The journey from Babel to Pentecost: the significance of language in dispute resolution theory

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Abstract

There is a substantial body of scholarly literature which addresses the significance of language in ordering the relationships of people in the human family. With reference to some of that literature together with empirical data collected in a current doctoral research project this article explores the relationship of language to the management and resolution of disputes through mediation. It argues that language is the currency of social intercourse in a functioning society and reflects the ideological and political values of recognition and respect for others, moral and political education, self-empowerment and the level of connectedness we have with each other. It argues that insufficient attention is being paid by lawyers and dispute resolution practitioners to the dynamics of language and that a greater focus of attention to language would have the capacity to enhance the educative value of mediation for disputants.

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1. Introduction

Words matter. They are able to calm the spirit of a distressed child or induce large crowds into a frenzy of religious bigotry or racial hatred. Governments are endorsed or swept from office on the basis of words employed in election campaigns and policy speeches. Words can also be soul-destroying or life-threatening. In 1989 the novelist Salman Rushdie's life was endangered because an ayatollah in Tehran pronounced a fatwa exhorting Muslims throughout the world to murder him on sight. In 1994, the words of Theoneste Bagosora and local political officials broadcast on government-sponsored radio and in telephone conversations promoted the Rwandan massacre, an atrocity in which an estimated 500,000 people were hacked to death with machetes by their neighbours in their homes and in the streets where ever they could be found.[2]

We use words to eulogise the memories of loved ones, to record our history of life's experiences and to declare our hopes and aspirations for the future. Martin Luther King's 'I have a dream' speech exhorting Americans to embrace a human rights culture and John F Kennedy's '*ask not what your country can do for you, ask what you can do for your country'* are memorable words that we recall many years after they were spoken because of the imaginative and evocative manner in which the speeches were crafted and delivered.

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[2] G *Prunier, The Rwanda Crisis, 1959–1994: History of a Genocide (1st ed.). (London: C. Hurst & Co. Publishers, 1995.)*

Words are used contextually to inform, beseech, request, persuade, advise, chastise, teach, coach, praise, negotiate, threaten and rebuke. They are used to express love, anger, frustration, regret, joy, sadness and grief. They are used to make laws which declare our freedoms and regulate our conduct. The effect of the language we use has become so much a part of us and so automatic that, like Moliere's Monsieur Jourdain who was surprised and delighted to learn that he had been speaking prose all his life[2], it comes as something of a surprise to us when, on reflection, we are able to see the effect that language has upon us and that we have upon others when we communicate through language. One has only to set foot on foreign soil where English is not spoken or understood to appreciate just how disabling it can be not to be able to communicate through the medium of the spoken word.

In this article, I propose to explore some of the literature about language and its role in affecting human relationships generally and in particular how it shapes dispute development, management, transformation and resolution. I will argue that language is the currency of social intercourse in a functioning society and that it reflects the ideological and political values of recognition and respect for others, moral and political education, self-empowerment and the level of connectedness we have with each other. Conversely, in a broken or dysfunctional society the disintegration of those ideologies and values is reflected in the deterioration of the language we employ to communicate with each other – a language that betrays a lack of respect, contempt for any meaningful search for truth and a scornful, often abusive, rejection of any views which happen not to conform to the dominant view. When that happens, as a society, we are all thereby diminished.

I will further argue that, whilst dispute resolution literature and practice have been at the forefront in promoting respectful dialogue between disputing parties, there nevertheless remains an opportunity for an increased level of awareness of the dynamics of language and how it impacts on dispute resolution and the future relationships of disputing parties.

2 Literature review

In his book *Free Speech: Ten Principles for a Connected World,*[3] Professor Timothy Garton Ash makes the point that in a post digital world where half humankind has access to the internet and where the number of Facebook users exceeds the population of China, we have an unprecedented opportunity to express our thoughts online where any one of billions of people might encounter them.[4] Similarly, we have an unprecedented opportunity to engage in the evils of unrestrained abuses of the freedom of expression in the form of death threats, paedophile images, and tides of abuse across national frontiers and throughout the world.

