

THE IMPORTANCE OF LANGUAGE EMPLOYED IN FAMILY LAW DISPUTES

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This article begins by exploring research surrounding the power of language and metaphors. It also examines the impact of the linguistic choices made by lawyers and other participants in the system on the way legal disputes are conducted, experienced and resolved. The article then moves to consider the particular importance of the language used in family law disputes. Finally, the article explores potential alternatives, solutions and options for change.

INTRODUCTION

Our choice of words matters. The language we use to describe concepts, people and events can have an impact on the ways in which they are understood and experienced by those to whom we speak. Language can also have a role in shaping reality, as people's perceptions of events and circumstances, which are shaped by the language used to describe them, become their genuine lived experience of those events and circumstances.

Language and metaphors play a significant role in law and legal practice, and particularly in the manner in which legal disputes are approached and managed.¹ The ways legal disputes are articulated can affect the ways in which they are experienced and ultimately resolved. It is therefore incumbent upon lawyers and other professionals involved in the legal system to take care with the words used in oral and written communications to ensure that they are assisting disputes being conceived of and

experienced in constructive and helpful ways.

In family law in particular, legal disputes often involve high levels of conflict and deeply felt emotions, particularly anger, hurt, betrayal and mistrust, which can act as barriers to effective dispute resolution. Often, these emotions are related to the background of the relationship between the parties, but the experience of legal disputes can provide a forum in which those emotions can be assessed, addressed and resolved, or alternatively reinforced, worsened and entrenched. Where there are children involved, parties to family law disputes will often need to continue to engage with each other long after the legal dispute between them is over. As such, the manner in which family law disputes are perceived and experienced by the parties, and the consequential impacts on the relationship between them, can be of particular significance.

THE IMPORTANCE OF LANGUAGE AND METAPHORS

The language used to describe concepts, experiences and things can shape the ways in which those things are perceived, understood and experienced by those to whom they are described. Metaphors, in particular, have been recognised as extremely powerful linguistic devices.

According to modern metaphor theory, metaphors play a role in structuring our thoughts.² The words used to describe concepts provide symbols, which in turn evoke emotions and attitudes.³ The attitudes,

¹ See, for example, Jonathan Cohen, 'Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution' (2003) 20(4) Dispute Resolution Quarterly 433; Brenda Danet, 'Language in the Legal Process' (1980) 14 Law and Society Review 445; Deanna Foong, 'Discussing Metaphors in Mediation and Negotiation' (2009) 20 Australasian Dispute Resolution Journal 47; Sarah Higginbotham, 'Bloodletting and Beasts: Metaphors of Legal Violence' (2014) 49(3) Wake Forest Law Review 727; Elizabeth Thornburg, 'Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System' (1995) 10 Wisconsin Women's Law Journal 225.

² George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 2003); Deanna Foong, 'Discussing Metaphors in Mediation and Negotiation' (2009) 20 Australasian Dispute Resolution Journal 47, 47; Harold Lloyd, 'Law as Trope: Framing and Evaluating Conceptual Metaphors' (2016) 37 Pace Law Review 89, 89-90; J Christopher Rideout, 'Penumbra Thinking Revisited: Metaphor in Legal Argumentation' (2010) 7 Journal of the Association of Legal Writing Directors 155, 165.

³ Meyer Elkin, 'The Language of Family Law is the Language of Criminal Law' (1975) 13(1) Conciliation Courts Review iii, iv.

mind-sets and perspectives conveyed by language, in turn, influence behaviour.⁴

This is well represented by a study designed to explore the roles played by metaphors in people's reasoning.⁵ In the study, participants were given a fictional newspaper story about crime rates in a town, along with statistics relating to crime rates in the town. Half of the participants were given a version of the story which described crime as a 'beast'. The version of the story given to the other half of the participants described crime as a 'virus'. The stories were otherwise identical.

