Mediation and the War Gene

By
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2012

2012 is not only witness to the spectacle and drama of the London Olympics, the greatest sporting event of its age, but the 100th anniversary of the maiden voyage of the Titanic, one of the greatest ships of its day, and the 200th anniversary of the birth of Charles Dickens one of our greatest writers. There have been many triumphs and disappointments of course along the way. Life they say is a roller-coaster of many ups and downs riding on a sea of emotion.

Gene Warfare

There are of course many layers of human emotion; lust, anger, greed, jealousy, hate, fear, envy, hope, love and compassion. All are displayed to varying degrees in our daily lives.

We are all impregnated and pre programmed for survival. Adrenalin primes us either for flight or to fight. Indeed it is a natural instinct not only to want to survive but to come out on top, to take command of, maximise and protect resources whether natural or man made. Many sides of our basic emotions play out in our daily lives not only at home but at work. Human interaction as well as the hotbed of human emotion, want and need, of course provide the setting for conflict.

Man has often been held out as the archetypal aggressor. In their 2008 Stanford University study, scientists Laurent Lehmann and Marcus Feldman[ii] advanced a model showing that aggressive traits in males may have evolved as an adaptation to limited resources. They further demonstrated that belligerence and bravery evolved genetically through the male line.

Experimental research conducted by Rose McDermott, professor of political science at Brown University and Giovanni Frazetto at the London School of Economics in 2009 affirmed the notion of Monoamine oxidase A (MAOA) as the "warrior gene."[iii] In 2012 Dr Joohyung Lee and Professor Vincent Harley at the Prince Henry Institute in Melbourne identified the SRY gene, only found on the male Y chromosome, as the 'aggressive gene.'[iv] In women, by contrast Oxytocin has been identified as the hormone of love and trust.

In this battle of the genes man has been portrayed as the innate aggressor. Woman by contrast has been viewed as the protective house builder and natural conciliator. The issue of inherent male/female traits was further explored in the recent New Law Journal article entitled 'The Battle of the Sexes.'[v] Man throughout his history of course has heard the drumbeat of war and conflict but also experienced the comfort and security of his mother's arms.

In ancient as well as modern times the search for dominance, power and glory has often been the setting for war and conflict. It is into this void that Laws are set forth and courts established as a mechanism for upholding the values of society. It is often said that left to his own devices Man would go on a rampage. This idea of natural instinct and base morality was infamously explored in William Golding's the Lord of the Flies.

Such was the preponderance of conflict, even in ancient times, that the Code of Hamarabi, often regarded as the historic father of the modern justice system and indeed the Ten Commandments were set in stone laying down principles for behaviour, punishment and retribution. Laws of course are frequently forged in the wake of conflict.

Insurance, Trade and Conflict

Insurance grew up in the age of empire to provide a protective hand. Much, however, has changed since the early days of the coffee house and the spice trade. We now have not only local but global markets. The industrial and silicon revolutions have seen the dynamic growth of trade at both micro

and macro levels, the formation and burgeoning of corporations, States and brands. Insurance too has spread its wings far beyond the simple perils of the voyage. Conflict of course emerges in all of these active dynamic systems.

We are all driven to perform and excel. For most sport is now held out as the modern theatre of war, maybe less brutal save that is for national pride and a gold medal its accolade. Sir Steven Redgrave, Sir Christopher Hoy and Michael Phelps have become the symbols of this sporting ideal. Man's aggressive gene of course has emerged into this new environment. Whilst sporting competition is idealised, competition has many levels and complexions.

Money, power and influence have become the imperatives of the day. Indeed the modern press are often regarded as the power brokers of their age, with the ear of political and public influence. Their hunger for a story has manifested itself in the phone hacking scandal, the Levison enquiry and the heartfelt story of Milly Dowler. We have also witnessed multiple investment and banking scandals that have played out in the collapse of Lehman Brothers, LIBOR rate rigging and global economic recession.