Ash argues that the power wielded by social media corporations such as Facebook and Google is greater than that of traditional nation states and that, together, they have created a 'world-as-city' which he calls 'Cosmopolis' whose citizens or 'netizens' communicate with their electronic neighbours across the globe without regard to national or geographic boundaries and sometimes with scant regard for political, religious or cultural sensitivities. He posits the development of communication as a journey which we must learn to navigate by speech, as ancient mariners taught themselves to navigate the Aegean Sea.[5]

> *"The goal of this journey" he says "is not to eliminate conflict between human aspirations, values and ideologies. That is not just unachievable but also undesirable, for it would result in a sterile world, monotonous, uncreative and unfree. Rather, we*

[2] R Fisher, and W Ury *Getting to Yes - Negotiating Agreement Without Giving In*, London, Hutchinson Business, 1986 Introduction at page xi
[3] T Garton Ash *Free Speech: Ten Principles for a Connected World* (London, Atlantic books 2016)
[4] Ibid p 1
[5] Ibid p 4

> *should work towards a framework of civilized and peaceful conflict, suited to and sustainable in this world of neighbours."*[6]

Ash's argument, and indeed, the central theme of his book, is to reconcile the public interest in freedom of speech with the public interest in protecting groups within society from vilification on the basis of religious, racial or ethnic identity.

Indeed many of the debates featured in the literature are cast in terms of freedom of speech. Should there be absolute, unrestrained freedom of speech? Should freedom of speech be subject to some restraint in the interest of preventing incitement to violence or affront to religious or ethnic groups? If so, who is to decide what religious or ethnic groups are entitled to protection and the nature of the protection to which they are entitled? At what point does liberal debate over legitimate differences of opinion become affront? Where do we draw the line? Does the level of protection required to cater for religious difference equate to the level of protection required to protect ethnic minorities? These questions are not easy to resolve. As Barendt observes:

> *"The proscription of any type of speech on the grounds of its offensiveness is, of course, very hard to reconcile with freedom of expression, for a right to express and receive only inoffensive opinions would be hardly worth having."*[7]

Why does any of this matter? I think the answer to that question is precisely because language does persuade, advise, teach, coach and threaten. It has consequences. It has the power to influence human behaviour. It can encourage or discourage, enrage or pacify, incite or deter. Almost all of the genocides committed in modern times have been preceded by vitriolic speech in which the victim groups have been targeted by dehumanizing language. Nazi propogandists referred to Jews as vermin and pests. Hutu propogandists spoke of Tutsis as cockroaches and Slobodan Milosevich referred to Muslims as black crows.[8] In every one of these cases speech was a precursor to mass violence.

Language is the currency through which we trade our thoughts and expressions and maintain our relationships with our family and friends and other members of human society. Like monetary currency it does not remain static. It can be inflated or devalued. It has the capacity to exaggerate or to diminish the significance of human behaviour and world events. If everything is 'amazing' then nothing is. The most appalling atrocities can be trivialised by the application of sanitised technical labels which consign them to the routine and mundane.

In February 1989, the Supreme Court of the United States rejected a claim for damages brought on behalf of a child from Wisconsin named Joshua DeShaney who had been battered senseless by his father and rendered brain damaged for life.[9] Such was the level of violence committed against this boy that doctors reported having found pools of rotted blood inside his brain resulting from constant beatings over a protracted period of time. Lamenting the inadequacy of the language employed by the Court in dismissing the claim one commentator said:

> *"How can any of us talk about the pain and grotesqueries of violence that people inflict on one another, especially those whom they know?...When the unspeakable becomes*

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[6] Ibid
[7] E Barendt *Religious Hatred Laws: Protecting Groups or Belief?* Res Publica (2011) 17:41-53 at 44
[8] S Benesch *Words as Weapons* World Policy Journal Vol 29 No 1 Spring 2012, 7-12 at p 11
[9] M Minow *Words and the Door to the Land of Change: Law, Language and Family Violence* 43 Vand L Rev (1990) 1665.

