April 2023
Issue 3

Mediation Matters!

The quarterly newsletter of the
University of Strathclyde Mediation Clinic

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Editor: Patrick Scott **Assistant Editor: Adrienne Watson**

Editorial

This is the third issue of ***Mediation Matters!*** and it is a bumper issue, which includes some of the presentations from the Mediation Clinic Conference which was held in March. The Conference was a great success, as you will see from other comments in this newsletter.

In this issue we have the usual regular contributions from the Director, the Chair and Clinic News, as well as a new column from Alastair Sharp, which is a sort of 'Agony Aunt' column, with a twist. It is intended that this will be a regular column, so if you have any matters that you would like Aunt Minerva to discuss, please direct your questions to ***Aunt Minerva's Agony Column, Mediation Matters!***, using the Clinic's email address, mediationclinic@strath.ac.uk.

Charlie Irvine's ***From the Director*** focuses on interesting developments in small claims mediations in England and Wales. Alastair Sharp in ***From the Chair*** gives very positive feedback on the Conference, and Pauline McKay in ***Clinic News*** also touches on the Conference, together with an update on what is happening in the Clinic, including funding. My column, ***Patrick's Ponderings***, deals with the drafting of settlement agreements.

Views of a Polish Mediator provides some interesting reading on the lack of support for mediation in Poland and Marcin Morawski shares his frustration at trying to start a mediation practice in Warsaw.

Alan Jeffrey has created a new blog and writes about that in ***A Conversation Starter***.

Creative solutions are always important for mediators and Linn Phipps shares the content of a Scottish Mediation Workplace and Employment Initiative Group discussion on the topic. Pat Kennedy also provides feedback on a mediation by way of a case discussion entitled ***So close, yet so far.......but, finally, settled!***

The second half of the newsletter is dedicated to presentations from the Conference. Tony Allen's keynote address ***Mediation in the shadow of the law - or sunlight?***, John Sturrock's presentation on ***The Green Pledge*** and some of the workshop presentations are included, as well as some feedback from two students attending the Conference. Enjoy reading these contributions!

Patrick Scott
Editor

From the Director ......

I was pleased to see so many of you at the Conference. I'm sure, like me, you took a lot from Tony Allen's keynote (included in this newsletter). His call for 'integrated' rather than 'alternative' dispute resolution rang bells, though my long-term hope is that we drop these catch-all labels altogether; if we mean mediation, let's say mediation.

Tony's home jurisdiction of England & Wales seems to be getting this message. My attention was piqued by the straightforwardly named *HMCTS opt-out mediation evaluation report*[1], published on March 21st. For some time, His Majesty's Courts and Tribunals Service has referred money claims up to £10,000 to another organisation that does what it says on the tin: the Small Claims Mediation Service (SCMS). Its model is distinctive: specially trained HMCTS staff offer free, one-hour, telephone shuttle mediations. In 2021 they conducted 20,831 mediations with a settlement rate of 55%.

A nudge in the right direction

Until May 21st, 2021, HMCTS asked parties to 'opt in' to mediation by ticking a box. As part of wider reform efforts this was flipped to an 'opt-out' approach. Parties were automatically registered for mediation with the option to opt out by clicking on a link saying: '*I do not agree to free mediation*.' This is a classic 'nudge' towards something policymakers see as desirable.[2] To assess its impact the evaluation took detailed snapshots of participants, five weeks before and five weeks after the change, via interviews, focus groups, a survey and settlement data.

The headline findings are underwhelming. Participation in mediation rose from 17% to 21% and settlement rates were only 29%. Despite differences, the Mediation Clinic offers a useful benchmark: in 2022 the courts referred 314 cases and we provided 167 mediations, a take-up of 53%, with a settlement rate of 75%. What is going on in England & Wales?

Under the bonnet

It's worth looking under the bonnet of this evaluation for several reasons:

- Since the Woolf reforms, mediation has been more deeply embedded in the justice system in England & Wales;
- The Ministry of Justice (MOJ) is committed to making mediation compulsory[3];
- Scotland, being at an earlier stage in development, can learn valuable lessons;
- However, as Tony Allen recapped so eloquently, critical voices from South of the Border sometimes find a warm reception in our wee jurisdiction.

I'll touch on three aspects of the scheme: choice architecture, pre-mediation and overoptimism.

1) Choice architecture – 'who clicks first?'

It's clear that a great deal of thought has gone into process design. These are important cases for the individuals and businesses involved and the 10-week snapshot took in over 15,000. Still, I was surprised to learn that the defendant (respondent in our system) effectively exercises a veto. If the defendant clicks the second line below, the plaintiff is none the wiser and the case defaults straight to a hearing.[4]

In fact, 69% of defendants DID opt out, down from 73% under the opt-in scheme. This meant that although claimants were less likely to opt out (31%, down from 36%) fewer than one in three ever had the option, leaving only 21% where neither party opted out.

Continue

I do not agree to free mediation

Compare this with what happens under Scotland's Simple Procedure rules. When a sheriff refers a case to mediation, by email or in person, both parties are asked to contact the mediation provider.[5] Either party can be first to get in touch, increasing the likelihood that the person who is more open to the idea makes the earlier mediation choice.

To put it another way, this reduces the chance of the more sceptical party having the last word (ironically by having the first).

By the time the second party ('Party B') contacts the Clinic they usually know that the other has opted in, adding another dimension to their decision, 'social proof,' meaning: "*we view a behavior as more correct in a given situation to the degree that we see others performing it.*"[6] Party B knows of at least one other who has agreed to take part in mediation (Party A). If the aim is to nudge parties towards a mediation choice the scheme in England & Wales is missing a trick by eliminating the option of the plaintiff responding first.

2) Pre-mediation

Most mediators now see pre-mediation work as essential. HMCTS study participants had no contact with a human being but did receive "*some pre-appointment information*."[7] Perhaps those designing the scheme should have taken a look at what other mediation providers do. Most offer some form of pre-mediation conversation.

After the Simple Procedure rules came into force I took a call from an irate claimant, who hollered: "*What's this mediation?*" He wasn't happy about something he'd never heard of blocking his chance to put the sheriff right on a few things. I knew the last thing he needed was a spiel about mediation. Liz Stokoe and her colleagues tell us that callers are unimpressed by mediation 'philosophy'.[8] Much more important is listening and building rapport. I asked this chap what he was looking for, heard about his frustrations with the other party and empathised with the hassle of dealing with the court. Finally, borrowing from the research, I asked: "*Would you be willing to take part in mediation?*" He said yes.

The HMCTS scheme replaces this step with written information. Little surprise that mediators reported parties coming to mediation unprepared and lacking an understanding of what's involved.[9] The first few minutes of a one-hour session had to be spent explaining how the process works and correcting false impressions, like expecting mediators to make a decision or tell them what they should settle for. This must be challenging, and it seems likely that a relatively brief intake call would improve engagement and settlement.

3) Addressing overoptimism

A key reason for parties opting out was the desire to have their 'day in court', although this could also act as a reason to mediate: some found the prospect of appearing before a judge highly daunting. Many, though, "*felt that they were completely in the right*" and "*the Judge would agree with them, and rule in their favour*."[10] These comments speak of another distinct challenge for unrepresented people: overoptimism.

This is no different in Scotland. Many of those without legal advice (and quite a few who have it) find it hard to believe that the judge will not listen empathetically to their story, be won over by its glaring good sense and vindicate them entirely. Watkins suggests those proposing mediation: "*must provide evidence that mediation is not just better than adjudication in reality, but better than adjudication in the optimistic fantasy world from which the parties derive their expectations of success*."[11]

The system that has evolved around Simple Procedure seems to include at least two moments when such views are challenged. First is the Case Management Discussion, where sheriffs often set out their preliminary thinking and, on occasion, disabuse overoptimistic parties. It can be a bracing experience as people discover that proving their case may be trickier than they thought.

Second, mediators here seem to feel less constrained about providing information and insight, often walking parties through the consequences of various courses of action including not settling. While some in the HMCTS scheme did the same, other participants complained that "*the mediator appeared to be little more than a messenger between the 2 parties.*"[12] I've written before about the evolution of the 'activist mediator' in court-referred mediation.[13] This approach is likely to become more common as mediators gain experience in both settings.

Conclusion

The HMCTS Report is both an encouragement and a warning. Encouragement comes from realising that the current approach to mediation within Simple Procedure is working pretty well. Despite being opt-in, the process fulfils some important 'nudge' principles, including helpful choice architecture (improving the chances of first contact coming from the party more open to mediation then leveraging their agreement as social proof); pre-mediation that allows for empathic listening; and input from sheriffs and mediators that helps to reduce overoptimism.

The warning is more sobering. Events in England & Wales cast a long shadow for Scottish policymakers. Busy individuals may only have time for headlines. When they

read that a large-scale opt-out scheme could only raise mediation take-up from 17% to 21%, they may question mediation's viability for system-wide reform.

There's a serious point here. If you do something badly enough people will never try it again. Mediation has been characterised as 'fragile'[14]: their most recent experience disproportionately influences people's view of the process in general. I wonder how many claimants in the HMCTS scheme have written-off mediation simply because the defendant vetoed its use? Or because they expected more than a one-hour shuttle telephone call?