Wars still rage, most notably in Afghanistan, Somalia and Syria and man still seeks to exploit and conquer the Earth. In this new age China has become the modern powerhouse for growth. The modern era has also witnessed passionate conflicts between 'progress' and global warming. Jerusalem the iconic emblem of faith still lies at the centre of a faith war.

We no longer live in a land of kings and empires but rather a land of commerce and enterprise. What then of conflict? At an international level we have the United Nations as a forum to settle the world's ills. Often, however, this body is regarded as ineffective, burdened by too many competing voices and political alliances. At a commercial and personal level of course we traditionally have the courts as the arbiters of disputes.

Dickens, the Courts and Conflict

Charles Dickens had one of the acutest minds and insights of his age and brought to life not only Victorian England but many court dramas and legal wars.

What then did Dickens have to say about the law and the courts? In Bleak House[vi] Dickens recounted the now infamous marathon court saga of Jarndyce v Jarndyce:

'Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why.'

Dickens' Jarndyce saga is of course highly caricatured and stylised and set its own time and place. It reveals however a number of threads, truths and warnings as to cost, risk and uncertainty that exist in the legal system to this day. Dickens for his part honed his pen as a legal and political correspondent.
Even today court battles can rage on for years, perpetuated by board room politics and commercial imperatives and give rise to Beowulf myth.

Any modern democratic society of course requires not only a well tuned legal system but access to justice for both commercial entities and the general populace alike. Exclusion of course breeds inequality that can perpetuate its own emotion.

British Justice and Risk Exposure

Today the British legal system is widely regarded as the best in the world. It is presided over by many judges of world renown and a commercial court fit for its purpose is housed in the Rolls Building in London.

Justice however comes at a cost, not only in terms of money, manpower and time but stress and the use of limited resources. Justice of course is never perfect and as many observers know does not always produce a just result.

Dickens himself made the following observation in the Old Curiosity Shop[vii]:

'... as doctors seldom take their own prescriptions and divines do not always practise what they preach, so lawyers are shy of meddling with the law on their own account, knowing it to be an edged tool of uncertain application, very expensive in the working, and rather remarkable for its properties of close shaving, than for its always shaving the right person.'

These words display the inherent risk in any court action.

Whilst the quality of British Justice is renowned around the world this does not necessarily mean that justice is on your side. Justice can be a matter of interpretation. It involves not only the consideration of evidence but the application of statute and the common law which itself is a creature of evolution. Even the Supreme Court, formerly the House of Lords does not always see eye to eye with the views of the Court of Appeal.

Litigation is not of course a simple lottery. It is however a stage on which great dramas can unfold and ordinary lives be laid bare. Litigation is a forum where one player bets his hand and case against that of an opponent with no absolute certainty of outcome.

As all litigation practitioners will tell you there is no certainty in litigation. The odds may be somewhat better than at the casino although ultimately it is a game of strategy, chance and risk. No one player has control of the outcome. Indeed the outcome is determined by an independent third party. The risks of litigation are well known and oft repeated in the corridors of court. Even in the world of commerce the financial giants of Lehman Brothers and Merrill Lynch once seen as paradigms of strength and certainty have witnessed unprecedented collapse.

Risk of course is a concept well known in the insurance industry. It grew up in an age of adventure and uncertain exploration. As with any great industry it seeks to define its risk and limit its exposure. Gone are the days of Russian roulette, unfettered swaps and underwriting.

Risk and the Benefits of Mediation

Mediation of course affords an opportunity for parties to limit risk, to control outcomes and indeed for the parties to become masters of their own destiny. It enables parties to define, shape and dispose of risk.

Mediation provides an opportunity for parties to enter into a private without prejudice dialogue and exploration, an opportunity to gain understanding, in a confidential environment outside of the precincts of court and away from the public galleries or ears of the press.

It also offers an opportunity to resolve matters at a much earlier stage, to save costs, to avoid stress and to maintain customer and commercial relationships as well as private dignity. Mediation can not only help to build bridges in understanding but can also help to forge and cement relationships for ongoing business.