> *spoken, its significance may seem lessened, the horror brought down to the scale of other words in the sentence, staidly positioned between commas or parentheses."*[10]

On 12 August 2017, demonstrations by white supremacist groups in North Carolina ended in the deaths of three people and injury to nineteen others. The President of the United States was equivocal in his response and blamed violence 'on both sides.'[11] His failure to respond as many people thought he ought to have responded has reverberated around the world. Many Americans who had occupied prestigious positions in the service of the US government have resigned in protest. Among them was Professor Daniel Kammen, an energy professor from the University of California, Berkeley, who had served as one of five US science envoys. In his letter of resignation, Kammen wrote:

> *"Acts and words matter…Particularly troubling to me is how your response to Charlottesville is consistent with a broader pattern of behaviour that enables sexism and racism, and disregards the welfare of all Americans, the global community and the planet."*[12]

Words are contextual and, as 'Cosmopolis' has become more fully connected with the development of technology, the audiences who hear the spoken word have grown exponentially so that words originally intended for the ears of one audience have often reached and offended a far broader spectrum of the population.

At his 29th birthday party in March 2010, a black South African youth leader named Julius Malema, cocked his finger as if pointing a gun and began to chant the words *Dubulu iBhunu* (shoot the Boer) and the crowd sang along merrily. A few days later when he sang the same song at a rally at the University of Johannesburg, hundreds of whites filed protests and a judge injuncted him from singing the song until the matter could be heard by a court.[13] The words of songs can be the powerful catalysts for action and much depends on the context in which they are sung.

I think there is much to be said for the view that the quality of our relationships is reflected in the way that we communicate with each other and how we express ourselves in both the written and spoken word. A quick check of the website Netmanners.com as I prepared this article disclosed the title of a book called *101 Email Etiquette Tips* which includes, among its tips the following: Make sure your email includes a courteous greeting and closing. Use the appropriate level of formality. Avoid using repeated exclamation marks (!!!) or question marks (???) as they may appear rude or condescending. Avoid using all upper case because it conveys the sense of shouting. These and many other tips about digital communication are provided because it is recognized that email is a very informal manner of communication, sometimes described as 'written speech' and people are inclined to say in emails and blog posts things which they would not say to a person's face.

These tips are provided for good reason. People who, in earlier pre-digital times, would never have considered taking the trouble to write a letter to the editor or publishing their views, even to a relatively limited audience, are now prepared to be gratified instantly by seeing their words published in blogs and news commentaries and, in the process, becoming engaged with other bloggers in heated exchanges of vitriolic abuse, usually writing anonymously under a pseudonym. We are, as Ash says, all publishers now.[14] There is a live question as to whether those anonymous exchanges of abuse affect the minds, attitudes and behaviour of the correspondents and those who read them. Are we influenced by what we read to the point where we are motivated to reflect on our own attitudes, to adjust our thinking and to

[10] Ibid at p 1673
[11] Washington Post 24.8.17
[12] Ibid
[13] S Benesch above n 8 at p 7
[14] T Ash above n 3 at p 1

embark on a course of action – subscribe to a cause, make a stand or otherwise change our behaviour? To what extent are our latent political and moral grievances and sources of discontent brought to the surface and our passions inflamed by the language employed in social media? How many personal disputes are brought about or escalated by something we read on Facebook?

Language can be subtle and nuanced. Solemn pronouncements from a Supreme Court judge are likely to be heard differently from the same or similar words uttered by a colleague or friend. Sometimes the context in which words are spoken can change their meaning or give rise to uncertainty. People say things like: *'I thought he was joking'* or *'I wasn't sure what to make of him.'*

In a lecture given to law students at the University of New South Wales in 2013, Justice Ronald Sackville complained that solicitors often exaggerate their clients' claims in correspondence and other communications with each other. They say 'outrageous' when they mean 'unreasonable' and 'astonishing' when they mean 'surprising.'[15] In the litigation process of adversarial combat, witnesses are subjected to cross examination by complete strangers in wigs and gowns who affront them repeatedly with the most offensive suggestions that their narratives are untruthful, that they are unreliable and ought not be believed. Having sworn to tell 'the truth, the whole truth and nothing but the truth' they are immediately told to say nothing except to *'answer the question'* and are treated in a manner which, in any other context, would be actionable as offensive and bullying behaviour.