I'm not at all critical of the mediators here. By all accounts they are impressive, listening, clarifying and steering uncertain parties towards resolution. But they can only play the hand they are dealt. More concerning is the model, with its assembly-line approach and inbuilt assumption that mediation offers cheap justice for low value claims: "*poor justice to the poor.*"[15] My own research found that small claimants were deeply concerned about the quality of the mediation process and the justice of the outcome.[16] If policymakers in England & Wales are serious about making a success of mediation they should introduce intake calls and move it onto Zoom, ideally allowing two hours instead of one.

Charlie Irvine[17]
Director, Mediation Clinic

[1] Available from https://www.gov.uk/government/publications/hmcts-opt-out-mediation-evaluation/hmcts-opt-out-mediation-evaluation-report

[2] Articulated by Richard Thaler and Cass Sunstein in *Nudge: Improving Decisions About Health, Wealth, and Happiness*. Yale University Press, 2008, and applied to mediation by Daniel Watkins (2010) 'A nudge to mediate: how adjustments in choice architecture can lead to better dispute resolution decisions.' *American Journal of Mediation* 4: 19–37.

[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1093682/mediation-consultation-web.pdf

[4] For the full screen see Figure 1.

[5] In our case the Clinic. Edinburgh Sheriff Court Mediation Service takes a similar approach.

[6] Cialdini, R. B., *Influence: The Psychology of Persuasion* (Revised Edn.) Harper Collins, 2007, 116.

[7] HMCTS Opt-out Mediation Evaluation Report (2023) 10.3

[8] Sikveland, R., & Stokoe, E. (2016). Dealing with resistance in initial intake and inquiry calls to mediation: the power of "willing." *Conflict Resolution Quarterly*, 33(3), 235–254, 237.

[9] If they turned up at all. Other SCMS data suggests as many as 3 in 10 do not attend their appointment.

[10] HMCTS Report (n. 6) 9.10

[11] Watkins 2010 (n. 2) 32.

[12] Ibid. 10.5

[13] Irvine, C. (2020) The Activist Mediator. Available from https://mediationblog.kluwerarbitration.com/2020/09/10/the-activist-mediator/

[14] Originally in Feuille, P. and Kolb, D.M. (1994) Waiting in the Wings: Mediation's Role in Grievance Resolution. Negotiation Journal, 10(3), pp. 249–264, 251; then applied to UK workplace mediation in Latreille, P. (2010) Mediation at work: of success, failure and fragility. ACAS Research Paper 06/10.

[15] Abel, R. (1982) cited in Cappelletti, M. (1993) Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to- Justice Movement. The Modern Law Review 56(3) 282–296, 288, fn. 19.

[16] Irvine, C. (2020) What do 'lay' people know about justice? An empirical enquiry. International Journal of Law in Context 16(2) 146–164.

[17] ***Charlie Irvine is the Course Leader on the University of Strathclyde's MSc/LLM in Mediation and Conflict Resolution and Director of Strathclyde Mediation Clinic. He is an experienced mediator specialising in organisational and workplace disputes. Charlie's academic work focuses on mediation in the justice system, and he is currently completing PhD research into mediation participants and their reasons for settling.***

Figure 1— Defendant First Screen

Free telephone mediation

We have automatically registered you for free telephone mediation from HM Courts and Tribunals Service.

How free mediation works

A trained, neutral mediator from HM Courts and Tribunals Service will help you to explore options, negotiate and agree a settlement.

> Mediation can be quicker and cheaper than going to court.

The claimant must agree to mediation. We'll contact you, within 28 days after the claimant's confirmation, to arrange a free appointment. The mediator speaks to each party separately, this is not a conference call.

Your mediation appointment will last for no more than an hour.

Find out more about free telephone mediation (opens in new tab).

After mediation

If mediation is successful, you'll make a verbal agreement over the phone. A copy of the settlement is available to both parties. You do not have to sign anything, but the agreement is binding.

If either party breaks the terms the other party can go to court to ask for a judgment or hearing.

If mediation fails and a court hearing is needed, what happened during the mediation appointment cannot be mentioned in court.

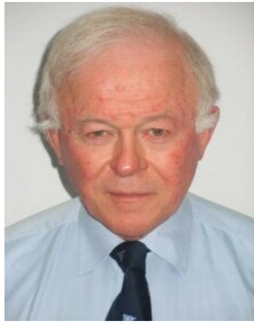
You will not have to wait longer for a court hearing if you choose mediation.

Continue

I do not agree to free mediation

HMCTS Report, S.14 at p. 32.

From the Chair .....



On behalf of the Board ...... A Very Happy Spring and Easter to you all!

Apart from Easter Bunnies, Fluffy Chickens and Chocolate Eggs, it is the time of year of regeneration and looking forward to where we are going and hoping to go, sometimes very different things. In the last edition, we highlighted the Strategy days and the SWOT and PESTLE analysis, and looked forward to the Conference on the 18th of March where these and much more were debated and discussed. It was an excellent and well attended day for those who attended, both online and in person at the Learning & Teaching Building at the University, where friendships were made and renewed, and networking flourished, accompanied by the copious food and non-alcoholic drink in the intervals between the talks and workshops. This was followed at the end of our stimulating and thirst inducing labours by a marvellous and generous free run of the Union where, by courtesy of Anderson Strathern, we all had what seemed to be an unlimited supply of vouchers for the bar. Your co-chair for one staggered back to Rhu, where he was staying with friends, thankful that his station was at the end of the line otherwise he may have ended up at Faslane or the Holy Loch.

Others in this edition also comment on the Conference, but it would be remiss of me not to thank Pauline and all her helpers for all the hard work that went into the whole day. As always, she and they worked indefatigably, and we are lucky to have such a team behind us. The front of house speakers were a formidable team. Presided over and facilitated by the ever lively and brilliantly informed Dr Vanessa Collingridge, we heard illuminating words of wisdom as to the position of mediation within the legal framework from our first keynote speaker, Tony Allen, followed by a choice of three workshops in the morning with a further three in the afternoon. Our second keynote speaker, for each is equally eminent and deserves equal billing, was John Sturrock KC, with a thought-provoking discourse on *The World Mediators Alliance on Climate Change*. The day was concluded by a panel discussion entitled *What have we learned from Today* which provoked interesting questions and lively discussion.

The Board met on the 6th of March, when there was considerable discussion as to the Standards Committee proposals, with a further subcommittee meeting taking place to enable updated proposed documents to be considered by the Board. As to the Strategy proposals which had been the subject of earlier discussion, this postponed due to a member being unable to attend but will be a major feature of the year ahead. There was also discussion as to the Funding sub-group which was progressing, but which needed further time for completion. As to the PACT proposal from Jonathan Rodrigues, relating to an international framework, these are progressing and are to be discussed at a separate meeting or possibly at the next Board meeting.

Two further matters, each very different but equally worthy of mention, are the Scottish Legal Awards and Alan Jeffrey's Blog. We are again entering the former with high hopes that we can make it a hat trick of awards this year. Alan's Mediation blog *Mongoose and Cobra* is a highly entertaining personalised perception of mediation, all raw in tooth and claw. Well worth a read.

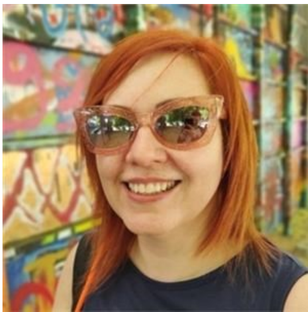
That's it for now folks as they say. Happy mediating.

"*A mediate a day keeps true conflict at Bay*" (anon)

Alastair Sharp[1]
Co-Chair

[1] ***Alastair Sharp is a former English Judge and has been a fully accredited CEDR Mediator since 2002. He completed the LLM in Mediation and Conflict Management at the University of Strathclyde in 2015. He is a Member of Scottish Mediation and the Founder and Principal of ASMediation, which is based in the North-East of Scotland, with his practice extending throughout the country and with a base in London at Lamb Chambers in the Temple.***

Clinic News



It's Spring already and what a busy time we've had since January.

The Third UK Mediation Clinic Conference took place in our new Learning & Teaching Building and was well received in person and online with attendance from over 60 delegates combined. We enjoyed meeting and networking in person and for many it was the first time in several years that they had met in the 'real' world as opposed to the 'virtual' world to which we have become so accustomed. I found myself being able to quickly arrange a meeting without the need for endless Doodle polls; answer questions from mediators and delegates that they had possibly not felt was worth putting in an email; and it was fabulous to meet people that I have only known via email and be able to speak with them outwith an office setting. It's good getting to know people again. An opportunity was provided for those who couldn't make it in person to join online, albeit in a limited capacity and we hope to build on that next time. Our thanks go to all the delegates, speakers, tech support and volunteers who enabled the event to run so smoothly. The drinks reception sponsored by Anderson Strathern was warmly welcomed at the end of a busy but fulfilling day and gave delegates the opportunity to relax and chat before heading home.