As Lord Woolf stated when effecting his review of the legal justice system 'court should be regarded as a forum of last resort' and alternative forms of dispute resolution should be explored. This remains true of course even once proceedings have been initiated.

Many parties to disputes view matters through different lenses. Viewpoints, objectives and values can differ, whether from contrasting commercial, personal, religious or cultural perspectives. Frequently

this is overlooked. The kernels of truth, experience and perspective can however be explored in mediation and hurdles overcome.

Mediation certainly is no absolute panacea although it represents a significant opportunity for any party involved in a dispute. As a wise man once said ‘a builder will consider all tools in his toolbox when building a bridge.’

Studies have shown that mediation has an 80% success rate.

Confidentiality and Diplomacy

Litigation exposes its players to risk in a very public place where reporters potentially line the corridors and inhabit the courts. Mediation by contrast is a private confidential process in which risks can be examined and determined behind closed doors. Indeed mediation is founded on the bedrock of confidentiality.

Mediation typically involves both private joint sessions between all parties and private closed sessions with a single party. Mediation, however, is a dynamic process which can adapt to suit both case and party needs. What, however, is said in these sessions and indeed what happens within the mediation remains confidential.

The mediator is at both times in the position of confidante and diplomat. Whilst the mediator can not disclose what is said to him by one party to another party without authority he can discretely build platforms to enable parties to engineer a resolution.

Nelson Mandela and Kofi Annan are perhaps the embodiment of the archetypal mediator; a calm, trustworthy repository of secrets seeking to explore contesting positions and to find peaceful solutions in highly dynamic and often charged circumstances.

Mediation and diplomacy are not submissive. They involve active engagement and strength. The strength to talk, the strength to listen and the strength to seek out common ground and find solutions which can extend far beyond the powers of the courts.

It can take wisdom both to talk and actively listen, to be receptive and insightful, to work together and build bridges rather than to destroy. As Sun Tzu the ancient Chinese strategist who wrote a treatise on the Art of War once said the best battle, is the battle that is won without being fought.

Nelson Mandela the sage of the modern era himself said ‘if you want to make peace with your enemy, you have to work with your enemy. Then he becomes your partner.’ Seeking resolution is not a sign of weakness but of wisdom.

Mediation and the English Legal Landscape

Over the years the courts have explored and gradually got to grips with the concept of extra judicial dispute resolution. The courts of course now wield active case management powers and an ability to enquire, suggest, direct and indeed impose cost sanctions where appropriate. Long gone are the days when the courts simply confined themselves to the realms of Part 36 payments into court. Proportionality is now the by word. Pre action protocols too have been unveiled as part of an actively encouraged process of engagement and dialogue between the parties.

Whilst mediation was being discussed in the corridors of court in the 1990’s the case of Dunnett v Railtrack[viii] in 2002 is often regarded as paving the way for mediation in England and Wales. It also represents one of the first cases of a successful litigant winning at trial, but losing the subsequent costs award because of an unreasonable refusal to mediate.

As Lord Justice Brooke noted in that case reciting the words of the Civil Procedure Rules:

‘CPR 1.4 reads:

(1) The court must further the overriding objective by actively managing cases.
(2) Active case management includes

(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.'

In 2004 Lord Justice Dyson in Halsey v Milton Keynes NHS Trust[ix] stated:

'All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR.'

In 2005 Lord Justice Ward in Burchell v Bullard[x] stated:

'Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation, and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued.'

When considering the issue of costs Lord Justice Rix further added:

'The court is entitled to take an unreasonable refusal (to mediate) into account, even when it occurs before that of the formal proceedings.'

Indeed the issue of costs sanctions has been evident in several prominent court decisions including Royal Bank of Canada v Secretary of State for Defence(2003)[xi], Halsey v Milton Keynes NHS Trust (2004) and the Earl of Malmesbury v Strutt & Parker (2008)[xii]. More recently this trend has been reaffirmed and indeed costs sanctions imposed against a non mediating party by the Court of Appeal in Rolf v De Guerin (2011)[xiii] which has given added impetus to the judicial costs armoury.