Of the participants given the 'beast' version, 71% opted for enforcement strategies to address crime. This was the case for only 54% of those given the 'virus' version of the story, who were more likely to opt for treatment and antidotes as solutions to the problem of crime. The study found that when people were primed to think of offenders as beasts, they were more likely to consider longer prison sentences and increased police force to be appropriate strategies for dealing with an increase in crime rates. Significantly, when asked to report on what had influenced their reasoning, 93% of the participants in the study claimed the crime statistics alone had led to their decision. This study demonstrated both the extent to which people could be swayed by metaphors in important decisions such as policies to address crime, and the covert nature of that influence.⁶

Not only do metaphors structure the way we perceive reality, but they do so in a way that chooses to emphasise certain parts of our experience at the expense of others.⁷ The use of metaphors to describe or explain concepts therefore carries a significant danger of underemphasising or causing the listener to ignore or miss significant aspects of the things being described. This, in turn, means that overuse of metaphors may be misleading, and, depending upon the metaphors used and the context in which they are applied, unhelpful or even harmful.

THE SIGNIFICANCE OF LANGUAGE IN THE LEGAL CONTEXT

Choice of language is particularly important in the context of legal disputes. How a dispute is defined

and articulated and the manner in which the roles played by various participants are described and understood are critical features of any legal dispute,⁸ and can have significant consequences for how the dispute is played out and whether it can be resolved without adjudication.

How one names an issue in dispute can control how that issue is perceived, which can, in turn, affect how it is approached and ultimately resolved. The choice of language is therefore of considerable significance to the ways in which legal disputes are understood, experienced and determined, and the power of 'everyday' words to influence legal disputes should not be underestimated.

Metaphors are particularly prevalent in the legal context.⁹ Indeed, they have been identified as being central to legal thinking¹⁰ and to the ways in which legal disputes and conflicts are described and framed.¹¹ This fact is not without significant consequences.

If a party to a legal dispute approaches a resolution-based event such as a mediation or round-table negotiation on the basis that he or she is meeting with 'the enemy' to discuss 'the fight' and perhaps obtain some 'ammunition' for his or her case, it is unlikely that he or she will be in a frame of mind conducive to considering options for resolution and exploring the scope for mutually beneficial outcomes. By contrast, if the same dispute is approached on the basis that the meeting is with another participant in the process, with whom common ground and potential solutions may be created, the mindset of each of the parties is considerably more likely to lead to constructive thinking and empathic consideration of each party's perspective.

PROBLEMATIC LANGUAGE IN LAW

Some metaphors and other language commonly used to describe and articulate legal disputes and processes can readily be identified as being problematic and potentially harmful to the prospects of positive, respectful and productive resolution of legal issues. Many commentators have noted, for example, that the use of war metaphors, in particular, is common in descriptions of legal

4 Deanna Foong, 'Discussing Metaphors in Mediation and Negotiation' (2009) 20 *Australasian Dispute Resolution Journal* 47, 50.

5 Sarah Higginbotham, 'Bloodletting and Beasts: Metaphors of Legal Violence' (2014) 49(3) *Wake Forest Law Review* 727, 727, 727-728; reporting on Paul Thibodeau and Lera Boroditsky, 'Metaphors We Think With: The Role of Metaphor in Reasoning' (2011) 6(2) *PLoS One* 1.

6 *Ibid.*, 727-728.

7 Elizabeth Thornburg, 'Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System' (1995) 10 *Wisconsin Women's Law Journal* 225, 230.

8 Lynn Mather and Barbara Yngvesson, 'Language, Audience and the Transformation of Disputes' (1981) 15 *Law and Society Review* 775, 775.

9 Harold Lloyd, 'Law as Trope: Framing and Evaluating Conceptual Metaphors' (2016) 37 *Pace Law Review* 89, 91.

10 J Christopher Rideout, 'Penumbra Thinking Revisited: Metaphor in Legal Argumentation' (2010) 7 *Journal of the Association of Legal Writing Directors* 155, 190.

11 Rebecca Storrow and Alexia Georgakopoulos, 'Mediators and Metaphors: An Analysis of Conflict Resolution Metaphors' (2014) 69(2) *Dispute Resolution Journal* 41, 41.

disputes¹² in Western countries. Phrases such as ‘we killed them on that issue’, ‘we attacked that argument’, ‘that argument is indefensible’ and ‘we shot down that argument’, together with references to ‘wars’, ‘battles’, ‘ammunition,’ ‘plans of attack’ and ‘the firing line’ permeate descriptions of legal disputes. It is readily apparent that although in most cases, such language will immediately be recognised as being metaphorical in nature and will not be taken literally, its use encourages people to perceive their legal disputes as being akin to war. As such, legal disputes are painted and therefore experienced as being contests in which violent and oppositional approaches are justified, tactical and strategic thinking is required, glory comes only from winning, and the other party is to be considered the enemy.

