Slaw

November 29 th 2019
Posted in: Justice Issues Practice of Law

The Meaning of Justice in Family Law Disputes

by John-Paul Boyd

Justice is a complicated concept. The dictionary definition is short enough, typically given as "fairness and moral conduct," but the seductive simplicity of the explanation ignores the important analyses offered by major thinkers from Plato – through Hobbes, Rousseau and Mill – to Rawls, and tends to stop at the doorstep of the courthouse in any event.

A few weeks ago, I was asked to speak at an ADRIC conference on justice in family law disputes and the difference, if any, between "justice" in the context of litigation and "justice" in the context of mediation. It was an intriguing question into which I put far too much thought; this article contains the surplus of my observations that could not be accommodated in the 20 minutes allowed to me.

Before I begin, an examination of the difference between family law disputes and civil disputes is likely worthwhile. Civil disputes usually involve strangers in arm's-length relationships, whose legal relationship will conclusively wrap up at the expiry of the applicable appeal period. Trials generally concern closed events that occurred in the by-then distant past, and revolve around concrete facts susceptible to measurement and empirical analysis. Pre-trial applications are few and far between and tend to concern disclosure and preservation, while post-trial applications are all but unheard of. The available remedies are remedial in nature and when a conduct order, such as an order for specific performance, are inadequate, damages – a monetary payment intended to restore the plaintiff to the position they would have been in had it not been for the bad act – will be awarded.

Family law disputes, on the other hand, concern people in intimate relationships that will continue, especially if the parties have children, well beyond the end of any appeal. Trials concern a sequence of events that began in the past and continue to the date trial commences, and the quality of evidence offered is often of a he-said/she-said variety, presenting competing views of indeterminate issues and intangible facts that are insusceptible to measurement and concrete analysis, other than by the varying opinions of varying experts. Pre- and post-trial applications are commonplace, and are rife among those in particularly elevated degrees of conflict. Other than an order for divorce, few final orders in family law disputes are in fact "final," partly because the available orders concern financial and parenting obligations that endure into the indefinite future with all the unknown changes the future may bring. Moreover, family law cases have an emotional spillover effect that can profoundly impact the wellbeing of the parties, their children, and any other family members and friends who are caught up in the dispute.

In England, civil disputes were first handled by the Court of Common Pleas, which Henry II carved out of the *curia regis* in the late twelfth century. Family law disputes were traditionally handled by the ecclesiastic courts, where right and wrong were more a matter of morality than legality, a situation that prevailed until the Court for Divorce and Matrimonial Causes was established in 1857. While a special forum for the hearing of family law matters might have allowed the rules of court to adapt to the unique nature of these cases, the court was regrettably absorbed into the High Court of Justice in 1875. Regardless of the specific provenance of these courts, both trace their roots to the mediaeval Germanic concept of trial by combat, a bloody process

in which justice was determined by survival, or by emerging the least maimed, that was brought to England via the Norman Conquest.

The adversarial character of litigation continues to the present day, despite important reforms such as the discovery and disclosure requirements developed by the Court of Chancery between the fifteenth and eighteenth centuries, and occupies an important position in the public mind, thanks largely to the popularity of shows like *Law & Order*, *Suits* and a good half dozen others. (Where, pray tell, is the riveting legal drama in which tense, fractious disputes are resolved through mediation?) Although it's helpful to remember that less than 5% of civil, including family law, claims are resolved by trial, that's not the attitude that most people bring to their first meeting with counsel. Especially in the emotionally fraught world of family law, would-be litigants are often highly motivated by the three Vs – vengeance, vindication and victory – often at all costs. We really haven't left the idea of trial by combat all that far behind us.

The three Vs, however, tend to obscure the capacity for dispassionate reason in family law disputes in a manner not often seen in disputes between corporate litigants or among the parties to a motor vehicle accident. In my view, the ideal family law litigant is one who is motivated by their own rational self-interest, to paraphrase Adam Smith, not one embroiled in conflict so venomous that the battle becomes more important than the outcome. (Here I have in mind that subset of clients who are prepared to endure a two-year wait to trial and the multiplicity of interim applications such delays invite, not to mention a six-figure legal bill, rather than yield on an issue of objectively trivial importance or value in negotiations.) However, in family law cases, there really is no such thing as a "win." Certainly, one can "win" on discrete issues, such as the valuation of a vacation property or the imputation of income, but the end result of these disputes inevitably centres on three things:

> a) the redistribution of the economic resources that met the needs of a family living in one household to the needs of a family living in two households;
>
> b) the redistribution of the social resources the family enjoyed while living in one household to properly parent children living in two households; and,
>
> c) the redistribution of the material resources the family accumulated while living in one household among two households.