In Rolf v De Guerin Mrs Rolf had evinced a willingness to settle throughout and proposed mediation. Whilst successful in his defence of the claim the Court of Appeal overturned the original costs order awarded in the Defendant's favour.

Lord Justice Rix giving judgment in that case observed:

'Parties should respond reasonably to offers to mediate or settle and…their conduct in this respect can be taken into account in awarding costs.'

In 2012 Lord Justice Ward in Oliver v Symons[xiv] further observed:

'It depresses me that solicitors cannot at the very first interview persuade their clients to put their faith in the hands of an experienced mediator, a dispassionate third party, to guide them to a fair and sensible compromise of an unseemly battle which will otherwise blight their lives for months and months to come'

Lord Justice Jackson himself has called for a 'serious campaign' to teach lawyers and judges the benefits of mediation to settle disputes.

With an emphasis on resolving issues the court has also examined the thorny question of what approach the court should adopt when considering the issue of third party indemnity within the context of an allegation of an unreasonable settlement and remoteness of damage. In this battle the courts clearly seem to have favoured the settling party.

In the 2010 case of Supershield Ltd v Siemens Building Technologies[xv] Lord Justice Toulson whilst observing that a judge would essentially have to ask himself whether the settlement was 'within the

range of what was reasonable' noted that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach. Indeed Lord Justice Toulson following the 2008 House of Lords case of Transfield Shipping Inc v Mercator Shipping Inc[xvi] stated:

'If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances.'

There are clearly therefore dangers in store for parties not coming to the table.

Writing on the Wall: What of the future?

The writing is indeed on the wall and winds of change are certainly in the air. Like an unstoppable tide mediation is now beginning to cascade across the legal landscape. We now have a European Mediation Directive[xvii] in force with the express aim of facilitating access to alternative dispute resolution and promoting the amicable settlement of disputes by encouraging the use of mediation. Ireland has published its own Mediation Bill. In England & Wales a pilot mediation scheme was set up by the Court of Appeal in April 2012 to deal with contract and personal injury claims with appeal values of up to £100,000. The issue of compulsory mediation has even been mooted.

In 2011 the British Government adopted mediation clauses in all Government contracts and published its 'Dispute Resolution Commitment'[xviii] aimed at encouraging the increased use of flexible, creative and constructive approaches to avoid, manage and resolve disputes. The Commitment states that 'mediation…should be seen as the preferred dispute resolution route in most disputes when conventional negotiation has failed.'

In March 2012, Justice Minister, Jonathan Djanogly, commenting on mediation stated:

'I strongly believe that for the vast majority of disputes in civil, family and administrative justice, it can be a better way of reaching a resolution for all concerned; quicker, less expensive, certainly less stressful, and a solution that the parties themselves will buy into because they have shaped the outcome.'

One judge, responsible for implementing mediation in his court, recently observed to me that at least 8 out of 10 cases were suitable for mediation. What proportion of your cases do you consider or indeed refer to mediation?

The order of the day is very much cost efficiency and proportionality. In the wake of Rolf v De Guerin and its case predecessors cost sanctions are now very much on the lips of the judges and are actively being considered as part of the judicial armoury.

In an age of global market turmoil and protracted economic uncertainty, 88% of participants in the 2010 Tough Talk survey believed that the cost of conflict was damaging to the UK economy. CEDR in its Fourth Mediation Audit published in May 2010 estimated that commercial mediation would save the British Economy £1.4 billion annually in wasted management time, damaged relationships, lost productivity and costs. Even the Government in its Annual Pledge Report published in March 2010 estimated that it had saved £90.2million by engaging in dispute resolution the previous year.

Mediation of course enables safe exploration and a fast, cost effective route to settlement.

Mediation: Final Thoughts

Great wisdom comes from life's experience, from observation, learning and insight. Great wisdom involves not only talking but listening. It is not insular but stems from interaction.