Thank you to those institutions that have contacted me about the Mediation Clinic Network. The Network will aim to provide encouragement, support and learning for Mediation Clinics. As well as the UK, we are delighted to discover many Clinics overseas and we are currently liaising with colleagues in Australia, India, Poland, Czech Republic and USA. More coming soon.

I am delighted to say that the University has agreed to fund and make my post permanent as Clinic Co-ordinator. This is an important step for the Clinic as it shows that the University very much value the Clinic as a resource, and value it's work across the courts.

We still have a limited amount of funding from Safe Deposits Scotland Charitable Trust to deal with Housing cases (stipulations are that one of the parties must be a private rented tenant). If anyone is aware of any cases or organisations that could use our help, please let us know.

A quick reminder to all Mediation Clinic members, if you are not already a member of Scottish Mediation (SM) and there is an SM course that you would like to attend, the Clinic can provide two places at member discounted rates. Please get in touch and we can arrange this for you.

As Elise and I continue to deal with the referrals coming to the Clinic (83 in January – March), please do not hesitate to contact us if we can help with anything. We are also available to provide 1-2-1 Zoom meetings and training on any aspect of the Clinic that you may be unsure about.

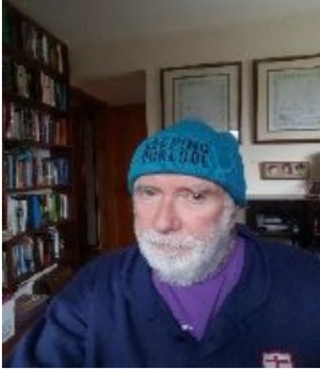
Roll on the Summer!

Pauline McKay[1]
Co-ordinator, Mediation Clinic

[1] ***Pauline McKay completed the PG Certificate in Mediation and Conflict Resolution course at the University of Strathclyde in 2020. She is currently an Accredited Mediator with Scottish Mediation, the Clinic Co-ordinator of Strathclyde Mediation Clinic and volunteers as a lead mediator with the Clinic and Lothian and Borders Mediation Service.***

Patrick's Ponderings by Patrick Scott[1]

The Settlement Agreement



Many of our Clinic mediators are not legally trained. Unlike the Agreement to Mediate, which really only requires the insertion of the parties' names, the Settlement Agreement can pose more challenges. Hopefully, this ponder may provide some assistance and lead to more consistency in the format and wording of these agreements.

The first part of the agreement that requires attention is the description of the parties. If the parties were correctly described in the Agreement to Mediate, the same description can be included in the Settlement Agreement. I discussed this in my previous ponder.[2]

The more challenging part of preparing the agreement is the drafting of the terms. The parties can be referred to as 'the Claimant' and 'the Respondent', 'Party A' and 'Party B' or by their names. Where the settlement involves the payment of money, a typical agreement will read as follows:

1. The Claimant will pay to the Respondent the amount of £100 in full and final settlement of the Claimant's claim and expenses.
2. Payment will be made within 14 days, by way of a bank transfer into the account of the Claimant, the details of which will be supplied by the Claimant;
   or
   Payment will be made in instalments of £20 per month, commencing on the 1st of June 2022, and by no later than the 1st of each following month, until the full amount has been paid, and will be made by way of a bank transfer, etc
3. Once payment has been received by the Claimant, the Claimant will complete Form 7A and have the case dismissed at the Sheriff Court.

The following can be noted from the above:

1. The payment is in full and final settlement of the claim and expenses. If that is not the case, expenses should be dealt with separately. A few years ago, I had a matter where the agreement recorded that the payment was '*in full and final settlement of the Claimant's claim*'. After payment was made, instead of having the claim dismissed, the Claimant went to court in an endeavour to persuade the Sheriff to award her legal expenses.
2. There should be a period within which payment will be made. It can either be a certain number of days or weeks, or by a particular date. It is not uncommon for payment to be in instalments. In this event, the amount of the instalment and the commencement date should be included.
3. The method of payment should be stipulated, usually bank transfer. It may, however, happen that a party wants to pay in cash or by cheque. The details of this then require to be dealt with (will a cheque be posted; if so, to what address; will the parties meet to effect payment; if so, where will they meet, etc).
4. Finally, it is important to provide for the dismissal of the case at court once performance of the settlement has occurred. This will normally be once payment has been received by the Claimant. Form 7A then needs to be completed by the Claimant.

Some settlements may involve the performing of some act. The Respondent may need to remedy defective work or complete an unfinished job. In return, the Claimant may need to pay the balance of the agreed fee. These terms should be described with sufficient clarity, that the parties know exactly what needs to be done and, importantly, by when.

Settlement Agreements are not confidential, but parties may agree to make them confidential. In such a case, there must be a clause to that effect in the agreement.

The Clinic's pro forma online Settlement Agreement which, unfortunately, cannot be more specific with regard to the terms of the settlement, given that there are many different possibilities that may arise is in Figure 2.

In the event that the settlement is not online, the agreement will be in the same terms, but without the portion describing the mediator reading the terms of the agreement to the parties. There are a few draft anonymised settlement agreements on SharePoint in the Case Files folder under '*Generic Documents for Mediations*', for guidance to mediators who are unsure of what the wording of a settlement agreement should be.

Finally, and for the sake of clarity in the event that any party questions the validity of the Clinic's online Settlement Agreement since it is not signed by the parties, the explanation is the following. In Scots law, an agreement does not "*have to be in writing and signed by the parties"* to constitute a valid and binding agreement. Oral or verbal agreements are equally valid (unless a particular type of transaction, such as the sale of a property, requires a written agreement signed by the parties). However, the difficulty with oral agreements is that they are difficult to prove in the event of a dispute over their terms. By following the Clinic's procedure, where the mediator records the terms of the settlement and reads those terms back to the parties, asking them to confirm them, there is a written record of an oral agreement, with the mediator as witness.

Until my next ponder, happy mediating!

[1] ***Patrick Scott completed the LLM in Mediation and Conflict Resolution course at the University of Strathclyde in 2018 and was awarded an LLM in Mediation and Conflict Resolution with Distinction. He is currently an Accredited Mediator with Scottish Mediation, serves on the panel of mediators of the Scottish Legal Complaints Commission and volunteers as a lead mediator with Strathclyde Mediation Clinic.***

[2] See '*Patrick's Ponderings – The Agreement to Mediate'* in *Mediation Matters!* Issue 2 at page 7.

Figure 2 - Outline Settlement Agreement

SETTLEMENT AGREEMENT

Case No:

This document records the settlement agreement between

(Party A) : ____

and

(Party B) : ____

reached in mediation on: _________________________ (date)

The terms of this agreement have been read out to the parties by the Mediator:

_________________________________ (name) on __________________________ (date)

and accepted by them as an accurate account of their agreement and fully binding.

The Parties agree as follows:

What is to be done?
By whom?
By what date?
'In full and final settlement of …'

Signed: ……………………………………………………………… (Date) Mediator

When the terms of the above agreement have been fulfilled, the Claimant should have the case dismissed by completing and submitting Form 7A (Application for Decision) to the court.

Aunt Minerva's Agony Column

By her earthly intermediary Alastair Sharp[1]

Minerva is the Roman Goddess of Wisdom and Just Causes. She has agreed to share her wisdom with members of the Clinic and answer queries as to unusual or interesting cases. This is her response to a query from 'Worried' of Kinlochsporran. The names and some of the facts have been changed for confidentiality purposes.

The Background

Amanda has a pet rabbit called Floppy. She, for it is a lady rabbit, is very large, the size of a small pony. She had supposedly originated in Romania where such rabbits are common in the Transylvanian mountainside where they were originally bred as comfort creatures for the Transylvanian nobility. They are protected in Romania and can only be exported by special licence, although this provision is commonly circumvented, and they are sold as family pets throughout the UK at a significant price. Amanda had been told by the charming young man called Vlad who claimed to be an authorised dealer in such creatures, that Floppy had been legitimately imported from Romania and was of high-quality stock. As Vlad was so charming and was asking a modest sum as it was "*the last of his stock*" and Amanda looked as if she'd be "*a lovely mother to her*", she did not ask for any documentation before handing over her hard-earned savings.

Amanda wanted to breed from Floppy, advertised for a suitable mate and received a reply from the owner of a similar Romanian Mountain Rabbit, Tosh, and who agreed for a price to introduce the pair to each other and hope for the best. Tosh arrived for the assignation with various documents in Romanian and Amanda was assured that all formalities had been complied with. Amanda barely glanced at the paperwork as she was so excited at the impending nuptials.

The introduction was a success. Triplets were born and Amanda decided to keep one and sell the other two. She advertised locally and nationally as it was during Covid, and such rabbits were being sold at a premium. She received an offer from one Julia who was very keen to buy one for her daughter, Sophie. An inspection visit was arranged, and the moment Sophie set her eyes on the one with the bouncy and fluffy white tail she exclaimed "*Oh Fluffy*" and embraced her and turned to her mother and said "*Yes please, this one Mummy*". There was a brief conversation between Amanda and Julia before Julia wrote out a cheque for £2,500 which was the going price for a Transylvanian Mountain Rabbit at the time.

