

THE REEL DEAL: INEFFICIENCIES AND INEQUALITIES IN ADR ON FILM AND TV

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This paper delves into the portrayal of ADR in film and TV, analysing its effectiveness and examining inequalities within the processes. Focusing on Roman Polanski's 'Carnage', it analyses a derailed negotiation, revealing gender biases and power imbalances through the principles propounded by Fisher and Ury. In Peter Morgan's 'The Crown', the mediated divorce between Charles and Diana is examined, highlighting the mediator's failure to address power disparities and gender-related differences in bargaining power. Finally, an episode of 'The Good Fight' is explored to evaluate the pitfalls of mandatory arbitration, where an employee faces unjust proceedings. Overall, the paper contends that these fictional depictions echo real-world challenges in ADR, serving as a lens to objectively scrutinise and address inherent inequalities.

TABLE OF CONTENTS

I.	INTRODUCTION	66
II.	CARNAGE: NEGOTIATION IN SHAMBLES	67
III.	THE CROWN: MEDIOCRE MEDIATION	71
IV.	THE GOOD FIGHT: ARBITRATION GONE AWRY	73
V.	NAVIGATING CONFLICT: POTENTIAL SOLUTIONS	75
VI.	CONCLUSION	76

I. INTRODUCTION

The representation of Alternative Dispute Resolution ('**ADR**') in pop culture has risen significantly in the 21st century, like its popularity and real-world application. Although it might not be as popular as courtroom dramas which audiences find more

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thrilling, the use of ADR in pop culture can be observed in non-legal contexts as well. For instance, Roman Polanski's *Carnage* is about two sets of parents who engage in a rather unproductive negotiation to resolve a conflict between their sons. This is a very good example to understand how one must not negotiate – with emotions running high, and parties constantly being distracted and deviating from the issue at hand, the negotiation is absolutely unsuccessful. A slightly more efficient use of ADR through mediation can be seen in an episode of Peter Morgan's *The Crown* where Charles and Diana are trying to settle the terms of their divorce through a mediation facilitated by the Prime Minister. An episode of *The Good Fight* depicts arbitration proceedings which turns out to be less than ideal when an employee opts for mandatory arbitration against his billionaire employer. Similar to its real-life application, mediation, negotiation and arbitration in films and Television ('TV') series have some concerning elements to them. A common thread in the two TV series and the film is the existence of inequalities between the parties. There is a palpable power imbalance, resulting in unequal bargaining power between the parties to the ADR mechanism in all the visual media. There are sexist undertones and grave financial inequalities which tend to marginalise already relegated groups. In this paper, I seek to analyse the use of ADR mechanisms in the abovementioned visual media to understand how effective the process was and how the inequalities between the parties affected the resolution of the dispute.

II. *CARNAGE*: NEGOTIATION IN SHAMBLES

*Carnage*¹ revolves around the parents of Zachary Cowan (Nancy and Alan) and Ethan Longstreet (Penelope and Michael) attempting to negotiate how they should deal with the children after Zachary hit and badly injured Ethan. Analysing this negotiation by comparing it with the principles laid down by Fisher and Ury in *Getting to Yes*² shows how effective this negotiation was. These include separating the people from the substantive problem, focusing on interests underlying the problem and not the parties'

¹ This paper is concerned only with the portrayal of a negotiation in the film. The paper and the author do not endorse and are not in support of the director's personal views or actions

² Fisher R and Ury W, *Getting to Yes: Negotiating an Agreement without Giving In* (Random House Business 2012).

positions,³ being open to creative alternatives that could solve the dispute,⁴ and insisting on using objective criteria in the negotiation.⁵

In the very beginning of the film, both sets of parents are willing to make concessions for each other and are being collaborative – when Ethan’s parents are typing up their statement about the incident, Zachary’s parents are not happy with the use of the phrase “*armed with a stick*”.⁶ Ethan’s parents are accommodative and agree to replace the word ‘armed’ with ‘carrying’, and both parties are happy. In fact, Penelope Longstreet says it is “...*better than getting caught up in that adversarial mindset*”. This is a productive way to resolve disputes where they are not arguing over positions. This discussion is efficient, is improving, or at least is not damaging the relationship between the parties and is resolving the conflict – all hallmarks of a wise agreement.⁷ It could be argued that the Longstreets were employing soft negotiation techniques, though not to an extent that it would compromise the efficiency of the negotiation. While they conceded to the Cowans’ requests, it was not to their own detriment – they were focusing on their interest and were ensuring the harm caused to their son was adequately acknowledged, rather than fixating on the position of loving, but irrational, parents. This interaction is perhaps one of the last productive discussions in the negotiation process. The departure from Fisher and Ury’s principles from hereon is significant and very apparent.