It is said that European Man is descended from only a handful of women.[xix] Indeed for some time Man was an endangered species. Man has struggled and survived through cooperation and sharing. Even

language stems from this basic of needs. The key to survival is adapting to the environment and the needs and rigours of the world.

Humans have ventured from the plains of Africa to the ends of the Earth. In modern times we have seen Man step forth on the moon and Man's hand reach to the furthest depths of our solar system with the Voyager spacecraft. The Hubble Space Telescope and the Mars Curiosity Science Laboratory[xx] have even paved the way for man to peer into the depths of the past and contemplate the future. No one could have achieved this on his or her own. It is through cooperation and sharing that we grow, even if we sometimes have to share our sorrows.

In adversity it can take a lot of courage and wisdom to stretch out one's hand and take the first step. Perhaps, no more so than when Her Majesty Queen Elizabeth II stretched out her hand to Martin McGuiness in a gesture of reconciliation and goodwill. Reconciliation of course involves a dialogue between two parties.

Perhaps it is time to come in from the cold. Indeed, maybe it is time to look at things with a fresh perspective. In the light of the expressions of the Ministry of Justice and the Judiciary we may all want to consider how best to employ mediation in our daily practice.

Finally, here are words of wisdom from an insurer, David Fisher claims manager at AXA:

'From the insurer's perspective mediation offers a myriad of benefits. It encourages earlier settlement in a less contentious environment…and is more cost effective.'

He further added *'when you do it, you see it works.'*

Endnotes

i Russell Evans is a CEDR and ADR accredited commercial mediator at Resolve UK working with the judiciary on the development of mediation within the judicial system. In association with the University of Southampton he is currently conducting a study into the use of mediation within the Insurance Industry. If you are interested in participating or indeed offering any views, anecdotes or perspectives please register your interest by sending an e-mail to resolve@resolveuk.co.uk quoting 'Mediation Study'.

ii Lehmann, Laurent and Feldman, Marcus W. 'War and the evolution of belligerence and bravery.' (2008) *Proceedings of The Royal Society B* 275, 2877–2885.

iii McDermott, R. and Tingley, D. and Cowden, J. and Frazzetto, Giovanni and Johnson, D. D. P. (2009) 'Monoamine oxidase A gene (MAOA) predicts behavioral aggression following provocation.' *Proceedings of the National Academy of Sciences of the United States of America*, 106 (7). pp. 2118-2123

iv Lee, J. and Harley, V. R. (2012) 'The male fight-flight response: A result of SRY regulation of catecholamines?' Bioessays, Volume 34, Issue 6 June 2012, pp 454–457.

v Lucy Chakaodza 'Battle of the sexes' New Law Journal, Volume 162, Issue 7515, 25 May 2012

vi Charles Dickens 'Bleak House' published in 20 monthly instalments 1852-53

vii Charles Dickens 'The Old Curiosity Shop' published in the weekly serial *Master Humphrey's Clock* 1840-41

viii Dunnett v Railtrack (2002) EWCA Civ 302

ix Halsey v Milton Keynes NHS Trust (2004) EWCA Civ 576

x Burchell v Bullard (2005) EWCA 358

xi Royal Bank of Canada v Secretary of State for Defence (2003) EWHC 1841

xii Earl of Malmesbury v Strutt & Parker (2008) EWHC 424

xiii Rolf v De Guerin (2011) EWCA Civ 78

xiv Oliver v Symons (2012) EWCA Civ 267

xv Supershield Ltd v Siemens Building Technologies (2010) EWCA Civ 7

xvi Transfield Shipping Inc v Mercator Shipping Inc (2008) UKHL 48

xvii European Mediation Directive 2008/52/EC

xviii Ministry of Justice ‘Dispute Resolution Commitment’ May 2011

xix Professor Bryan Sykes ‘The Seven Daughters of Eve’ (2001) explores the theory of human mitochondrial genetics

xx See www.nasa.gov