Precisely what was said between the adults became a significant issue in the mediation that followed, as was who was present and might have heard the discourse. Julia recalls asking if all the paperwork was in order, including vaccinations, and being told everything had been done as required. And Amanda remembers Julia only having a very brief conversation with her, and explaining to her that the father had all the paperwork but the mother came from a professional dealer. Amanda thinks that her boyfriend was present in the room at the time of the sale but is not sure as he had been popping in and out, and in any event, she does not want him involved.

After three months Julia contacted Amanda saying that Fluffy had become ill and the vet had diagnosed Romanian Rabbit disease which must have been carried by one of the parent rabbits and should have been vaccinated against by their owners or at least by Fluffy's owner at birth or shortly thereafter. The disease was not fatal provided the rabbit had regular and expensive medication costing about £500 a year. Vaccination was not always 100% effective but lessened the chances of infection significantly. Also, a tendency for the disease can be tested for at birth, but with uncertain results

Julia wanted her money back and said that Sophie was distraught, and Amanda could "*eat the damned thing*" if she wanted. Amanda, after consulting a man in the pub who worked as a paralegal, said it was a question of buyer beware and Julia could have had the beast tested if she had really cared. Julia sued for £3,000 (the cost of Fluffy and vet's fees) and the Sheriff referred the case to mediation.

The court paperwork included certain agreed facts, namely:

1. It is unlawful to export Mountain Rabbits from Romania without a Special Licence.
2. Romanian Mountain Rabbit disease is a common ailment which can be vaccinated against either by treating the parent animal or the infant when still very young.
3. The disease can be treated by medication costing about £500 a year.

****

Dear Aunt Minerva

I received this case from the Sheriff at Kinlochsporran Sheriff's Court and have had pre-mediation telephone discussions with each party. Each party feels hard done by and is not inclined to settle although they are persuaded that it's worth a try. Neither really wish to face the Sheriff as he apparently has a fearsome reputation locally, although his female colleague who occasionally sits, has a very benevolent approach to litigants especially females. I am quite a new mediator.

My questions are as follows:

1. Do I make any attempt to move the case from the resident male Sheriff to ensure the more benevolent Sheriff hears it if goes to a proof?
2. Do I recuse myself as it seems that one or other of the parent rabbits might have been exported unlawfully from Romania and if I do, do I make some kind of report to the Romanian authorities?
3. Do I suggest, and if so, do I make it a forceful suggestion, that Amanda takes a statement from her boyfriend?
4. To what extent, if any, do I enquire from Amanda as to the current position of the remaining two baby rabbits as possible aspects of a settlement?
5. Julia has a friend who is a board member of a local animal charity and who Julia would like to accompany her at the mediation. Should I agree to this?
6. If any suggestion emerges that one solution would involve euthanising Fluffy, should I encourage this and if a settlement looks as if it may eventuate based upon such a suggestion, should I draft it? I am a member of PETA and unhappy at the thought.

Yours,

Worried

****

Dear Worried

1. No! Definitely not. Do not try to interfere with the court process. Unless of course you are a drinking pal of the Sheriff's, when you could tell him after the sixth malt that if he were wise, he'd get rid of the bleeding rabbit case!

2. Only if you are desperate to get rid of the case. If unlawful exportation is lurking in the background, it is just that, namely in the background, and the Romanian authorities probably have enough on their hands at the moment without investigating rabbits.

3. Suggest, but do not insist. Point out that his evidence might help considerably but until it is obtained it cannot be said how important it might be. Also bear in mind that there are sometimes reasons why parties do not want others to be involved, which is their right.

4. It is worth making this enquiry in a private session, as there could well be a solution that could involve one or other of them which would be outside the scope of what the Sheriff can do.

5. Only if Amanda agrees and is offered the chance to bring a supporter as well. Take the time to discuss the supporters' role in the mediation during your pre-mediation conversations.

6. This is a difficult one. People do euthanise pets when they reach a certain age and sometimes perhaps if an operation or treatment is too expensive, but do you want to condone this? A matter for your conscience, I think. You could possibly tell them it is a matter for them, although you personally wouldn't do it. On no account allow Sophie to persist in her suggestion of eating Fluffy! Treat it (perhaps humorously) as a suggestion in bad taste (so to speak).

If readers have any other questions, please direct them to:

Aunt Minerva's Agony Column, Mediation Matters!

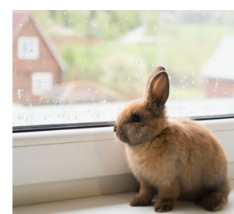


Photo by Анслэш Степана on Unsplash

Views of a Polish Mediator

Marcin Morawski[1]

I graduated from the University of Strathclyde postgraduate course in 2017 with a Master's degree in mediation. I chose to study in Scotland because mediation is not very popular in my home country of Poland. As a few years have now passed, I should have gained some experience in the field of mediation, the experience that I have been asked to share with you, dear reader. Unfortunately, it has not been a success story thus far.

After graduating, I decided to leave Scotland and return to Poland. It was virgin territory for mediation at the time and I hoped to contribute to change. I set up my own mediation practice. I volunteered as a court mediator in several courts in the Warsaw area. I also tried to find clients on my own. I sent hundreds of emails, placed many advertisements, made contact with lawyers and social workers. Finally, after a few months, one of the judges sent me a case, a family dispute. I eagerly tried to contact the clients, but without much success. They were just not interested. After many phone calls and attempts to reach them by email, I received the message that they would simply go to court and '*let the judge decide*'.

A little depressed, I remembered some of the mediations I took part in when I was a student in Scotland. Given my background and the fact that there are many Poles living in the UK, I took part in two or three mediations with Polish participants. As a student mediator I had some space to observe the main mediator's struggle. It was not easy for the lead mediator. The parties were absolutely convinced that they were right and that the other party was there to deceive them. They preferred to walk away from negotiating the terms of the settlement rather than compromise. Needless to say, none of the mediations were successful.

I know that mediation is not an easy task. But mediators are not miracle workers, they can only do what the parties allow them to do. What is it then that holds the mediating parties back, that prevents them from making concessions? Something that makes them so intransigent that they cannot compromise? I can imagine that in other nations there are stubborn individuals, but among Poles it was beginning to take on epidemic proportions.

Despite many attempts to popularise mediation in Polish society, it is still a marginal phenomenon. In 2014, the Polish Ministry of Justice published a comprehensive report on the state of mediation, entitled '*Diagnosis of the state of use of mediation and the reasons why mediation is too low in relation to the expected popularity*'. The title itself sounded pessimistic, and the report highlighted the main problems.

According to the report, the use of mediation is low in both courts and prosecutors' offices. This conclusion applies to all areas of law - the percentage of business law cases referred to mediation by district courts in 2014 was only 0.25 per cent of all court cases, family law - 0.17 per cent, civil law - only 0.023 per cent, labour law - 0.21 per cent and criminal law - 0.16 per cent.

The problem of the low percentage of cases referred to mediation is not specific to Poland but to the entire European Union. Analyses carried out in the EU show that, despite the undoubted advantages of mediation, it is used in less than 1% of civil and commercial cases.

The report has also identified the roots of the problem of low use of mediation in Poland and, very interestingly, acknowledged this problem from different angles. For example, from the perspective of judges, one obstacle to the low popularity of mediation is the judges' belief in their own ability to mediate and a fixed way of thinking and acting, which is not conducive to referring cases to mediation. From the point of view of the legal profession, lawyers often perceive mediators as competition and see referring cases to mediation as economically disadvantageous for themselves (the way lawyers are paid often makes it in their interest to pursue a case in court for as long as possible). From the point of view of the parties, the main reason why mediation does not take place is a lack of willingness to participate in mediation. Apart from the barrier of not knowing what mediation is and what its advantages are, there is also the reluctance of the parties to decide for themselves how to resolve the conflict and the expectation that the judiciary will decide for them. Finally, low public awareness of mediation, insufficient information and promotion activities and scattered sources of information are barriers to the dissemination of mediation to the general public and businesses.

Therefore, the Polish judicial authorities set a target for the achievable level of mediation. The short-term scenario was to achieve a level of 1.1% of cases referred to mediation nationwide by 2020; a level of 3% by 2030; and 10% beyond 2030.

Let's see if we are on the right track. According to the latest statistics published by the Ministry of Justice, the number of mediations in 2021 was as follows:

- civil law: 9,200 mediations
- criminal law: 3,890 mediations
- family law: 8,700 mediations
- commercial law: 6,400 mediations
- juvenile law: 200 mediations
- labour law: 3,700 mediations.

In total, around 32,000 cases were referred to mediation nationwide in 2021. This seems like a lot, until you realise how many cases were referred to the courts nationwide - around 14 million. This gives us a very poor ratio of cases referred to mediation: 0.2253%.

As we have seen, the targets set have little in common with reality. However, I would not put all the blame on Polish stubbornness. Old-fashioned ways of thinking, the inefficiency of the judiciary, the lack of openness to new solutions or the unfortunately well-known Polish problems with the rule of law are equally important factors.