The negotiation goes downhill when the parents begin to talk about the next course of action and is exacerbated by the nonchalance of Alan, Zachary’s father. The Longstreets ask the Cowans if Zachary would be willing to apologise to Ethan, and Nancy, his mother, agrees saying it would be good for them to talk.⁸ They are working together to resolve the problem rather than fighting amongst themselves. Having Zachary apologise would likely have been for the mutual gain of the parties – their relationship might have persevered through the conflict. If they had agreed to this, they would have had a principled negotiation.⁹ However, Alan intervenes saying Zachary is only eleven years old and does not understand the seriousness of the

³ *ibid.*

⁴ *ibid.*

⁵ *ibid.*

⁶ *Carnage* (SBS Productions 2011).

⁷ Fisher and Ury (n 1).

⁸ *Carnage* (n 5).

⁹ Fisher and Ury (n 1).

incident. At this juncture, there is a shift from principled negotiation to hard positional bargaining. According to Fisher and Ury, when this happens, the parties solidify negative impressions of each other and try to score points by blaming the other party.¹⁰ Such actions are detrimental to both parties. Instead of trying to prevent any miscommunications and emotions from taking over the conversation, they give in to them. When Nancy suggests Longstreets should come over to their house so that Zachary can apologise to Ethan, Michael declines as he believes the “*victim shouldn't be the one to make the trip*”.¹¹ While it is perfectly valid to feel that their son was wronged, refusing a *bona fide* attempt at reconciliation based on such feelings will not bring them closer to a solution. Neither party is willing to see the situation from the other party's perspective. The words used by the Longstreets – “*disfigurement*” – to describe what had been done to their son, are understandably not well-received by Alan. It is counterintuitive to the negotiation process since the Cowans have already accepted that it was Zachary who caused harm and are willing to let the boys talk and resolve the dispute.

Throughout the negotiation process, we see the women being side-lined by the men. Both Alan and Michael lash out at their own wives and at the other's. Aside from the negative implications of individuals within the same party having opposing views, it is highly discriminatory and counterproductive to the negotiation. There is a disparity in the bargaining powers of men and women. However, since there is one each in both parties, it does not have too much of a detrimental effect on either party. Sexist remarks were made during the course of the negotiation. Alan says to Penelope, “*Women think too much*”.¹² She asks Alan how he can live without a “*moral sense of the world*”. This is common in negotiation proceedings where male negotiators cast aspersions on female negotiators' femininity and gain a psychological advantage.¹³ Her husband then affirms Alan's statements saying family is the worst ordeal God inflicted on them. Men are also likely to use forceful language while negotiating.¹⁴ Alan tells his wife he does what he wants, despite them both negotiating from the same side. When Penelope is crying, he says when “*women cry, men are pushed to a*

¹⁰ *ibid.*

¹¹ *Carnage* (n 5).

¹² *ibid.*

¹³ C B Craver and D W Barnes, ‘Gender, Risk Taking, and Negotiation Performance’ [1998] *Mich J. Gend. L.* 299.

¹⁴ *ibid.*

breaking point".¹⁵ The presupposition by the men in the negotiation here is that the women are not adversarial and will be cooperative – this is especially true of Alan who seems to expect his wife to go along with everything he says. When the negotiation reaches breaking point, he says to the women that they are involved problem solvers, but the women he likes are "*sensual, crazy and shot full of hormones*".¹⁶ This is an obvious indication of the lack of bargaining power of the women in the negotiation as their opinion is not valued at all.

The separation between the people and the problem is also largely lost. Alan becomes busy with a problem at work and is repeatedly on the phone. He is not actively listening to or acknowledging what is being said.¹⁷ He is also not speaking for a purpose – he says he is '*useless*' and asks for the negotiations to continue without him, and he calls his son a '*maniac*'. The Longstreets launch personal attacks on the Cowans and the two couples begin to have intra-party disagreements. New issues, previously relegated, resurface when the Cowans take issue with Ethan's name-calling of Zachary, to which the Longstreets take offence. The parties are not speaking to each other in a constructive manner, or in a way that is understood by the other party.¹⁸ The main conflict is not at the forefront; the parties' attentions are engaged in finding faults in each other's positions. There is an attempt at conciliation and retaining '*fair-mindedness*',¹⁹ but it does not last long. The couples decide it was the worst day of their lives and the negotiation comes to a standstill. The negotiating parties begin insulting each other towards the end, after which the Cowans leave. Outside, Zachary and Ethan are playing together amicably. The entire negotiation was essentially pointless. The negotiators did not have full information about the issue – they do not seem to know what their boys were fighting. They were unable to keep a check on their emotions, and nor were they able to prioritise their interests over their position. The Cowans were focused on minimising their child's actions while the Longstreets were attempting to ensure their son was perceived as a victim. There are no objective criteria to settle the dispute, they go back and forth, renegotiating the same issue or bringing up new points about issues that were already settled. They fail

¹⁵ Carnage (n 5).