Other common metaphors used to describe legal disputes and processes include those relating to other forms of violence (such as ‘we put up a good fight’, ‘we knocked them out’, ‘we beat them into submission’ ‘we cut them off at the knees’ or descriptions of lawyers as ‘hired guns’), which likewise encourage a mindset based on conflict, a goal of attacking and lack of compromise, empathy or compassion. Any scope for approaching these disputes and processes as opportunities for reconciliation, growth, reparation or productive, collaborative interaction and problem-solving is obscured by the description and resulting conception of these events and processes as scenes of violent attacks, where risk and reward are dependent upon inflicting and defending against violence.

Metaphors relating to contests and competitions, particularly sports (constructing a ‘game plan’, ‘playing hardball’, ensuring a ‘level playing field’ and a fair ‘referee,’ reacting to a ‘game changer’, being ‘in the game’, and succumbing to ‘white line fever’)

also permeate legal discourse.¹³ In general, the dominant metaphors used to describe legal disputes foster conflict-based and adversarial actions and attitudes.¹⁴ Metaphors and language relating to justice and fairness, or compassion and empathy, are far less prominent in legal discourse.¹⁵

These descriptions and approaches are not merely distractions or deviations from the primary focus of people who engage with and experience legal processes, but play a significant and often defining role in that engagement. Indeed, metaphors so pervade our language about litigation that it is almost impossible to talk about a trial without using them.¹⁶ The manner in which lawyers and other professionals working within the system engage with and interpret legal processes has a direct impact on the experience of their clients and other parties engaged in legal disputes with whom they come into contact.

As with metaphors more broadly, legal metaphors, while originally mythical or aspirational, shape and influence the way litigators think and behave¹⁷ and the way they understand concepts such as argument.¹⁸ In so doing, they shape lawyers’ sense of professional practice and how they view their roles and act in certain situations.¹⁹ This results in a professional culture which, in some instances, is excessively litigious, aggressive, hostile, combative and confrontational, and is focused on distrusting and discrediting other parties and winning at all costs.

Non-metaphorical legal language evokes similar imagery. The law in many Western countries operates and is practised within the ‘adversarial’ system.²⁰ Hearings, even in civil matters, are known as ‘trials,’ which are performed against an ‘opponent’ or ‘the other side’. We speak of ‘defending’ a case or argument, being ‘open to attack’ and using ‘strategy’. In some jurisdictions, legal proceedings are commenced by way of

12 See, for example, Carrie Menkel-Meadow, ‘Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving’ (2013) 8 *Unbound: Harvard Law Journal of the Legal Left* 79, 100; Elizabeth Thornburg, ‘Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System’ (1995) 10 *Wisconsin Women’s Law Journal* 225, 225, 230, 232, 233; Carrie Menkel-Meadow, ‘Is Altruism Possible in Lawyering?’ (1992) 8 *Georgia State University Law Review* 385, 386; Jonathan Cohen, ‘Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution’ (2003) 20(4) *Dispute Resolution Quarterly* 433, 434; J Christopher Rideout, ‘Penumbra Thinking Revisited: Metaphor in Legal Argumentation’ (2010) 7 *Journal of the Association of Legal Writing Directors* 155, 158.

13 Carrie Menkel-Meadow, ‘Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving’ (2013) 8 *Unbound: Harvard Law Journal of the Legal Left* 79, 100; Elizabeth Thornburg, ‘Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System’ (1995) 10 *Wisconsin Women’s Law Journal* 225, 225, 239; Jonathan Cohen, ‘Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution’ (2003) 20(4) *Dispute Resolution Quarterly* 433, 434.

14 Thornburg, above n 7, 228.

15 Carrie Menkel-Meadow, ‘Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving’ (2013) 8 *Unbound: Harvard Law Journal of the Legal Left* 79, 100; Carrie Menkel-Meadow, ‘Is Altruism Possible in Lawyering?’ (1992) 8 *Georgia State University Law Review* 385, 386.

16 Elizabeth Thornburg, above n 7, 231.

17 *Ibid.*, 226.