You might ask me: what will you do then? What about your planned career as a mediator? Well, I found the solution - I became a lawyer. But I will never forget my mediation background and I will not hesitate to use it whenever I see such an opportunity in my work.

[1] ***Marcin Morawski completed the MSc in Mediation and Conflict Resolution course at the University of Strathclyde in 2018. He currently works for Pietrzak, Sidor and partners law firm in Warsaw, Poland, as well as volunteering for Strathclyde Mediation Clinic.***

A Conversation Starter

Alan Jeffrey[1]

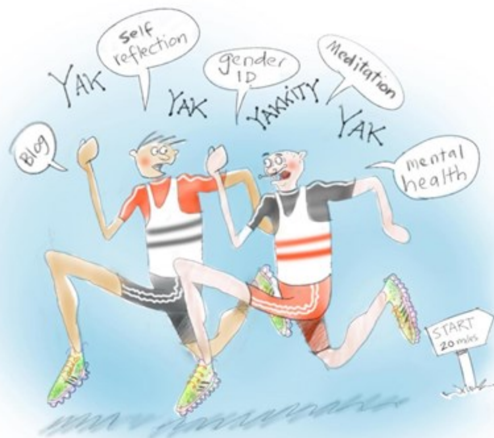


Illustration by Paul Burns

A few weeks back I went on a long run with a virtual stranger. My usual running buddy was on parenting duties; pancakes, PAW Patrol and Play-Doh kept him away from his planned training. Sadly, he would remain confined to the house on what was a perfect day for running. The sun was shining, the temperature was in double-digits, and I had brand new running shoes in an ostentatious colourway. The Holy Trifecta. Of course, long runs are always improved by the company, so it was unfortunate that this key element had been ruined by the middle-aged burden of responsibility. Luckily, the previous week a third runner had joined us, a friend of my friend who held all the characteristics a good running buddy should hold. He ran at a similar pace to me, was keen and capable of running the required long-miles and had decent banter. So, despite having only met him once, I reached out. I felt like my six-year-old daughter approaching another child in the playground "Will you run with me? Will you be my *friend*?". It's absurd how making friends is so much harder as an adult. Well, it *feels* harder. Paradoxically, he enthusiastically texted back and soon we were out in the morning sun, enjoying our run. As simple as that.

Of course, having only met once we talked about the usual things that you do when you don't know someone very well; suicide, gender identity, mental health, politics and the turmoil of middle-age. Wait…that's not the usual thing! The usual things strangers talk about on runs are the weather, race chat, running gear and aggressive comparisons of marathon times. What was going on!? Let's rewind a few weeks.

As I begin the final stages of my MSc at the University of Strathclyde, I have been reflecting on what it has given me. My main motivating factor in starting this journey was to prevent what is best visualised as my brain melting into a gelatinous soup, chunks of Peppa Pig, My Little Pony and Barbie offering the only evidence that something solid once sat there. The past five years of child-raising, beautiful and rewarding as it had been, had left me feeling like my IQ had dropped into the single digits from a great height (medium height, I was never that smart!). The course has been successful in switching on the creative and curious part of my brain, and I have specifically relished the opportunities the essay assignments have given me to read more, think deeply and especially to *write*. I don't profess to be the greatest writer, but I've always enjoyed doing so, and it's been years since I took the time to put pen to paper. Knowing that my university career would end this year I started to think about how I could maintain the motivation to write without the jolt of imposed deadlines! Without giving it too much thought, a particular strength/weakness of mine, I dived head-first into the twentieth century and created an online blog where I could hold myself accountable to write more, and by proxy read and *think* more. Maybe no one would read it. In fact, that's the most likely outcome! That was fine. That wasn't the main driver for the project. I just want to write about what

interests me; mediation, relationships and the power of community and prevent the soupening (New word. Take that Shakespeare!) of my brain for a while longer. So, www.mongooseandcobra.co.uk was born. A little place on the internet where I could put my thoughts and indulge my want to write.

Back to the run! Why was the conversation atypically serious for a Sunday morning run with a stranger? Well, it turns out that my new pal *had* read my blog. I had mentioned it off-hand the previous week and generously he had gone out of his way to check it out before meeting me again. The positive feedback was delightful to hear, but more importantly, and surprisingly, was the depth of conversation that arose, sparked by the blog's content. I learned more about my new running buddy in those two hours than I might have in two months of typical running chat. As other friends found the blog, I noticed that this wasn't an isolated incident. Suddenly small talk gave way to spiraling conversations about community, anxiety and the devastating revelation that more than one of my friends thought I was doing a degree in **MEDITATION** rather than **MEDIATION**! This functionally explained why they have been greeting me by saying *namaste* recently. My good friend Paul (who graciously offered to create the incredible art for the blog) and I had lunch and discussed how hard it can be to say that you *love* your male friends. Other friends, many I hadn't spoken to in some time, reached out to tell me something had struck a chord with them, and in a bittersweet discovery I found that some of my friends are not doing as well as I had thought. Put simply, my relationships with my friends and family are improving, and the blog is acting as a catalyst.

I am hoping that this piece comes off in the spirit it is intended. I am not here espousing my writing as special or even especially good, but I am writing with honesty about things that matter to me. And they seem to matter to others too. The small community of friends, family and colleagues who have indulged my literary fantasies are responding to it in ways that I really appreciate. I don't want the blog to be an isolated monologue. I want to have deeper conversations. I want to be closer to the people in my life. I love talking about the latest Netflix show, but I don't want that to be the only thing we talk about. So, whilst I started the blog just for me, I'd like to invite you to have a read. Have a read then come to me and tell me why I am wrong. Present me with your alternative perspective. Help me learn and improve. Tell me why shuttle mediation isn't actually terrible (The only thing that I got any push back on in my last *Mediation Matters!* piece!). Mostly, let's get to know each other better, whether we've been running through life together for years or for a week.

I became a mediator because I believe in the power of conversation - so let's talk.

Come and join the conversation at
www.mongooseandcobra.co.uk

[1] ***Alan Jeffrey is a part-time student in his second year on the MSc Mediation and Conflict Resolution course at the University of Strathclyde. He currently works for Cyrenians Mediation Support as a family mediator and workshop facilitator, as well as volunteering for Strathclyde Mediation Clinic and Lothian and Borders Court Mediation.***

The Use of Creative Solutions in Mediations

By Linn Phipps[1]

The Scottish Mediation Workplace & Employment Initiative Group (WEIG) held a discussion on the use of creative solutions in mediation in January 2023. The aim was to be reflective of our current and future practice rather than to reach a definite conclusion.

As is our practice in reflective sessions, we ask for examples of real mediations to be shared, suitably anonymised. And for this to form the basis for discussion and further suggestions. Examples presented included:

- Parties had agreed the payment from a married couple that would settle the dispute but not exactly who would pay it. The couple were not agreed on who would pay and had differing views on reputational issues. The mediator had encouraged a creative solution, through private sessions, that a way forward might be that the amount due be paid solely by one of the couple, and that it could be paid to a charity rather than to the other party.
- Another case history was shared around unpaid factor bills and debt recovery costs consequently also sued for. The mediators had creatively encouraged the separation of the factor fees from the legal and administrative fees, and this enabled a settlement of the factor fees element. It also laid the groundwork for a better relationship and resolution of the legal fees claim, which subsequently settled.
- Another example presented was of creatively using reality testing to help one or other party reflect on what would happen if the case went to court, and to reframe their own desired course of action.

Sometimes the skill of asking the question is seen to be more important than knowing 'the' answer. So, an important question for us was, to what extent should a mediator introduce creative solution ideas if they don't actually emerge. Further examples shared demonstrated the importance of listening and of then asking the testing question(s), such as: 'What would happen if …'. One good practice shared was taking the opportunity of moving beyond the formal mediation and creating space, for example, by taking a park walk (and relaxing) with a party and then listening to what they really wanted.

Others shared that they too had used a charity payment as a creative solution; and proposing tossing a coin once the amount of money in dispute had shrunk to very little. One mediator had resolved a dispute over a redundancy when he discovered that the employee wanted to move into horticulture and he noticed that the employer's grounds required a gardener. Another mediator had reached out with a signpost to expert advice to help a party who was grieving.

Further discussion followed about 'evaluative mediation' and the role of the mediator in controlling the mediation process - but not the outcome. Some mediators emphasise clearly defining the problem. One practiced 'jumping the parties together' by privately making suggestions and teasing out what each party might be prepared to accept. Another focused on brainstorming with a whiteboard and playing 'devil's advocate'. Further comments were made about the difference between 'evaluative' and 'evaluation' mediation.

These discussions highlighted the challenges of working with parties which are in fact couples or groups ('sides within sides') and may have diverse aspirations. These divergences also present the mediator with creative options! This may be a suitable topic for a future WEIG.

Note: WEIG meets around 4 times a year, mainly on Zoom, and these free meetings are open to all Scottish Mediation members, particularly workplace mediators. Please contact linnphipps@gmail.com for more information. The session recording (31 1 23) can be found on the members' section of the Scottish Mediation website.