¹⁶ *ibid.*

¹⁷ Fisher and Ury (n 1).

¹⁸ *ibid.*

¹⁹ Carnage (n 5).

to abide by all four principles propounded by Ury and Fisher. Perhaps in such a situation, if there had been a real problem, mediation would have better suited the parties. Both parties made valid points and most of them had a genuine interest in reaching a resolution, but the discussion lacked much-needed structure, and the parties should have been more cognisant of their own biases and prevented their emotions from side-lining the main issue.

III. *THE CROWN: MEDIOCRE MEDIATION*

The presence of a mediator in the episode *Couple 31* of *The Crown*²⁰ ensured that such issues did not affect the Prince and Princess of Wales reaching a mutually agreeable divorce settlement. A neutral third party with no personal stake in the case would help the parties reach a solution that is mutually agreeable to them. A mediator, unlike an arbitrator, facilitates the exchange of information, promotes understanding between the parties and encourages them to find creative solutions to their disputes.²¹ Here, John Major, the Prime Minister ('PM') was the mediator. Diana and Charles had agreed to divorce by mutual consent and were finalising the terms. Correspondence between the two parties is happening through their legal teams, neither of which is known for their ability to make peace, according to the PM. When he is asked to be a mediator by the Queen, it does not seem like he has no vested interest in the mediation. He is, after all, the PM, and a successful mediation would mean his public image is bolstered, especially in such a high-profile case. Apart from this shortcoming, he handles the mediation very well.

Diana wants to keep her residence and her office and is seeking a one-off payment of thirty-five million pounds. She threatens to revoke her consent to the divorce if he did not agree. Charles is outraged at this request. A mediator's role in such a situation is to facilitate the exchange of information constructively. They can do this by structuring the remarks made.²² The PM's interpretation of Diana's demand to Charles is that she is preventing being beholden to him for a long time while also securing her financial independence. By asking for a lump sum, both of them are being liberated. The PM is attempting to clear the emotionally tarnished image the parties have of

²⁰ 'The Crown: Couple 31' (Netflix 9 Nov. 2022).

²¹ Kimberlee K. Kovach, *The Handbook of Dispute Resolution* (Michael L Moffitt & Robert C Bordone., Jossey-Bass 2012).

²² *ibid.*

each other and is helping Charles understand the rationale behind the demand in an objective manner. He encourages them to be more flexible in their thinking.

However, he does not acknowledge their unequal bargaining power. Diana has suffered a lot of emotional abuse from Charles and is not very well-regarded by his family. By virtue of their position, they are unlikely to be able to take this matter to court. Further, the sphere of mediation in the UK is not regulated by any formal body. The 'voluntariness' of the process means disadvantaged parties can be strong-armed into agreeing to an unfavourable settlement. Here, Diana is used to a certain quality of life and is economically dependent on her husband. Her position is therefore weaker compared to Charles's. Although she has the capability of harming him by disparaging him in the media, she was not viewed favourably when the settlement was happening.

A more formal system can ensure equality is maintained in such proceedings and that women are protected.²³ This is primarily because judges are better equipped to deal with these cases than untrained mediators, especially because no qualifications are specified for mediators in the UK. Since mediation is unregulated, women are left to fend for themselves. Further, it is argued that women tend to play the role of self-sacrificing peacemakers where they negotiate for others rather than for themselves, or they take on a fault-finder role where they blame the husband for the breakdown of marriage and base their entitlements on their sense of betrayal and are unable to focus their inner resources for themselves.²⁴ Diana's situation resembles the latter category. She fell out of favour with the public and the royal family, leaving her vulnerable.

Additionally, she was being hounded by the press. Her needs in this situation are unique because she has to ensure she is safe. She feels this can all be solved by taking money from Charles. She is rightly incensed about the way divorce is proceeding, especially considering the involvement of the Queen and the presence of Camilla. Her anger towards Charles might have prevented her from thinking about other important concerns such as security, in addition to her monetary demands. The PM could have been more aware of gender-related differences in bargaining power and facilitated

²³ Carol Lefcourt, 'Women, Mediation and Family Law' [1984] Clearinghouse Rev. 266.

