A View from The Centre
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The Zipper and Daniel Kahneman

What They Can Teach Us About Mediation

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My client, a key executive with a consumer-products company, was about to participate in his first-ever mediation. I wasn't too worried. The one-day session was scheduled in California to settle a U.S. patent infringement lawsuit in its early stages; I knew my client was well prepared both on the issues and on the ebbs and flows of a typical mediation. However, I had not reckoned on my client getting caught in *The Zipper.*

Let us pause here and consider the aspirations my client had coming into this voluntary mediation. We will circle back to The Zipper below. As the defendant in this lawsuit, my client's business faced significant monetary losses in the form of a possible monetary award and a certain expenditure of legal fees. On the positive side of the ledger, the recent early evidentiary discovery had revealed facts that supported several defences in our client's favour. Taking account of this, we had handicapped an appropriate range of settlement dollar numbers.

The big smudge in this picture was that the U.S. patent attorneys defending our client had estimated that well over US$100,000 in legal fees needed to be incurred for eight to ten months before our client could have the suit dismissed. This, above all, provided a strong incentive for my client to reach a settlement by the close of the day-long mediation.

Going in, he was eager to finally meet the owner of the plaintiff company, have a conversation with him and size him up. Our client, whose reasonableness was palpable, wanted to induce his counterpart to jointly explore whether a settlement might include or consist of a joint business venture.

These then were the plans. It turned out that the mediator, chosen by the plaintiff's litigators and accepted by ours, had other ideas. Ideas that those familiar with VanIAC Mediation Rules of Procedure will find unusual. Right after he entered the room into which our team had been ushered, he informed us that he did not believe in the standard mediation model, namely an opening plenary session in which the principals would exchange points of view and the opposing lawyers would present their takes on case developments to that point. The VanIAC Rules state that after the parties submit their brief summary of the issues to the mediator pre-conference, they should exchange these summaries between themselves. This mediator informed us that, honouring the Plaintiff's request, their summary would not be given to us. Also, he did not tell us whether he had any previous involvement with the Plaintiff or its

attorneys, as VanIAC Rules would require. He told us that we would probably not meet the plaintiff's lawyers, sequestered in another room, until settlement was reached. As for the plaintiff's principal, he was in town…but at another location. Another departure from VanIAC Rules.

The mediator explained that his plan was to reach into his toolkit for one gap-narrowing technique after another until one worked and the dispute resolved. Experience had taught him, he added, that the lawyers' legal presentations were not conducive to settlement. He even told us it was unnecessary for him to learn about the issues in the lawsuit. And direct discussions between the principals only led to everyone digging in.

While his approach, delivered with quiet confidence and folksy charm, did not set off alarm bells, it did surprise us. Gone was the opportunity for the plaintiff's principal to hear from us how discovery to date had made his position wobbly. And missing, as well, was the opportunity for our client to gauge his counterpart's willingness to reach a business settlement.

After the mediator had pulled several gap-tightening devices from his toolkit without success, he told us it was time for "The Zipper". This entailed, as you may have guessed, persuading the plaintiff team, in their redoubt, to reduce their demand by an increment (say, by $25,000) and then shuttling to our room and suggesting that we increase our offer by the same increment. In effect, this was akin to a *two-way* zipper that can be closed from opposite directions. He would continue his shuttle until the two sliders drew closer and met somewhere along the zipper chain.

This technique worked wonderfully, provided one's measure of success is that it led to an agreement. Or provided one's yardstick is that it ended costly litigation near its outset, which is nothing to sneeze at. Nonetheless, from the perspective of what the defendant had planned for and might possibly have achieved, it might be seen as disappointing. Why had this happened and why did the mediator have such success with The Zipper?

To answer those questions, we turn to the many psychological concepts explained by Nobel Laureate in Economic Sciences, Daniel Kahneman, in his landmark book, **Thinking, Fast and Slow** (Doubleday Canada, 2011). As the book summarizes a lifetime of pioneering research, we will only be able to scratch the surface, but what a fertile surface it is!

His concept of *Anchoring* describes the influence that an irrelevant or inappropriate reference point has on decision-making. Studies have shown that if subjects are asked to guess the height of redwood trees, immediately after being shown very high numbers completely unrelated to tree height, their guesses will be on the high side. The opposite occurs when subjects are shown low numbers. In our case, the mediator used the first settlement offer made weeks earlier by the plaintiff to anchor the upper descending slider in his first Zipper proposal. Of course, this meant that the two sliders eventually met close to the top.