This, of course, is why a few practitioners no longer speak of separation and divorce but of "family restructuring:" the same constituent elements that supported and nourished the family commonwealth before separation still exist; the result of the trial or settlement is their reallocation.

Let me return to the theme of this article, justice. From a lawyer's perspective, "justice" in family law litigation should surely consist of a fair and reasonable application of the legislation and common law to the facts, resulting in an equitable redistribution of the family's social resources, economic resources and matériel that is satisfactory to clients acting in their own rational self-interest. From a client's perspective, "justice" usually has an altogether different meaning. For litigants in situations of high conflict, justice often consists of the expectations that:

> a) the judge will apprehend the *real* truth, like a berobed ontological oracle, and their spouse will be chastened accordingly;
>
> b) they will receive some measure of vindication, gratifyingly leavened by a dash of retribution; and,

finally,

c) they will get what they know they really, truly deserve.

From this perspective, justice is dichotomous and delivered in pairs of right/wrong, win/lose, truth/lie and good/evil, all of which are amply supported and reinforced by the adversarial nature of litigation. For example, consider allegations of alienation or alcoholism. The only possible response to either is an unequivocal "no." The alleged alcoholic cannot admit that there is any shred of truth to the allegation, and inevitably replies "I have one or two drinks with friends after work, socially," if not with an equally inflammatory counter-allegation. The alleged alienator likewise cannot reply "well, maybe I did, a little bit," but instead responds saying "the children don't want to see you because you're a shitty parent," a claim to which the rejected parent also cannot concede, even in part. The admissions and concessions that would speed the process and avoid the necessity of costly expert opinion simply cannot be made because of the probable prejudice to the accused parent's position in the litigation. Meanwhile, the positions of the parties have been sharply polarized into irreconcilable antipodes.

When counsel are unable or uninterested in mitigating this view of justice, which, in fairness, is really quite lucrative, compromise is impossible and trial inevitable. (The ultimate irony, of course, lies in the well-known judicial saw-off, which compels compromise by giving neither party all of what they seek except in circumstances of egregious, persistent and unrepentant misbehaviour.) Regardless of outcome, trials usually leave both parties more miserable, more impoverished and more deeply entrenched in their conflict than they were before. Not much of a "win," especially when an all-too-rare award of costs fails to make much of a dent in their lawyer's bill.

This hints at two other factors, unique to family law, that militate against the all-or-nothing mentality litigation encourages. As I've already mentioned, the relationship between parties with children is doomed to continue until their children predecease them. This suggests that important values in resolving family law disputes ought to include the preservation of civility between the parties and the promotion of their ability to work together in the future. These goals are rarely achieved with a three-V approach to dispute resolution. Further, the available research clearly indicates that children's adaptation to their parents' separation rests on two key elements: the quality and nature of their relationships with each parent; and, the intensity and duration of the conflict between their parents. Given the endemic delays which plague the resolution of family law disputes in court, never mind the animosity litigation fosters, the short- and long-term wellbeing of children is seriously imperilled by adversarial processes.

Ideas of justice are somewhat different in the context of mediation. Rather than attempting to stuff the messiness and ambiguity of family relationships into a dichotomous paradigm best suited for the resolution of property line and corporate/commercial disputes, mediation offers a process where there are no winners and no losers, only compromise and a spectrum of potential outcomes.

While lawyers, one hopes, would still set a benchmark based on an equitable redistribution of the family's social resources, economic resources and matériel that bears some relationship to the likely result at trial, even that benchmark must be approached with deference to their clients' informed consent and subjective preference. Clients, on the other hand, must approach mediation with an expectation of compromise that transforms "justice" from an "I want what's *best for me*, the other party be damned" perspective to "I want what's *fair for me*." No one can reasonably enter mediation in a family law dispute with the expectation that they're going to get all they want; each party must be satisfied with a saw-off or there will be no settlement, or, at least, not a settlement that endures.

In contrast to the litigation of family law disputes, mediation is premised on cooperation rather than conflict, interests rather than rights, and looking toward the future rather than morbidly dwelling on the past. By avoiding the polarization of positions, nuances and subtleties can be explored and admissions can be made that would be catastrophic if revealed in court. Difficult claims, like allegations of alienation or alcoholism, can be addressed in a manner that doesn't push people to dichotomous extremes of "did" and "did not," but instead to ask questions about the sort of parenting arrangements that will best ensure the safety and wellbeing of the children while in the care of the offending parent.

As a result, mediation reduces rancour and often has the collateral effect of showing parties that they can indeed work with each other and resolve disputes by agreement. Because it can be speedy – I've resolved court cases that had been pending for years in half a day – cost and the intensity of parental conflict are reduced, and anything that reduces the children's exposure to their parents' conflict is something to be assiduously striven toward.