In all of these instances, whether we are singing at a birthday party, sending an email to a business colleague or pleading a case before a judge, we are engaging with other social beings and our conversation is an act of recognition and respect (or contempt) for others as well as an expression of our moral and political views and an act of self-empowerment.

It is inevitable that, at times of conflict, our language will be informed by our views and our desire to promote our self-interests in an environment where we feel threatened and our self-empowerment is challenged. Understandably, the desire to promote our own self-interest may provoke in us and our lawyers a temptation to exaggerate our thoughts and feelings during times of stress and conflict. Paradoxically, the language we choose on such occasions may also serve to inflame hostilities and exacerbate the rift between disputants. Arguably then, the language in which we frame our thoughts, fears and aspirations and how we communicate those things should play an important role in our management of the dispute.

The importance of language and communication in dispute resolution is well documented in the literature. King and others spoke of: *"…the potential to enhance communication, develop cooperation and preserve relationships between disputing parties…"*[16] Hardy and Rundle have emphasised the importance of coaching disputants to engage with mediation using appropriate and non-toxic forms of language.[17] Nancy Welsh cited as one of the original core values of mediation that the parties would: *"…actively and directly participate in the communication and negotiation that occurs during mediation."*[18]

Referring to the US Postal Service's REDRESS program which explicitly addressed the importance of language in mediation, Bush and Folger said:

> *"The manner in which participants express themselves changes from strong emotion to calm, from defensiveness to openness, and from speaking about or at the other party to*

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[15] Lecture notes from the author's enrolment in the LLM course *Judging and the Judiciary* UNSW 2013
[16] M King, A Freiberg, B Batagol and R Hyams *Non-Adversarial Justice* (Sydney, Federation Press, 2009) p 93
[17] S Hardy and O Rundle *Mediation for Lawyers* (Sydney, CCH, 2010) p 134
[18] N Welsh *The Thinning Vision of Self-determination in Court-Connected Mediation: the inevitable price of institutionalization?* 6 Harvard Negotiation Law Review (1) 2001 p 4

> *interacting with the party...Interactions between participants that are negative and difficult often lead to discussions that are positive and productive. Participants gain new understandings during the mediation about the other party and their actions…"*[19]

The importance of language in dispute resolution was noted by Vasilyeva who observed succinctly:

> *"Every dispute presents a practical problem for participants to deal with. Participants have to determine what they are talking about but they must also construct a way of talking to each other and resolving their conflict in the context of different constraints."*[20]

3. What the research is telling us about lawyers and language?

The transformative power of mediation to bring about or facilitate this kind of growth in human interaction is a valuable benefit of mediation and undoubtedly contributes greatly to the true resolution (as distinct from mere settlement) of disputes, reconciliation of the parties and preservation of functional relationships.

For this reason, included in the empirical component of my doctoral research into lawyers' involvement with court-connected mediation there was a question to lawyer respondents which asked the following: *"Do you have any thoughts about the level of your client's involvement in the dispute resolution process. In other words, do you prefer to speak on behalf of the client or do you prefer to have the client speak?"*

This question was designed to determine whether any restrictions are being placed on parties' entitlements to express themselves directly in mediation and are thereby restraining the participants' capacity to engage fully with the process. The following examples illustrate the research findings:

> *"Again, it depends pretty much on the client. Some clients for reasons of, say, nervousness, or a lack of willingness to speak to the other side which would cause them to want to not speak during the mediation in, for example, Family Provisions cases or Family Law cases, it is often the case that the parties are a robust lot who are not on speaking terms and not speaking is often a good idea. There are other times when you have a sophisticated client who just needs to have his or her say and in that case you must let them speak for themselves and you might have another case where there is a sophisticated client and you know that whatever they say will not help their case so you might prefer them not to speak."*