²⁴ Isolina Ricci, 'Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlements for Women' [1985] J. Divorce 49.

mediation such that they could be overcome. While this might raise questions about mediator neutrality, the concept of selective facilitation where the mediator where the mediator selectively leads, constrains and structures client discussions and seeks inputs from them is not new to the field of mediation.²⁵

Although the parties cannot be held to the standards of a conventional heteronormative couple, the mediation process was skewed in Charles' favour because of his position and actions which served to hurt Diana emotionally, preventing her from adequately advocating for herself. The mediator could have made the parties aware of this imbalance and helped them reach a more holistic agreement. Sadly, he seemed more interested in swift resolution and ingratiating himself with the Queen. He credits Charles for instigating the breakthrough – indicating plainly that he had the upper hand since he sought nothing from Diana and simply agreed to give her a lesser sum than she asked for. Her role in the family – which was an inherent part of most of her adult life – is not discussed and is left uncertain. Though the PM performed adequately in that he helped them reach a settlement, a more experienced mediator might have been able to address the inequalities within the process and could have included other important issues about the roles of the parties in future. They also could have encouraged the parties to engage with each other personally rather than conducting the entire process through their legal teams. The couple's relationship was fraught with tension even before the mediation began. Their lawyers focused mostly on the transactional aspects of the divorce like property and money. These factors, coupled with their lack of direct communication resulted in a further breakdown of Charles and Diana's relationship. Their personal relationship might have survived if they felt a sense of psychological ownership over the process and the resolution.²⁶ An experienced mediator could have established this sense of ownership by better educating the parties about the process and understanding their expectations from it.

IV. THE GOOD FIGHT: ARBITRATION GONE AWRY

In the episode '*First Week*',²⁷ Maia, a novice lawyer, takes on the case of Frank, a worker at BMI, a sporting goods store worth billions of dollars. During a *pro bono*

²⁵ D Greatbatch and R Dingwall, 'Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators' [1990] Council. CTS. Rev. 53.

²⁶ Kimberlee K. Kovach (n 20).

²⁷ 'The Good Fight: First Week' (CBS 19 Feb 2017).

consultation with members of a workers' union, Frank approaches Maia for advice as he was accused of stealing 400 shoes by BMI and was forced to confess to having done this lest he should be fired. He was also questioned by BMI for 7 hours without being allowed to leave. Coerced, he signs the confession because of which his wages are lowered to account for the cost of the stolen shoes.

Aggrieved by this, he chose to go to arbitration as there was a mandatory arbitration clause as part of his contract with the company. Such clauses have become increasingly common in the United States.²⁸

Arbitration, which is supposed to allow for easier and more convenient access to justice, has been weaponised against employees. According to Staszak, compulsory arbitration clauses mandated by employers serve to save their own skin by evading the courts, making the clause disproportionately in the corporation's favour.²⁹ In Frank's case, the arbitrator hardly took any time to consider evidence. Maia advocates for Frank, and BMI's representative denies the claims. Based only on this, the arbitrator rules in BMI's favour. Additionally, when Maia brings up the issue of false imprisonment before the arbitrator, he immediately rules in favour of BMI. However, as she points out later, as per the agreement between BMI and Frank, the arbitrator cannot determine tort claims. The efficiency and quick resolution of disputes through arbitration is no doubt desirable. However, the arbitrariness and lack of due diligence can be to the detriment of weaker parties like Frank. The lack of an appeal mechanism puts Frank in a situation with no tangible remedy.

Moreover, hiring lawyers to challenge the award or, indeed, to represent them in the arbitration proceedings, might not be feasible³⁰ for employees who have been fired or have had their wages reduced, especially considering their financial resources as opposed to their employers'. In this case, there was a single arbitrator and the portrayal of the arbitration gave the impression that Frank had no control over their appointment. The arbitrator decided matters after hearing them for mere minutes. This lack of opportunity given to parties goes against the principles of natural justice and

²⁸ Seema Nanda, 'Mandatory Arbitration Won't Stop Us from Enforcing the Law', (*US Department of Labor Blog* 20 March 2023), <<http://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law>> accessed 1 May 2024.

²⁹ Sarah Staszak, 'Privatizing Employment Law: The Expansion of Mandatory Arbitration in the Workplace' [2020] *Stud. Am. Polit. Dev.* 239.