18 J Christopher Rideout, above n 10, 166.

19 Deanna Foong, above n 4, 50.

20 Elizabeth Thornburg, above n 7, 225.

'complaint'. Monetary awards are known as 'damages'. The person against whom proceedings are brought is a 'defendant'. Cases involve 'competing arguments' and 'objections'. It is not uncommon to hear references to the 'enemy'.

The power of this conflictual and competitive language can also have a significant impact on non-litigious dispute resolution processes such as negotiation and mediation, despite the fact that these processes are designed and utilised for the purpose of reducing conflict, facilitating resolution and deterring parties from engaging in or pursuing aggressive and competitive litigation. Unsurprisingly, if people conceive of their legal disputes in conflictual and aggressive ways, they will approach negotiations and other processes designed to resolve those disputes with the same mindset, and this will impact upon the likely success of, and the options likely to be explored within, those processes.

THE FAMILY LAW CONTEXT

The potential for harm arising from destructive or conflict-based language and violent or competitive metaphors is particularly strong in the area of family law, where parties often need to maintain, at a minimum, the ability to engage in constructive and polite communication and basic levels of cooperation well after their formal engagement with the legal system has ended. Ideally, in the absence of family violence or other risk issues, separated parents will succeed in maintaining mutual trust and respect for one another and for each other's parenting style and competency.

The deleterious effects of entrenched parental conflict on children are well documented.²¹ Fostering goodwill, mutual respect and cooperative attitudes is therefore of paramount importance in such cases and forms part of the duty of the legal system to protect the most vulnerable members of the community.

Even in cases where children are not involved, family law disputants and litigants are often focused on emotional issues related to the breakdown of

their relationships, such as hurt, distrust, betrayal, disappointment and shame. Often, the emotions driving the disputes have little to do with the law or legal outcomes, but if legal disputes are not managed sensitively and appropriately, courts and other legal processes can become the forum (or, in accordance with common descriptors, the 'battleground') for destructive, highly emotional and expensive conflicts. This is to the detriment not only of the participants themselves, but of other litigants and the community more generally, as these disputes cause backlog within the legal system, stretch precious public resources and can lead to disillusionment and loss of faith in the legal system. As such, legal and other professionals working in family law have an important responsibility to limit the extent to which these parties' engagement with the legal system fuels existing emotional conflict.

For decades, there have been calls for the adoption of language in family law that will foster more positive attitudes, traditions and customs regarding separating and divorcing families. There has long been an identified need for words that will reinforce the ideas that parents and families are forever and that divorce merely ends the spouse/partner roles, but not the parent and child relationship or the parents' responsibilities to their children.²² Above all, the words used in family law should alleviate stress on the divorcing family rather than add to the stresses already present.²³

Deliberate moves to change the language used in the Australian family law context in order to change the focus of participants in the family law system have already been made. For example, in 1995, amendments to the *Family Law Act*²⁴ removed the words 'custody' and 'access' and replaced them with the terms 'residence' and 'contact'.²⁵ The rationale for this change was to emphasise 'the concept of parental responsibility for the care, welfare and development of children rather than giving parents any rights to custody and access, which tends to foster notions of ownership in children'.²⁶ Any reference to parental rights was deliberately omitted from the legislation.²⁷ At the time of these amendments, the Australian Government expressed awareness of 'the concern that the current terminology in the *Family Law Act* in relation to children encourages concepts of ownership and parental "rights" concerning children, when the focus should be towards the best interests

21 See, for example, David Doolittle and Robin Deutsch, 'Children and High-Conflict Divorce: Theory, Research and Intervention' in Galatzer-Lewy, R and Kraus, L (eds), *The Scientific Basis of Child Custody Decisions* (John Wiley & Sons, 1999) 389; Paul Amato and Sandra Rezac, 'Contact with Nonresident Parents, Interparental Conflict and Children's Behavior' (1994) 15(2) *Journal of Family Issues* 191; Richard Chisholm and Jennifer McIntosh, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separations' (2008) 8 *Family Relationships Quarterly* 3; Gordon Harold and Mervyn Murch, 'Inter-Parental Conflict and Children's Adaptation to Separation and Divorce: Theory, Research and Implications for Family Law, Practice and Policy' (2005) 17(2) *Child and Family Law Quarterly* 185; Joan Kelly, 'Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research' (2000) 39(8) *Journal of the American Academy of Child and Adolescent Psychiatry* 963.

