructionism to intersubjective systems theory to chaos theory to theories of affective determinants, grief and loss and appreciative inquiry, the book draws on, and intricately synthesises, ideas to underpin the R M process. In the R M process, mediation is a 'game in the making' as parties' perceptions about their loss continue to evolve. The effect of the loss on parties' psychological wellbeing and outcome of the dispute is critical. Loss in the context of R M mediation is the unmet expectation based on a social contract – terms of a contract – through which parties have conceived, or which is indicative of parties' shared meaning. Disruption of this shared meaning through unmet expectations is the source of loss experienced by parties. The R M models addresses the construction and reconstruction of loss to support the parties in moving on regardless of the loss.

Of importance is the role of the mediator who in the R M mediation process is a relational learner with no vested interest in the outcome of the dispute and who

maintains confidentiality and makes no judgement of the way the parties have conducted their lives in the past or how the parties wish to conduct their lives in the future. However, what is crucially different is that a social constructionist mediator offers the parties an opportunity to co-construct whatever new way of being fits their current immediate needs to accommodate their current losses and leave their disappointment or resentments and or their grief behind in the hope that parties create their own form of social justice (p 50).

In defining the role of the mediator this way, one can see similarities between facilitative and transformative mediators' roles in promoting party self-determination. By placing the responsibility on parties to create their own justice, that is, to self-determine, the RM model echoes traditional facilitative mediation's focus on party self-determination, and more particularly, relational self-determination (Field, 2011). As Field noted in discussing contextual mediation ethics, an ethical mediator:

*must be relational, because "ethics deals with human relations". The parties as people are at the centre of mediation practice. This reflects the fact that the value of the mediation process is only real in terms of the people who engage in it, and that the critical focus of a mediator's role is to support the parties in achieving self-determination. In mediation, self-determination is of people, by people, and for people (p 13).*

What differentiates the RM model however is the positioning of the mediator as a 'fellow relational learner and co-creator' with the parties, thus enabling a process that may move between models of mediation, from facilitative to transformative to evaluative; a 'blended process of 'pure models' ... that work best ... and only to the extent that the parties, as **co-creators**, are willing and able to make them work' (p 51). Thus, the model values self-determination as well as the mediator's role as involved and engaged beyond facilitating resolution.

A major factor differentiating the R M mediation process from other models is the recognition of perception of loss and its influence on disputing and resolution. The focus on loss helps parties to clearly identify what is at stake, and the extent to which they can live with the loss or demand compensation, or a form of compensation. The model also provides the opportunity for both parties to identify their own contribution to the loss – to reconstruct 'the meaning attached to the loss in order to move away from the dispute'. Parties are thus able to create a new reality 'forging a new meaning ... to make sense of loss' (p 54). By supporting parties to deal with their losses in this way, there may be less likelihood for disputes to resurface between the parties. Dealing with loss from different dimensions, including, emotional and psychological dimensions, may support parties in moving forward and putting an end to the dispute. It also supports parties to attend to how the dispute has affected their emotional wellbeing. Resolution in the R M model thus supports 'healing' in the process of dispute resolution. The process is therapeutic (pp 65-66).

In relation to loss, the claim that mediation can be used in many situations even where there is no identifiable loss, such as when parties may engage in the process to negotiate a contract to prevent future disputes is addressed by the author's explanation that preventive or transactional negotiation assisted by a third party still deals with potential loss (p 8). And, although, the capacity of the R M model as a 'healing' process may not be activated where the focus is preventative, it can be argued that eliminating as much potential loss as possible through such a preventative process is eliminating the need for any future healing.

An important tool in the R M process is the normative information session (NIS) which is purposely designed to challenge parties' worldviews and encourage openness to other worldviews, a relational learning process (p 88). The NIS provides the opportunity for the mediator to present information to parties including about the nature of mediation, conflict mapping, personality traits, grief and loss as well as R M principles. This information is critical for parties to engage in the R M process and for the potential of the process to be realised. During the NIS, the parties and the mediator are '*actively encouraged to be relational learners by using the substantive content ... to constantly learn and monitor their awareness regarding their levels of ability, readiness and willingness to move forward at any point in time, and to do the same with the other party*' (p 90). The detailed and somewhat complex engagement expected of parties in this process, which is based on grounded theory, will require skills which parties may or may not possess. For example, the parties' opening statement is treated as a data collection process with data analysis occurring thereafter. In analysing this data, parties are expected to 'cooperatively analyse/code and determine/categorise which data will constitute the main substantive issues for resolution' (p 78) and to use 'vivo codes' for agenda setting, that is, 'use important words or groups of words [used by the other party in their opening statements] as a code or label to identify an issue or legal category' (p 79). This process will require substantial coaching of parties and parties must be sufficiently switched on to use the process. This, however, does not take away from the usefulness of the process as it is expected that information about the nature of the process would have been presented to parties and their consent to use the process must have been obtained prior to commencement of process. It is this process, and the mediators' skills, that allow deconstruction and reconstruction of loss to be placed in the R M process.

Finally, it is claimed that the R M process improves parties' access to justice. This claim is based on the argument that the process enables relational responsibility for parties to accommodate their losses in a more meaningful way by affirming and creatively combining complex, contradictory, paradoxical truths in order to identify complex, higher order, synergistic solutions' (pp 158 -159). It is further claimed that the R M process does better than other models of mediation to facilitate 'goal sharing between parties' because it digs deeper, 'unravelling assumptions about loss' (p 159). In addition, the process, it is claimed, creates opportunities for social change and justice. This it does by affording due process, enabling parties to recognise their own power and providing a way to address their grief and loss to prevent future disputes. The process respects confidentiality of the process while neutrality of the mediator is considered

inappropriate (p 176). While the R M process may achieve access to justice in addressing issues that may inhibit justice, including power, it is entirely dependent on the extent to which parties cooperate to achieve the goal of justice through relational responsibility.

The book makes a very important contribution to dispute resolution scholarship and practice. For mediators seeking to locate their practice in theory, this book is a must read. For mediators seeking to add new tools to their mediation toolbox, a lot will be gained from reading this book. The challenge with using the R M model will be 'doing it well'; coaching parties to use the process and accommodating the amount of time it will take to 'do the process well'. This is no disadvantage however because the necessity of uncovering assumptions, taking joint responsibility and designing a way forward for the future are hallmarks of deep conflict resolution building lasting peace.