Leaving to one side the assumption implicit in this report that the preservation of *'their case'* remains a dominant interest to be valued in the context of a mediation, the emphasis on the 'you' in the final phrase of the response suggests that, despite the matter being subject to instructions, the power equilibrium still rests in favour of the lawyer who prefers to retain the right to filter whatever communication is to pass from the client to the other parties. A further issue here was the tacit acceptance of the assumption that if parties are *'…a robust lot who are not on speaking terms…'* then the status quo should not be disturbed and the parties should not be encouraged to speak. The response suggests on the part of the respondent a

[19] R Bush and J Folger *The Promise of Mediation: The Transformative Approach to Conflict* (San Francisco Jossey Bass 2005) at p 69

[20] A Vasilyeva *Identity as a resource to shape mediation in dialogic interaction* Language and Dialogue 5:3 (2015) 355-380 at p 355

lack of recognition of the transformative power of mediation described by Bush and Folger[21] which might be harnessed by allowing the parties to engage in a conversation directly with each other.

Another lawyer respondent offered the following:

> *"Again, it depends very much on the client and the dispute and the people on the other side. It tends to be that either I, or if counsel is involved, counsel, will open and I think that is generally safer but there are instances where the client is sufficiently switched on and intelligent, eloquent and confident enough to open and is not going to end up doing more harm than good, and there are instances like that, but being a lawyer I tend to be pretty risk averse and it tends to be the exception rather than the rule."*

This response reinforces the maintenance of the power dynamics in favour of the lawyer as expert and, interestingly, adopts the positional strategy of safety from *"...doing more harm than good..."* with the adversarial eye of the lawyer ever looking over the shoulder at the battle which is yet to come. It is also noteworthy that this respondent adopted the language of adversarialism in describing and, incidentally, limiting, the client participation to "an opening," language which is more consistent with what happens at the commencement of a court hearing than making a statement or engaging in conversation at a mediation.

Some lawyer respondents were ambivalent in their attitudes to the issue of their clients speaking or being personally involved in mediation processes. One respondent thought that client involvement was a necessary evil to provide up to date instructions and put the lawyer in a position to be able to answer questions from the mediator to which the lawyer did not know the answer. The same respondent, however, was also able to recognize the cathartic element and the transformative merit of having direct client input into the process. He reported that:

> *"...obviously there are times when you as a lawyer have to speak, you know. That's generally the opening address that you make on behalf of your client. But there will be times during the course of the mediation where certain issues will be raised and there is a need for the involvement of your client. It doesn't often happen but there are times when it does happen. In all sorts of things – in workers' comp, you know we have the mediator on the phone and the questions that need to be asked – I can't answer them so you have your client there to answer them. It is also good to have the client speak sometimes because, you know, particularly in a conciliation or mediation, if the mediator is pro-active in trying to resolve it, the mediator can make up his or her mind as to the sincerity or truthfulness of the client.*
>
> *Q. Does that matter though in a mediation? A. Oh hell yes, particularly in the Family Provision cases where there are a lot of emotional matters involved and people need to express those feelings and to indicate why they've adopted certain positions and sometimes it's interesting to see the toing and froing between the two parties where, to a certain extent, they've reached an understanding of one another's attitude and decision. They might still be poles apart but at least they have an understanding and sometimes it changes their attitude a little bit as well as to how they see the compromise."*

Clearly enough, this respondent was able to identify the transformative value of allowing participants in mediation to speak directly to each other so that *"...sometimes it changes their attitude a little bit..."* Nevertheless, his observation that the need for client involvement *"...doesn't often happen..."* would tend

[21] Ibid

to suggest that, in the mind of this respondent, direct disputant participation in the mediation process is still the exception rather than the rule.