22 Meyer Elkin, above n 3, iv-v.

23 *Ibid.*, v.

24 *Family Law Act* 1975 (Cth).

25 *Family Law Reform Act* 1995 (Cth).

26 Explanatory Memorandum, *Family Law Reform Bill* 1994 (Cth), 1.

27 *Ibid.*, 24. See also Renata Alexander et al, *Family Law Principles* (Thomson Reuters, 2011), [8.10].

of the child.²⁸ The 1995 amendments were enacted following a report from the Family Law Council indicating that '[t]he terminology of the custody/access arrangement has its roots in the notion of ownership of children. It contains adversary notions of winning and losing and frequently has the effect of substantially devaluing one parent's contribution.'²⁹

Further amendments to the *Family Law Act* in 2006³⁰ again addressed the issue of the terminology used to describe parenting disputes and legal outcomes. Amid concern that the 1995 reforms had not gone far enough in distancing the legislation from notions of winners and losers and possession of children,³¹ one of the recommendations arising from a major parliamentary inquiry into parenting arrangements following separation was that the language of 'residence' and 'contact' should be replaced with more 'family friendly' terms such as 'parenting time'.³² This recommendation was adopted in the legislation that was ultimately enacted,³³ which introduced the child-focused concepts of 'living with' and 'spending time with' parents rather than focusing on parental rights or awards, and also introduced other language which was designed to be positive, such as explicit recognition of the potential benefit to the child of a 'meaningful relationship' with both parents.³⁴

The clear intention of these aspects of the reforms was to bring about positive change by addressing the way the issues under consideration were described in the legislation³⁵ and consequently perceived and understood by participants in the system. The Government's stated intention was to refocus attention on relationships.³⁶ However, other changes enacted as part of the wide-ranging 2006 reforms have been criticised as heavily rights-focused and for treating children as

property.³⁷ For example, the legislation was focused on promoting equality between parents, both in terms of involvement in long-term decision-making and in relation to consideration of the amount of time children spend in the care of each of their parents. This focus on equality focuses the minds of people engaging with the system on perceived parental entitlements rather than the quality of family relationships.

One relevant change that has developed is a tendency in some cases, particularly cases resolved by consent, for the time a child spends with each of his or her parents to be described in court orders or parenting agreements as 'living with' each of the parents at particular times, rather than 'living with' one parent and 'spending time with' the other. This reflects a profound change in the nature of the question that courts are asked to decide that has come with the changes in legislative language. Whereas under the old model of custody decision-making, the choice was typically a binary one, between the mother and the father as the custodial parent, there is now a spectrum of choices on offer.³⁸

Australia was not the first jurisdiction to make changes to the language used to describe family law disputes. Developments in the United States during the 1980s were driven by members of the 'helping professions' (including psychologists and social workers),³⁹ who are said to have transformed divorce through the use of rhetoric and narrative.⁴⁰ These professionals, like their Australian counterparts, identified difficulties with the 'win/lose' philosophy of assuming that there will be a sole carer for children following separation, and the potential offence that may be caused by allowing a parent to 'visit' his or her children, along with the tendency for children to be described in terms (such as the use of the word 'custody') that suggest they are property in relation to which adults have rights of possession and control in disputes over their living arrangements.⁴¹ Words commonly used in family law such as 'custody' and 'visitation' had also been criticised for their links to the criminal justice system, and particularly their prison-based connotations.⁴²

This deliberate change in language and focus facilitated alterations to the ways in which disputes

28 Australian Government, 'Family Law Act 1975: Directions for Amendment: Government Response to the Report by the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975' (December 1993), 24.

29 Family Law Council, 'Patterns of Parenting After Separation: A Report to the Minister for Justice and Consumer Affairs' (April 1992).

30 Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

31 Lisa Young and Geoff Monahan, 'Family Law in Australia' (LexisNexis Butterworths, 7th ed, 2009), 275.

32 House of Representatives Standing Committee on Family and Community Affairs, Parliament of the Commonwealth of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003), xxii.

33 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2006 (Cth), 17.

34 Family Law Act 1975 (Cth) s 60CC(2)(a).

35 For more on this, see Richard Chisholm, 'Post-Separation Parenting: Public Debates' (Paper presented at the Families Matter: 9th Australian Institute of Family Studies Conference, Melbourne, 9-11 February 2005), 18.