³⁰ Jean R Sternlight, 'How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection' [2015] *Brooklyn Law Rev.* 80.

would not have happened in a court of law. Further, as Frank explains earlier in the episode, he is struggling to pay rent and is clearly reliant on this job to make ends meet. A court might have looked favourably on Frank and would have been aware of the potential negative implications of power imbalance between the two parties.

Furthermore, BMI, like most corporations, is likely to have drafted the arbitration clause with little input from its employees who agree to bind themselves to it. Although they consent by signing on the dotted line, it would be difficult to determine if it was truly agreed to freely when it represents a choice between gainful employment and financial insecurity. Employers often do not have standardised means of appointing and administering arbitration proceedings, nor do they adopt any specific rules and procedures to guide the proceedings.³¹ This could lead to employers choosing procedures that benefit them, causing further harm to already disadvantaged employees. In Frank's case, in particular, it seems as if BMI has created a scenario where it acts as judge, jury, and executioner. BMI made the allegation against Frank, investigated the claim by interviewing him, and penalised him by garnishing his wages. In addition to this, a sole arbitrator, likely chosen by BMI as he is one of the company's managers, assisted by another employee of the company who questioned Frank for seven hours, is deemed appropriate to decide this matter. This reflects the adversarial attitude of employers towards their employees – the former succeeds when the latter fails to get past the hurdle of mandatory arbitration clauses in their employment contract.

V. NAVIGATING CONFLICT: POTENTIAL SOLUTIONS

Although this paper reviews a film and episodes of TV shows, such inequalities are not wholly alien to the way negotiations, mediations and arbitrations occur in the real world. The parties and mediators in these situations were amateurs and as they did not practice this regularly, they were unaware of the ideal manner of negotiating or mediating, nor were they aware of the ethical standards they needed to be mindful of. An experienced negotiator or mediator would be able to recognise inequalities in parties and rectify them. This is essential in such unregulated dispute resolution

³¹ Alexander JS Colvin, 'Mandatory Arbitration and Inequality of Justice in Employment' [2014] Berkeley J. Emp. Lab. L. 71.

mechanisms to ensure parties are not worse off, especially when they enter into it in good faith, hoping to preserve and continue their relationship.

Had the Cowans and Longstreets been more mindful of the dispute they intended to resolve rather than attacking each other, their negotiation might not have derailed. It is understandable that the involvement of their sons made the negotiation more emotionally charged. However, the parents making personal remarks against their own partners and the other couple, and the casual misogyny were unwarranted. Perhaps they would have benefited from the presence of a neutral third party in the form of a mediator, who could have structured their interactions to bring out more fruitful outcomes.

Conversely, Charles and Diana's lack of involvement and the introduction of an inexperienced mediator could have contributed to some of the unfavourable terms in their settlement. Divorce is complicated and it is not uncommon for parties involved to be hostile towards each other. A mediator should ideally be able to create an environment where this hostility can be set aside, even if temporarily, to have conducive discussions on the terms of the division of assets, custody arrangements, etc. Here, the PM was unfortunately unable to facilitate such discussions.

Both situations would have benefited if the parties to the negotiation were more focused on the problem and not their positions, and if the mediator was more experienced and had some qualifications in mediation.

In the case of arbitration, the arbitrator and the proceedings were deliberately set up to disadvantage one party who already had lesser bargaining power. Although there are laws governing the selection and appointment of arbitrators, parties with lesser bargaining power may not be aware of or be able to adequately exercise their rights. While it is unrealistic to expect a lawyer to be readily available free of cost to represent people like Frank, the episode highlights the importance of lawyers like Maia who can inform and speak up for people in his position. Of the three, these arbitration proceedings resulted in the most successful dispute resolution outcome. Maia was able to identify the loopholes and advocate for Frank's rights in a system that seemed to work against his interests.

VI. CONCLUSION

Depictions of alternative dispute resolution processes in pop culture can sensitise viewers to the inequalities in bargaining powers due to various reasons like gender and financial status, among others. The conflicts portrayed here are primarily for entertainment and are not intended to echo realistic situations. Nevertheless, it allows viewers to examine these dispute resolution processes objectively, with no vested interest in the dispute or its outcome. It has the potential to help viewers make generalisations and realise the pitfalls of these ADR mechanisms if conducted arbitrarily. It also shows that ADR spaces are no exception to the misogyny and inequalities which pervade all aspects of life. In essence, while pop culture representations of ADR processes may not always mirror real-world scenarios, they act as a valuable lens through which viewers can scrutinise the complexities and potential injustices prevalent in these systems