Respondents who practice in family provisions cases brought a unique perspective to the research. This is the area of legal activity where, not only is the dispute between parties who are blood relatives where preservation of personal relationships might be thought to be of value, but it is also an area where mediation is both compulsory and takes place under the direct supervision of the court.

Family provision cases in New South Wales are governed by the *Succession Act 2006* (NSW) section 98(2) of which provides that unless the Court, for special reasons, otherwise orders, it *must* refer family provision applications to mediation before it considers the application.[22] The process is conducted more like a directions hearing than a mediation. The mediator introduces himself (sometimes as 'the registrar'), makes a short formal introductory address and then invites each of the parties' representatives, in turn, to make an address before the parties separate into groups and the process continues as a shuttle mediation with the registrar plying back and forth between the two rooms conveying offers and counter-offers.[23] There is no suggestion that the parties themselves should speak or actively play any role whatever in the process and their exclusion is reinforced physically by having them sit on the other side of their legal representatives and away from the mediator.

Asked about client involvement in that process, one lawyer respondent said:

> *"Mostly at the mediation either a barrister or myself will do the opening statements and, in those opening statements, the barrister that I normally use, she would put my or our position and our first or opening offer. Mostly our clients don't speak. We have said to them, the barrister and I, they are more than welcome to but if you're going to get emotional or hysterical, then our preference would be 'Don't.' Mostly the clients don't. They choose not to. Every now and then they might have something to say but mostly they let us do the talking. They do a lot of talking when we go to the break-out rooms and the pressure is off. They do a lot of talking to us but not so much in front of the other person. It's a little bit like poker faces across the table sometimes."*

Another lawyer respondent who practices in family provisions matters offered the following:

> *"Q. Does a barrister talk more at a mediation as a barrister than you would talk at a mediation as a solicitor?*
>
> *A. Yes. That's my experience and perhaps it is because I'm not as sophisticated as a barrister but from my experience the barrister starts with all the legal principles and the cases and the case law and the common law and the issues that arise from the case and the most recent decision in the case. I think from my experience that the lawyers – if a lawyer is coming to mediation, a lawyer will start by saying: 'My client would like to resolve this dispute.' I think lawyers generally would like to approach mediation using more client familiar language.*
>
> *Q. When you say 'lawyer' do you mean 'solicitor' rather than 'barrister'? A. Sorry yes, but that's just my experience."*

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[22] *Succession Act 2006,* section 98(2)

[23] This was the process followed in a family provisions mediation attended by this author at the Supreme Court of NSW in Sydney on 27th July, 2017.

Yet another family provisions lawyer said: *"You are looking for common ground – not to drive parties apart. More often than not, when parties want to speak, it's not to be conciliatory, it's to argue. It's to say: 'I want you to accept what I have to say.' More often than not it is argumentative. So I generally tend to discourage parties from speaking."*

Some lawyer respondents were unequivocally opposed to their client having anything whatever to say at mediations and guarded jealously their role as lawyer expert. Asked whether she had a practice regarding her client's level of involvement in the mediation process one respondent said simply: *"I prefer to speak on behalf of the client."* Another said:

> *"No, I don't think it is a good idea for the client to be doing the talking. No, not at all. It's for the professionals. It's a much more subtle process – the whole negotiation and the whole process. A client could sour the whole thing so quickly. Forty years of legal experience allows me to be involved in the process."*

The empirical research component of this project also included personal interviews with mediators who conduct mediations of disputes which are in the shadow of the law; that is to say, disputes which are either subject to present litigation or where litigation is threatened. The following section of this article considers the evidence of those mediators who reflected on their observations of lawyers' behaviour in mediations with specific reference to the extent to which they aided or permitted their clients to participate in the mediation process.

4. What mediators are saying?

Disputant participation in mediation was a prominent theme in discussions with mediators some of whom attributed the failure of mediation sessions to the reluctance or, in one case, the absolute refusal of a lawyer to allow his client to speak at the mediation.