36 Australian Government, Response to the Recommendations of the House of Representatives Standing Committee on Family and Community Affairs inquiry into Child-Custody Arrangements in the Event of Family Separation (2005), 7.

37 See, for example, Lucy Daniel, 'Australia's Family Law Amendment (Shared Parental Responsibility) Act 2006: A Policy Critique' (2009) 31(2) *Journal of Social Welfare and Family Law* 147, 153; Anne Hollonds, 'Will the Changes to the Family Law Act Benefit Children and Reduce Family Violence and the Impact of DV?' (2006) 15 *Developing Practice: The Child, Youth and Family Work Journal* 7, 9.

38 Patrick Parkinson, 'Family Law and the Indissolubility of Parenthood' (2006) 40(2) *Family Law Quarterly* 237, 250.

39 Martha Fineman, 'Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-Making' (1988) 101 *Harvard Law Review* 727.

40 *Ibid.*, 727, 728, 753.

41 *Ibid.*, 732, 737.

42 See, for example, Meyer Elkin, above n 3, iv.

over children's living arrangements were conceived of, understood and articulated. The dominant rhetoric no longer described divorce as a process that terminates the relationship between spouses, establishing one as the custodial parent and the other as a parent with rights of visitation. Rather, divorce was described as a process that restructures and reformulates the parents' relationship and the family in a manner that facilitates ongoing parent-child relationships, and in some jurisdictions, terms such as 'shared parenting' and 'periods of physical placement' replaced 'physical custody' and 'visitation'.⁴³ This is an important substantive and conceptual shift in which language played a critical role.⁴⁴

ALTERNATIVES AND SOLUTIONS

Although some change has already been attempted and achieved by means of deliberate changes to the language used to describe and formulate disputes, particularly in the area of family law, further change is both possible and warranted. To be effective, change will need to occur not only in relation to the formal language used in legislation and other legal documents, but in common discourse and the language used by lawyers and other professionals working within the legal system and related fields when framing and managing legal issues and disputes.

One particular area in which change is warranted is in the choice of metaphors used to describe legal engagement and disputes. Lawyers and other professionals within the legal system can, with a conscious effort, think before they say words such as 'battle' and consider the implications of their choice of language. There is value in considering why we have the metaphors we do and how we acquired them,⁴⁵ and in taking care when applying them. By studying their metaphors, practitioners can learn something about their concept of dispute resolution; they can see what their metaphors emphasise and what they hide.⁴⁶ Linguistic awareness can also protect against misunderstandings arising from the use of metaphors, which may be used haphazardly when speakers are unaware of or not attuned to them.⁴⁷

Alternative metaphors, such as those depicting the resolution of a legal dispute as a building or construction process may be useful.⁴⁸ Metaphors relating to construction are sometimes already used. It is not uncommon to hear of lawyers using

'tools', 'constructing cases' or 'laying foundations'.⁴⁹ These metaphors are likely to lead to less harmful interpretations and experiences of legal disputes, as they emphasise the positive and constructive aspects of legal engagement, including the importance of cooperation and collaboration and the scope for productive and constructive outcomes rather than damage.

Another suggestion is the use of the language of the arts, with the participants in litigation being depicted as co-creators of a collaborative piece of work.⁵⁰ Like metaphors relating to building and construction, arts-based language is already used to some extent, as lawyers are said to 'paint a picture', 'set a scene' and 'tell a story'. These metaphors emphasise the more positive and productive aspects of engagement with legal processes, including cooperation, communication, interaction, collaboration, creativity and the search for common principles.⁵¹

Education-based language has also been suggested. For example, litigation could be described as an educational process, with the courtroom as the classroom, and lawyers as teachers with the common goal of presenting a clear and complete lesson and properly informing and guiding the class.⁵² Such metaphors, like those suggested in the preceding paragraphs, emphasise the positive and constructive aspects of legal engagement and minimise focus on conflict, dispute, and undermining or attacking others, which are concepts not generally associated with educational processes.