[1] ***Linn Phipps, Chair of SM WEIG and based on session notes by Chris Cox. Linn is a coach and mediator specialising in Workplace. She also enjoys volunteering with Strathclyde Mediation Clinic and is currently serving on the Clinic's Board. She was previously Vice-Chair of Scottish Mediation. Linn was originally trained by CEDR 17 years ago. In her spare time, Linn is a serious amateur singer and performer in Gaelic and English, and performs in a duo Na Maighdeannan-mara (the sea-maids/ mermaids).***

So close, yet so far………. but, finally, settled!

Pat Kennedy[1]

Joe's elderly mother's car had finally given up. This ancient jalopy was now in need of a replacement engine.

Comfy Cars had always serviced the car, and Joe obtained a quote from them for the cost of replacing the engine. He paid a deposit of £2,475.

The new engine was ordered and Comfy Cars advised Joe of the installation date. However, the engine failed to arrive on time, and Joe cancelled the order – outside of the 14-day cancellation period.

Joe offered to pay for Comfy Cars' outlays, but Comfy Cars initially insisted on retaining the deposit which was part of their terms and conditions. Joe sued them for payment of his deposit of £2,475 but subsequently offered to let them keep £475 of the deposit and refund £2,000. Comfy Cars responded by offering to repay £1,475.

The matter came before the Sheriff, who wisely sent the case to mediation.

The mediation started with Peter, the mediator, meeting both parties independently to ascertain their positions. The principles of mediation were explained to them, and they each signed the Agreement to Mediate.

Whilst the parties were not far apart financially, they were miles apart emotionally. Joe believed Comfy Cars not to be open about the costs they had incurred, and Comfy Cars believed Joe to be trying to wriggle out of the contract conditions. In short, there was not much love in the room and even less trust.

During the opening joint session, it was clear that both Joe and Comfy Cars were becoming more entrenched in their respective positions and, like two boxers at a weigh-in, unwilling to concede any ground at all. The focus seemed to be on trivialities, such as whether certain emails were sent and received, with both Joe and Comfy Cars attempting to score points by proving who was wrong (rather than who was right). Twenty minutes or so of this was enough to demonstrate how this was shaping up and, in the forlorn hope of absence making the heart grow fonder, Peter opted to keep both parties apart for the remainder of the mediation. This was a clever move as both parties were antagonising each other in the joint session and the process was in danger of derailment at any point.

In the breakout room, with Joe, Peter highlighted the financial disparity being £525. Whilst clearly still annoyed at Comfy Cars, Joe was willing to meet Comfy Cars halfway. We were now sitting at a difference of £262.50.

At this point Peter did not seek permission to share this with Comfy Cars as he had experienced in the past that the receiving party would negotiate this down further and Joe, whilst he had agreed to the lesser amount, had made clear that this was his final concession (allegedly).

So back into the breakout room with Comfy Cars.

Peter initially sought to ascertain if Comfy Cars would be willing to move their position. However, Comfy Cars held firm on their position. No concessions. Despite Peter explaining the economics of awards for court expenses being maximised at 10% of the claim value for claims of less than £3,000, Comfy Cars was not for budging.

By now Comfy Cars was very un-comfy and wanted the process over. There was a customer waiting to speak to them.

Back to Joe. Peter was aware that Comfy Cars may not be willing to give any concession if they believed Joe was entrenched.

He spoke to Joe and asked for permission to share the movement to halfway with Comfy Cars. Joe gave that permission.

There was now a virtual carpet being worn out between the Zoom Rooms.

Back to Comfy Cars. Peter explained the shift in Joe's position, but Comfy Cars was adamant there would be no movement. They had given all they were going to give and were becoming more agitated as they had customers waiting.

Peter reminded Comfy Cars of the economics at play. £262.50 was the difference. Comfy Cars was still adamant but did say they wanted this over.

At this point it looked highly likely that the mediation would fail over approximately 10% of the claim value.

Skilfully Peter advised Comfy Cars that this would be the last chance to resolve this and reminded them of the difference.

Peter advised Comfy Cars of the values. Comfy Cars would return £1,737.50 to Joe and retain £737.50 to cover costs. Comfy Cars was still not willing to budge the whole way and countered with them keeping £750 and refunding £1,725. Comfy Cars said this was the final offer and they were leaving the mediation to deal with customers. Before they left, Peter read the revised final agreement to them, and they accepted this.

Back to Joe again. Peter explained Comfy Car's position and advised that Comfy Cars had now left the mediation and there was no opportunity to return to them. It was deal or no deal time.

Peter put the revised position to Joe. Joe was unimpressed. On a point of principle, he was reluctant to move. Peter explained the economics of the difference now being £12.50. In essence, the argument was now over the bus fare.

Joe thought long and hard (and he did think long and hard – between 1 and 2 minutes) before accepting the reality of the deal and therefore accepting the final offer from Comfy Cars.

So, the mediation concluded successfully but some key learning points were evident.

Firstly, it may be advantageous to keep the parties apart if it is abundantly clear that having them in the same room (God forbid physically) will almost certainly result in failure.

Secondly, bringing expertise to the table can help. As an advocate, Peter is well versed in the Simple Claims Procedure and was able to advise Comfy Cars as to the paltry amount (relative to the expected high legal fees) that they would recover. It focused the mind as parties often think that costs can be recovered only to get a shock on the day (gain £247.50 with a legal bill of several thousands). Therefore, we should always remember what expertise we can bring to the process to ensure participants are well informed.

Thirdly, when it became clear that Comfy Cars was leaving the mediation, Peter got their final position agreed before they left.

Fourthly, on the face of it, the mediation could have been considered to be over as one of the parties had left. However, this was actually used to move both parties to a final position. Comfy Cars had made theirs and it was recorded. It was now up to Joe. Had Comfy Cars still been in the meeting I believe we would have trodden the threadbare virtual carpet chasing down to amounts that would have required a skilled mathematician to formulate. In recognising the opportunity here, Peter moved the mediation to a closure as Joe, by far the less emotive (not a very high bar, to be fair), was the most likely to make a logically reasoned decision. In the last meeting, Peter used silence excellently. Clearly Joe was angry. However, Peter resisted any urge to convince Joe to concede the last few inches and allowed Joe to reach this conclusion himself. Joe, although still smarting, was comfortable that he had been allowed to make the decision and nothing was forced upon him. Would Comfy Cars have made the same decision. I am not so sure and therefore it is important to size up the motivations of the parties before opting to take this line.

A very interesting mediation with two parties poles apart and entrenched in their positions. The role of Peter the Mediator was critical in ensuring a resolution of this dispute.

No two mediations are the same but there are certain circumstances and events that do reappear over time. The objective of a developmental mediator must be to identify the correct tools to use to give the process the maximum opportunity to succeed.

Experience and self-reflection will help us achieve that.

Even with two reluctant participants this was achieved.

Peter the Mediator to Peter the Great. Well done.

[1] ***Pat Kennedy completed the Diploma in Mediation and Conflict Resolution at the University of Strathclyde in 2021. He currently works for Smith & McLaurin Ltd, as well as volunteering for Strathclyde Mediation Clinic.***

The University of Strathclyde's Third UK Mediation Clinic Conference

On the 18th of March, the Clinic held its third Conference, and the first in person. It was also attended by a number of participants online. ***Mediation Matters!*** is pleased to be able to include in this newsletter a number of the presentations from the Conference.

The first presentation is the keynote speech by Tony Allen, entitled ***Mediation in the shadow of the law – or sunlight?***

There were six workshop presentations, four of which are included below.

- ***How to prevent a slip 'twixt the cup and the lip!*** by Patrick Scott
- ***From Theory to Practice*** by Leon Watson and Adrienne Watson
- ***Making the most of mediation in Simple Procedure - a Sheriff's perspective*** by Sheriff Derek Livingston
- ***What we learn from our own practice*** by Ben Cramer and Alison Welsh

A summary of ***Working with lawyers in mediation***, by Dr Anna Howard, will appear in the July issue of ***Mediation Matters!***

John Sturrock KC addressed the Conference on ***The World Mediators Alliance on Climate Change***, and that address is also included below.

The final item on the programme was a panel discussion ***What have we learned from today?*** with Charlie Irvine, Craig Cathcart, Alison Welsh, and Tracey Reilly. Due to the nature of the presentation, there is no copy available.

Finally, we have reports back from a couple of Conference attendees, Mandy Richards and Andrew Reid.

Mediation in the shadow of the law – or sunlight?

Keynote speech by Tony Allen[1]

So, my questions this morning are - is mediation - are we mediators - in the right place? What remains to be done to put us where we ought and want to be? What can individual mediators and mediation providers - whether they be a mediation clinic or an organisation like CEDR - do to get the positioning of mediation within civil justice into a better - the best - place? Do we really work in the shadow of the law and is that the best or only place to be?