*What You See Is All There Is**,*** and its acronym, *WYSIATI**,*** is Kahneman's concept for explaining that people can scarcely help but treat the limited information in front of them as if that is all there is to know. He explains that this operation of the reflexive (not "reflective") mind goes hand in hand with the bias to believe and confirm. Its flip side is the inclination to overlook ambiguity and suppress doubt. While the mediator had engaged the defence team in his energetic performance of the two-way Zipper shuttle, the fact that further discovery was likely to solidify several winning defences faded from view. Virtually all that the parties saw was that they were getting closer to the other's number.

Reference to several other of Kahneman's concepts can explain this. As the evaluative function of the brain (which he calls System 2") considers the options suggested by its intuitive mechanism, ("System 1"), it gets lazy; it does not want to expend the necessary energy to meticulously weigh options. It takes shortcuts ("heuristics") and becomes a *Machine for Jumping to Conclusions**.***

One way the mind does this is by *Replacing hard questions with easier questions*, without realizing it has done so. Here is an example. An incisive but hard question for the defendant is whether there are feasible alternatives which are better than settling at the predictable Zipper meeting point. For example, adjourning for a few hours to explore early summary judgment options. Or adjourning until the plaintiff's principal agrees to meet with his defendant counterpart.

Instead, the substitution heuristic asks an easier question. "Does the certain dollar number that The Zipper will predictably produce be less than the sum of (a) the expected fees to be incurred over another eight or so months of litigation, plus (b) the large uncertainty cost that the litigation might entail legal fees beyond eight months and possibly an adverse judicial award?

Why is our deliberative System 2 so susceptible to taking short-cuts and jumping to conclusions? As mentioned, running System 2 takes effort, effort is a cost, and it depletes our overall fund of energy. Kahneman cites studies of Israeli judges that demonstrate they are more likely to deny parole (the easier and default decision in this area) before lunch, when their blood sugar/energy is low, than after lunch.

He also postulates more intriguing cognition-related reasons, i.e., we humans "*crave causal explanations*." We tend to perceive "intentional causality", often framed as – "things happen for a reason". We have a bias for "certainty over doubt." For inevitability over contingency. The mediator's two-way Zipper technique fits into that template. Once a starting point is picked, it operates in understandable and familiar increments. The mediator performs his shuttling with familiar time increments. The gap closes steadily, and the endpoint is expected. It happens for a reason. The resolution produced feels like it was "meant to be."

In Thinking, Fast and Slow, Daniel Kahneman also illuminates our strong "*yearning for coherence"*, for a tightly woven story. So, to create and enjoy it we tend to suppress or overlook facts that could leave holes and loose ends. We create an *"Illusion of understanding"* by

crafting many false coherences. For instance, before he placed us on the two-way Zipper, the mediator told us engaging "war stories" of some previous mediations. This triggered the "*halo effect*", where we transferred our appreciation of his stories (the "halo") to our trust in him in our own mediation.

The inverse of these *"narrow framing"* biases are the powerful decision-making tools that we ignore. Kahneman explains that we will substitute a decision based upon plausibility and coherence for one based upon the more counterintuitive and difficult concept of "probability". For example, while it was *plausible* that the secretive plaintiff would not settle at the mediation unless the session ended with agreement on a high number, it was *probable* that the plaintiff was as anxious as the defendant to have the mediation succeed at a low number. His lawyers had likely warned him that the upcoming discovery would likely solidify the defendant's case.

The concept of *"Loss Aversion"* is a cornerstone insight of Kahneman and his collaborators. It teaches that, in decision-making, perceived losses have twice the heft of perceived gains. For the defendant, the expenditure in legal fees expected from eight or more months of litigation weighed more heavily in the balance than the possible gain in defence credibility that another month of discovery could produce.

In the decade since its publication, Kahneman's book has been enormously influential. Many of the biases and cravings he identified are discussed in an early chapter of **Litigation Interests and Risks Assessment** (*"LIRA"),* an invaluable book co-authored by Michaela Keet and Heather Havin, Professors at the College of Law, University of Saskatchewan, and award-winning dispute resolution researchers. (John Lande is the third co-author; it was published in 2020 by the American Bar Association). The co-authors argue that the strong pull exerted by these shortcuts in decision-making must be understood before one can fully appreciate the empirical and probability-based techniques for assessing LIRA in dispute resolution that they illustrate in their book.

Readers of the LIRA and Kahneman books will have a much deeper understanding of whether the two-way Zipper and its "zip-em-up" analogues work in favour of your client's interests or against them.

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