Some mediators were opposed to the idea of even having lawyers present at mediations at all because they held the view that lawyers obstruct the free flow of information between the parties and distort the conversation. The following example illustrates the point:

> *'Q. Now just reflecting on your experience as a mediator where lawyers have been present, do you think that their presence contributes to the mediation process or detracts from it?*
>
> *A. In an overall sense, there are obviously exceptions where they are useful, but I do find in terms of really fully resolving a matter for all the parties, it is a detraction.*
>
> *Q. And can you tell me more about that? Why do you think that is?*
>
> *A. Because the perspective of the lawyer is, as I said, a narrower perspective and quite often that becomes the dominant point of discussion – legal entitlements and so forth, whereas in a lot of situations, it is certainly a lost opportunity for a transformative process which mediation can provide and a good mediator would be able to facilitate.*
>
> *Q. Right, so that's when you've got the parties? A. Yea.*
>
> *Q. What happens when the lawyers are present? A. When the lawyers are present they tend to be the one speaking on behalf of the client and they narrow the scope of the situation and they cannot allow for full, frank discussion about what's going on for the parties.'*

There was a view among mediator respondents that the tendency of lawyers to present opening statements on behalf of their clients represented an effort to frame the mediation in an adversarial way which suits their expertise and ability but operates to the detriment of other more positive aspects of the mediation process.

5. What follows from the evidence?

The first thing which needs to be said about the evidence disclosed by this study is that any conclusions of a general nature should only be drawn with great caution. This is because the sample group of lawyers interviewed, numbering twenty-seven in all, were drawn from a potential pool of more than thirty thousand lawyers who hold practicing certificates in New South Wales.[24] That said, it is also the case that the sample was self-selected and was as randomized as it is possible to achieve in a study of this kind. Lawyer respondents were drawn from a wide range of age groups, professional seniority, experience and geographic location within New South Wales. Most were from private practice but two were in-house counsel (one from the banking sector and the other from the insurance industry). Mediator respondents were likewise taken from across the spectrum of mediation practice. Some were qualified lawyers and some were not. Conversely, some lawyer respondents were accredited mediators and others were not.

Secondly, it must be acknowledged that dispute resolution practitioners and academics have placed considerable emphasis on coaching and encouraging the development of language skills as a means to reduce the toxicity of language in dispute communication. Condliffe dedicated an entire chapter of his book to managing difficult conversations and complaints.[25] In a table listing advantages and disadvantages of lawyer attendance at mediations, Hardy and Rundle considered that one of the disadvantages is the fear that parties are less likely to speak directly to each other which may present a lost opportunity to maintain a relationship and develop a future conflict management strategy.[26] In her chapter on negotiation skills, Sourdin devoted much attention to the employment of appropriate language skills such as active listening, reframing, summarising and paraphrasing in order to encourage disputants to approach dispute resolution processes more positively.[27] There is, however, a remaining question whether the appeal to language as a means of encouraging true dispute resolution has yet reached the ears of those who represent disputants caught in conflict in the shadow of the law.

Whilst mediation literature supports the view expressed by Ash and others that language and communication are important elements in managing conflict, this recognition does not seem to have achieved unqualified universal acceptance in mediation practice in relation to those disputes which come to mediation in connection with court proceedings. There is, it seems, an unrealized opportunity for lawyers and dispute resolution practitioners to place greater emphasis on the language of mediation so that disputants will have the opportunity to express themselves more directly, more fully and with greater self-determination so that they may participate more fully in the mediation experience generally. The journey from Babel to Pentecost is not yet over.

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[24] A Wallace and D Fase *National Profile of Solicitors 2016* (lawsociety.com.au/cs/groups/public/documents/internetcontent/1378059.pdf viewed 5.7.17)
[25] P Condliffe *Conflict Management: A Practical Guide* (4th edition Sydney Lexis Nexis Butterworths 2012) at p 57
[26] S Hardy and O Rundle *Mediation for Lawyers* (Sydney CCH 2010) at p 140
[27] T Sourdin *Alternative Dispute Resolution* (4th ed Sydney Thompson Reuters 2012) at p219