I was incredibly lucky to get involved in the mediation world when I did. After just under 30 years in my first full-time career as a practising solicitor, towards the end of which I oversaw the introduction of the newly minted Civil Procedure Rules into my law firm, I collided with mediation. After working through a five-year overlap with a foot in both private practice and mediation development, I embarked on my second full time career in mediation so far lasting 22 years, as a Director with CEDR for 11 years, and then freelance, mediating all kinds of cases and training mediators all around the world.

What can individual mediators and mediation providers - whether they be a mediation clinic or an organisation like CEDR - do to get the positioning of mediation within civil justice into a better – the best - place?

Many mediations sprang to mind when preparing for today - the people involved, the way the process worked, the satisfactions and the frustrations. Mediation of clinical negligence claims is now my particular interest, coupled with the huge challenges of best interests/right to life mediations, a sector involving inherent power imbalance, huge emotion and technical complexity. More of those later perhaps. But when I joined CEDR as a full-time Director in 2000, my first major task was to edit the new edition of *The ADR Practice Guide*, including updating the section on the law as it related to mediation. Sixty pages were devoted to this topic - a few cases were mentioned but there was no list of authorities at the front of the text. This generated my abiding interest in mediation law and civil practice, and those 60 pages have led to two editions of my own book *Mediation Law and Civil Practice* - 380 pages long, with over 220 reported decisions referenced.

Three memorable events in which I became involved stand out in relation to the development of the legal framework within which mediation operates:

Firstly, a talk to 28 Court of Appeal judges in 2002 - arguing that unreasonable refusal to mediate could properly be sanctioned in costs under CPR44 as being unreasonable litigation conduct, even imposed on a winning party - 11 days later the Court of Appeal established that principle for the first time in *Dunnett v Railtrack*.

Secondly, writing CEDR's submission to the appeal in *Halsey v Milton Keynes NHST* in 2005, sitting in on the hearing and ever since writing more words about this one case than any other. *Halsey* is famous for purporting to establish that for an English court to order ADR breaches Article 6 of the ECHR. Now broadly regarded as wrong, the decision was all the more startling because, as later emerged, counsel for the Law Society who took that point had been instructed not to do so!

Thirdly, Professor Hazel Genn's Hamlyn Lectures in 2008 *Judging Civil Justice*, in particular the one she delivered at Edinburgh University in December 2008 entitled *ADR and civil justice: what's justice got to do with it?*

There is a fourth series of events to mention to which I will return at the end of my speech.

While *Halsey* will certainly come up again today over what it said about the relationship between the courts and mediation, I want to start with Hazel Genn's Hamlyn lecture, especially the one she chose to deliver in Scotland. Charlie Irvine was there and can tell you about how it felt to be in that audience from his direct experience. I was not, but she did choose to involve me later in her own symposium on her lectures at University College London.

Looking back just over 14 years later on her views as expressed then, they represent probably the most articulate challenge to mediation, of what it is and isn't and what it should be, which still require proper reflection and

the best answers we can give to her challenges - in effect the answers to the questions I posed in the opening to this speech. In several respects I think she was wrong then about some significant points, but we do need to be able to say why, and to make quite sure that what we assert about mediation is resilient and meets the needs of our society, because her views were and have remained influential among the judiciary in both Scotland and England & Wales. For instance, in his first report on costs reforms in 2011, Jackson LJ described ADR (wrongly, in my view) as "*by definition the antithesis of the administration of justice by the courts*" and accepted Professor Hazel Genn's criticism of a culture which "*wishes to drive all litigants away from the courts and into mediation, regardless of their wishes and regardless of the circumstances of individual cases*". But after undergoing a Damascene conversion, Jackson LJ devoted a whole chapter of his final report to ADR, recognising it as efficacious in many kinds of dispute, including personal injury and clinical negligence claims, as a means of settlement and of cost saving, and while not supporting compulsion for its use, he regarded mediation as under-appreciated and under-used. His recommendation for an ADR Handbook has now been published to make information about ADR readily available to the judiciary as it exercises its case management role, and in his 2017 judgment in *Thakkar v Patel* he said:

> *The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction.*

So, Hazel Genn has been and is an important voice, not to be ignored.

The tenor of her views about mediation was that:

- Mediation is a sound and useful process so long as it does not undermine the value (and the values?) of civil justice. She notes that "*it is capable of achieving creative solutions that would not be available in court adjudication; that it focuses on commercial realities of disputes rather than legal technicalities; that it can repair damaged relationships; that it can reduce conflict; and that it is less stressful for parties than court procedures.*" All absolutely right.
- But, she says, mediation is often promulgated as anti-adjudicative and positively socially useful as such (by implication, challenging the constitutionally vital role of mainstream civil justice), and this antithetical role does serve to undermine civil justice, giving government the excuse to reduce civil justice funding: she talks in her first lecture of "*an **internal** threat to civil justice emanating from sections of the judiciary and the emerging ADR profession in search of a market for their services.*" She continues: *"In the process of seeking necessary and laudable improvements to the administration of civil justice, voluble reformers have attacked its principles and purpose in a 'post-modernist' rhetoric which undermines the value of legal determination, suggests that adjudication is always unpleasant and unnecessary, and finally promotes the conviction that there are no rights that cannot be compromised, and that every conflict represents merely a clash of morally equivalent interests."*

In her Edinburgh lecture she said that mediation is private, non-precedental and may foment power imbalance. It is not adequately accountable and does not afford better "*access to justice*". Then in a burst of what might be styled a shining example of '*pre-modernist rhetoric'* she declaimed this:

> *Are mediators concerned about substantive justice? Absolutely not. That is the wrong question to ask. Mediation is about searching for a solution to a problem. There is no reference to the hypothesised outcome at trial. The mediator's role is to assist the parties in reaching a settlement of their dispute. The mediator does not make a judgement about the quality of the settlement. Success in mediation is a settlement that the parties can live with. **The outcome of mediation is not about just settlement, it is just about settlement.***

Do we recognise this characterisation of mediation, from our various experiences, even if it was an exaggeration to make a point? Are we as mediators **never** concerned about substantive justice? Does mediation - do we mediators (a subtly different question) **only** search for solutions to problems? Is there never reference to the hypothesised outcome at trial during a mediation? Is it ever our job within a mediation to make a judgment about the **quality of the settlement** (note that this is 'a judgment' about the fairness of what the parties choose to

agree, not whether we should be taking on the role of adjudicator and doing the judging)? Is it wrong for resolutions to be chosen '*because the parties can live with those terms*' rather than the terms being somehow objectively right and wrong in the circumstances? And what do you think about her aphorism, much quoted since:

> ***The outcome of mediation is not about just settlement, it is just about settlement!***

Before seeking to discuss those questions, just a couple more quotations from Professor Genn's lecture to clarify and buttress her views, and a summary of her conclusions. She says:

> *These processes are called 'alternative' because they are ways of resolving disputes that theoretically do not require the involvement of any aspect of the legal system and because the approach to achieving settlement will not depend on reference to legal rights or the legal merits of the dispute but will approach the dispute as a problem capable of solution. The eventual settlement can incorporate anything to which the parties will agree and does not have to bear any relationship either to the type or to the magnitude of any remedy that would have been available under the law. Indeed the 'spirit' of mediation is precisely to shift away from a focus on legal entitlement to a problem-solving frame of reference. It is about different interests and seeking to achieve a settlement that maximises the opportunities for both sides to achieve their interests.*

And later:

> *In civil justice at least, there is an interdependency between the courts as publicisers of rules backed by coercive power, and the practice of ADR and settlement more generally. Without the background threat of coercion, disputing parties cannot be brought to the negotiating table. Mediation without the credible threat of judicial determination is the sound of one hand clapping. A well-functioning civil justice system should offer a choice of dispute resolution methods. We need modern, efficient civil courts with appropriate procedures that offer affordable processes for those who would choose judicial determination.*

Her conclusion, as it relates to whether courts should mandate mediation, is that it should not be mandated by courts: on this she says *Halsey* was right to limit mediation development, and she expressed surprise that a number of judges were advocating growth in its use. Of the *Halsey* decision, she says that "*it attempted to turn back the tide, the decision having been given by a judicial ADR non-believer or at least a judicial ADR sceptic.*" Embarrassment for both of them arose from this remark, to the extent that Lord Dyson (who delivered the unanimous judgment in *Halsey*) felt the need to deny this description of him in a speech in 2010 to the CIArb Symposium on Mediation (in which he accepted that *Halsey* may not be right on the Article 6 point):

> *One of the more colourful accusations levelled against me was that I am an ADR non-believer, or at least an ADR sceptic, that is Professor Hazel Genn. I am quite happy to admit that I am not an evangelical about mediation. I didn't think, and I still don't think that it is necessarily appropriate for every dispute, but I do not consider that either of those epithets used by Hazel Genn accurately reflects my views about mediation. Far from indulging in ADR atheism, I in fact am a strong believer in its merits although I don't think that it is necessarily appropriate for every dispute.*

Rather presciently, Hazel Genn's initial reaction to the *Halsey* judgment was to suggest that for a court to order mediation would not contravene Article 6 of the ECHR. In her report *Twisting Arms*, reviewing the Central London County Court 'mandatory' mediation pilot in 2005, she said:

> *It is arguable whether, in fact, a direction to attempt mediation prior to a hearing would infringe Article 6. Referral to mediation is a procedural step along the way to a court hearing if the case does not settle at mediation. It does not exclude access to the courts and to require parties to attend a three-hour low-cost mediation session does not order them to compromise their claim. Having attended the mediation meeting, the parties are free to terminate and leave at any point and to continue with the litigation.*

This was not a view she chose to repeat in her Hamlyn lectures in 2008.