Other suggestions include the description of litigation as a journey.⁵³ The journey metaphor, in particular, has also been identified as being ideal in negotiation and mediation settings, because it downplays competitive behaviour, highlights the cooperative and problem-solving aspects of the parties' engagement with one another, and is future and solution oriented.⁵⁴ Each of these metaphors focuses on the future and on productive solutions rather than on the negative aspects of legal disputes and the difficulties of the past. As such, each is significantly less likely than the current metaphorical framework to inflame disputes and impede the identification and exploration of creative, mutually beneficial solutions.

Future-focused, constructive and cooperation-based metaphors may be of particular value in family law disputes, particularly those involving children. In addition to limiting the extent to which

43 Martha Fineman, above n 39, 750-751.

44 Ibid, 732.

45 Mark Johnson, 'Mind, Metaphor, Law' (2007) 58(3) Mercer Law Review 845, 859.

46 Deanna Foong, above n 4, 51.

47 Thomas Smith, 'Metaphors for Navigating Negotiations' (2005) 21(3) Negotiation Journal 343, 348.

48 Elizabeth Thornburg, above n 7, 269.

49 Ibid, 269.

50 Ibid, 272.

51 Ibid, 272.

52 Ibid, 273.

53 Deanna Foong, above n 4, 51.

54 Ibid, 51.

engagement with the legal system causes emotional harm to the parties and their children, if such parties can conduct and conclude their legal interactions in a manner that is focused on supporting and building relationships and jointly creating solutions this is likely to be of considerable benefit as they approach the task of defining their post-legal dispute relationship and interactions.

Metaphors are not the only linguistic aspects of contemporary approaches to legal disputes for which increased awareness, reconsideration and adjustment are called for. Caution about the language used in the context of legal disputes more generally is also warranted.⁵⁵ Change in this regard, it has been argued, can begin from legal and other practitioners consciously identifying the linguistic frame being used and then asking themselves whether they should attempt to shift it.⁵⁶ It appears that it is generally accepted that reframing a problem by casting it in different language can sometimes lead to a different outcome.⁵⁷

In the negotiation and dispute resolution context in particular, there have been calls for increased use of descriptive language that reflects the cooperative aspects of dispute resolution processes as well as their aspects relating to competition.⁵⁸ In that setting, for example, the term 'counterpart' has been suggested as an alternative to 'adversary' or 'opponent'.⁵⁹ It is also identified as being important that the concept of conflict itself not be framed in wholly negative terms, which could obscure the potential for conflict to lead to growth, change or learning.⁶⁰

Conscious efforts to identify and shift the language used by the disputants themselves can also be of assistance. Disputants in settings such as mediation are commonly encouraged to engage in appropriate communication styles and relate more positively to each other.⁶¹ However, this can be taken further in attempts to reframe the dispute itself, and shift the attitude or orientation of the parties by changing the language used to describe the dispute and related concepts. This can involve paraphrasing anger and other emotions expressed by the parties in a calm

and steady manner, choosing not to emphasise certain aspects of dialogue, signalling them as inappropriate, describing agenda items in neutral terms, and redirecting discussions to underlying interests.⁶²

CONCLUSION

There are likely to be significant benefits arising from changes to the language and metaphors used in describing legal disputes, and particularly family law disputes, if the focus of disputing parties and their legal and other advisors can be shifted towards more collaborative and cooperative approaches to the resolution of legal issues and engagement with legal processes. This article calls for increased care and attention to the language used and the metaphors employed, both in family law disputes and legal disputes more generally, in the hope that more positive, cooperative and collaborative language can lead to reduced levels of conflict and more constructive approaches to legal engagement and dispute resolution.

62 Ibid.

55 Michael Wawrzycki, 'Language, Morals, and Conceptual Frameworks In Dispute Resolution: Establishing, Employing, and Managing the Logos' (2006) 8 *Cardozo Journal of Conflict Resolution* 209, 209.

56 Jonathan Cohen, 'Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution' (2003) 20(4) *Dispute Resolution Quarterly* 433, 436.

57 Ibid., 437.

58 See, for example, Jonathan Cohen, 'Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution' (2003) 20(4) *Dispute Resolution Quarterly* 433, 433.

59 Ibid., 433, 435.

60 Rebecca Storrow and Alexia Georgakopoulos, above n 11, 56. See also Meyer Elkin, above n 3, iii.

61 Morgan Brigg, 'Mediation, Power, and Cultural Difference' (2003) 20(3) *Conflict Resolution Quarterly* 287, 295.

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