The subjective experience of "justice," in short, is indeed different in the context of litigation than in mediation. While the coercive quality of litigation ensures that a result will be reached, although not at any time soon, the notion of justice it reflects has expensive and destructive consequences. Barring cases of exceptionally high conflict, family violence that cannot be safely accommodated, and threats to persons or property, court is, without a doubt, absolutely the wrong place to resolve family law disputes, and I say that while acknowledging the difficult tasks provincial and superior court judges struggle with every day and the very good work they do. Litigation is admirably well-suited to the resolution of disputes between legal strangers; it is spectacularly inappropriate for the resolution of disputes between parents involved in an ongoing relationship and damaging to the children who will be impacted by their conflict.

Mediation is based on a contrasting view of justice that is predicated on cooperation and compromise at the very outset. Although "winning" and "losing" are not on the table, success is nonetheless far from guaranteed and relies on the willingness of the parties and the careful, deliberate perspicacity of their lawyers. However, if everyone involved is able to participate in good faith, with an understanding that they are unlikely to get all they want, mediation gives parents the best chance of establishing a good working relationship into the future and finding a resolution that hews more closely to the dictionary definition of "justice" as fairness and moral conduct.

Comments

A. Prior
November 29th, 2019 at 12:25 pm (Edit)

This is a very good article, although I would suggest it is far more applicable to civil and commercial litigation than you give it credit.

Although family law is unique from most civil disputes (in that the relationship does truly continue), it is also unique because the nature of the relationship is typically clearly known and defined (former spouses). In civil/commercial/construction litigation, it is almost always the precise definition of the relationship that is up in the air, often due to poor (or no) documents, disparity in bargaining positions, the passage of time, self-interested recollection of past events, etc…

Your list of "expectations" of justice is something that civil litigators routinely have to deal with when

managing files, even with highly sophisticated clients and I have little doubt that the perception of justice, even in the civil context, is negatively impacted by a client's expectation that the court will deliver justice by, totally coincidentally, agreeing with absolutely everything they have to say on the matter.

How we define justice is significant, especially when we then try to talk about access to this "justice" – and to date, I have not really seen a compelling definition that the majority of people will be willing to adopt, even when they have the losing case.

John-Paul Boyd
November 29th, 2019 at 12:30 pm (Edit)

Thanks for your comment. I do think you're right, I've likely sold non-family civil litigation short, and I appreciate the observation.

It would be interesting to pursue the potential impact of developing an agreed meaning of "justice" on parties' ability to settle a dispute.

A. Prior
November 29th, 2019 at 5:52 pm (Edit)

It is less selling non-family short – as much as selling the value of your observations short. I think they apply to the other areas of litigation as well.

Over time I have come to believe that we need a definition of justice that does not include "trial" – where trial is seen as a matter of last resort (better than pitchforks and a mob) rather than the "best" way to get to a just outcome. Negotiation, mediation, etc… lead to just results. Trials are just better than the alternative of violence – but so long as people think justice means access to trial, we are bound to disappoint the participants in the system because they don't get the "vindication" you talk about.

Rebecca Alleyne
December 6th, 2019 at 12:11 pm (Edit)

I was there at the ADRIC conference and I was left feeling disappointed that that the panel presentation ended with no time for discussion or questions. So, I was thankful to see this great article for more on the subject. As a family lawyer, and one that now exclusively practices as a family law mediator, I could not agree with you more. The need for, at the least, a functional and civil ongoing relationship between parents makes court out of the question to anyone truly seeking "justice" for the family as a whole.

Also, mediation grants a respectful level of trust to the parties to untangle themselves from their own relationship – I often get the sense from lawyers and particularly from some on the panel at the conference that there's an underlying assumption that the parties can't figure out it on their own and that some other decision maker knows best. Maybe a part of justice in family law is providing parties the space, support, information and tools to determine and agree how to handle their own life. "Justice" being defined by those who live it.

Anyway, thanks for the follow up article. Interesting topic.

Mark Walton
December 6th, 2019 at 9:16 pm (Edit)

Agree with Rebecca Alleyne to an extent re: "Justice" being defined by those who live it. The sometimes (not always) problem is that a parent's sense of justice (or perhaps injustice) can tip the scales against the interests of the child(ten). The result is that an objective mind is needed from somewhere – preferably someone with expertise in childhood development. If we could put parents behind a Rawlsian 'veil of ignorance' we may have something to build on. Here's hoping.

John-Paul Boyd
December 7th, 2019 at 10:50 am (Edit)

I've always enjoyed the social contract approach to thinking about political, economic and social justice. There's something deeply compelling about asking people how they would choose to structure an optimal society with no knowledge of their place in it.

Your comment makes me wonder whether the idea of a veil of ignorance could somehow be applied in the context of mediation, to pull people out of their subjective experience and encourage them to a more objective perspective of their own dispute, to overcome obstacles to settlement. It's worth thinking about, in any event.