What did Hazel Genn say positively about mediation?

As far as customer satisfaction is concerned, in summary her evaluations of court-annexed mediation schemes show high levels of satisfaction among those who volunteer to enter the process. What parties value is the informality of the process and the opportunity to be fully involved in the proceedings. They like the lack of legal

technicality and the opportunity to be heard at the beginning of the proceedings. Parties like the speed of the process, the possibility of imaginative non-judicial outcome and, among businesses, the focus on commercial issues in the case. However, they do not like being pressured to settle and some complain that they felt under such pressure. The benefits of mediation are generally explained by comparison with the likely experience of the anticipated trial. This tendency to compare the experience with what might have happened at a trial is reinforced by the mediation process itself, during which a principal tool for achieving settlement is to constantly remind parties of the 'danger' of not settling on the day and the unpleasantness that awaits them if they proceed through to trial. We perhaps need to check whether we say such things and whether they are necessarily appropriate.

Four main themes needing examination and reflection seem to me to emerge from Hazel Genn's critique, which are as relevant to us today as they were when she published it in 2008. In different ways they all consider whether and how mediation really does operate "*within the shadow of the law*". They are:

1. Where does 'justice' reside in the mediation process?
2. Does mediation deliver fairness of process: does it deal properly with issues like power imbalance?
3. What is the proper relationship between the civil courts and mediation provision? Should the courts positively recognise mediation and even order its use as a proper part of modern dispute resolution provision? To what extent should mediators be accountable to the civil justice system, or are they to be afforded special privileges? Does the growth of mediation help or do damage to civil justice?
4. Does the greater informality and privacy of the mediation process demand higher and more transparent ethical standards of mediators?

Bearing in mind the provisional answers to the above questions, where do we go to from here? Are we - mediators/mediation providers and teachers - in the right place, as I started by asking? Should we - might we - aspire to be in legal sunshine, rather than merely in the law's shadow?

1. Where does 'justice' reside in mediation?

One of Hazel Genn's remarks with which I have always disagreed most fundamentally was her catchy phrase: *The outcome of mediation is not about just settlement, it is just about settlement.*

This is simply because it jars so painfully with my own experience, especially if coupled with her comment "*(t)here is no reference to the hypothesised outcome at trial*." My mediations are always conducted with reference to the hypothesised outcome at trial. In a clinical claim, there may be a deep dispute about whether there has been a breach of duty, or whether any such breach has caused additional damage over and above what the claimant would have suffered anyway. There may be disputes over the value of a number of heads of damage. The parties arrive at the mediation usually a long way apart on such issues and the provisional monetary gulf between them can be immense - sadly often amounting to millions. So, what discussions take place during the mediation, and how can they be rendered safe, free from any fear that sending a signal of possible weakness might be used against the signaller? That is met by conducting the mediation in a privileged atmosphere and with an agreement as to confidentiality of such discussions, so that parties get to trust the fact that they cannot damage their on the record case, or have any provisional if unfilled willingness to compromise reported to the trial judge, and furthermore they cannot be criticised by a trial judge for not settling.

That safe environment being established and relied upon, they can have honest exchanges direct or through the trusted neutral mediator to confront their opponent with their own strengths and their opponent's perceived weaknesses, so as to inform a reappraisal of risks of not achieving their own best case. That done, a bidding process can start so as to see whether an acceptable risk-discounted resolution can emerge, tested always against the prospects of success or failure on the point in question if the case proceeds to trial. If agreed terms emerge, in effect they represent an agreed discounted settlement value of the claim, discounted upwards or downwards to reflect the risk that a judge would or would not find for each party's best case. Any such agreed outcome is rarely if ever the same as a judge's decision would be, but it has certainly been achieved by repeated reference to the hypothesised outcome at trial. Is a judge's decision the only type of just outcome (especially in an all-or-nothing case, where one party must win and the other lose)? Is there anything inherently unjust about an agreed resolution to which both parties have contributed and made concessions which takes account of their perceived risk of not winning? I would argue not. It is a proper form of "*just outcome*". The late Sir Gavin Lightman coined the phrase "*an approximation to justice*", which may perhaps

be fair.

It is of course possible to have a successful mediation in a case where the law simply is not clear. A prime example was the retained organs claims group litigation in the mid-noughties, in which I played various parts as process designer and mediator of a part. It is sometimes said that a good reason for not mediating is that you wish to establish a precedent. Those who want the common law to be nourished would certainly approve of that. The problem is that in the real world, while it may be advantageous if that precedent goes in your favour, it may be rather disadvantageous if it goes against you. Look what happened to the National Group litigation in the retained organs claims as an illustration of that.

The point that Hazel Genn makes - that "*mediation without the credible threat of judicial determination is the sound of one hand clapping"* - is absolutely right, and this is what makes sure in the vast majority of mediations that parties do have an eye to "*the hypothesised outcome at trial*" as this is the alternative to settlement. "*What will tomorrow look like without resolution and what happens next?*" are proper questions for mediators to ask, and the time and expense implications of going to trial and whether or not the nature of the trial will meet each parties' needs are fair questions for parties to answer for themselves.

And surely the phrase '*just about settlement*' needs enlargement by adding the words '*or not*'. '*Success'* in a mediation does not necessarily connote settlement. Parties are allowed to continue to disagree about their rights and interests even after open and confidential exchanges. I am almost relieved that a certain number (not too many perhaps!) of cases that I mediate do not settle, as that shows that I am not strong-arming parties into unwelcome deals. If I were, that would be a very valid ground for criticism of mediation. Some of my cases - such as 'best interests' claims about terminating the life of very sick children are almost impossible to settle. But for a safe and honest mediated conversation to have taken place is really important, especially for a judge who may ultimately have to make a life-or-death decision, and who can do so in the knowledge that no important issue has been left unexplored within a well-managed and thorough process.

Hazel Genn also very fairly noted broad satisfaction with the fact that mediation could produce agreed outcomes which judges cannot order. Trial judges are almost always called upon to review the effect of past events. Mediation can help parties willing to do so put the past to one side and examine their relationship with a future perspective, almost regardless of the past, or taking account of learning from past mistakes to redesign a better future. In one of my clinical mediations, the financial claim had been settled beforehand, and the entire day of mediation was spent going over what had gone wrong and apologising for it and reviewing what steps have been put in place to implement change. How a claimant patient is to receive future treatment or is to contribute to future learning at a hospital Trust by speaking to staff meetings often arises in my mediations. In a business context, it is open for parties to negotiate a better future relationship and set aside what has gone wrong in the past. Employers and employees often seek to work out better ways of working in the future, all in ways that a court or tribunal could not order.

In relation to small claims - often the stuff of a mediation clinic's workload - a CEDR colleague recently noted that these are frequently relationship disputes which have been shoehorned into a legal format. Mediation is of course the best process for dealing with relationship breakdown, and in such disputes reference to any hypothesised court outcome may be inappropriate or surplus to party needs. Where better to explore and if possible, map out a future relationship which has been damaged than in a mediation, deploying the power of self-determination, rather than doing what you can with the decision by a third party about what went wrong in the past which is imposed upon you?

2. Does mediation deliver fairness of process: does it deal properly with issues like power imbalance?

Hazel Genn also noted both approval and criticism of users with the mediation process and what was discussed during mediations. It must be axiomatic that we mediators deliver a fair process - free, so far as human frailty can manage, from bias, and one which gives equal opportunity for parties reciprocally to say what they wish and be heard - free indeed from any perception of bias. One of her concerns was power imbalance, something which mediation clinic practitioners may encounter frequently when one party is represented and the other is not. I will return to some of the ethical dimensions and challenges within this problem later. But in terms of the set-up of normal mediation processes, there is clearly a need for sensitivity and caution where there are suspicions or

allegations of duress or abuse or violence. Family and community mediators encounter such problems regularly. Small claims mediators will often encounter claims involving unrepresented individuals being sued by large institutions, maybe with legal representation. I am lucky in that in my practice, I hardly ever have an unrepresented party, but of course I have to be constantly alive to the sense of power imbalance that a patient may feel when suing a huge entity like the NHS, when even a local hospital Trust will seem enormous and faceless. I take comfort from the fact that when we all sit around a fairly normal looking table in a fairly ordinary looking meeting room, to have each party constituted as a team of three or four fairly ordinary looking people who show themselves ready to have a fairly ordinary type of conversation, both speaking and listening, with a trusted neutral there to manage the discussions as far as is needed, this does an enormous amount to quell any sense of power imbalance. Of course, we as mediators must anticipate that a sense of imbalance may well lurk and do what we can quietly to dissipate it. But in a world where Goliath has become accustomed to the dynamics of mediation, Goliath will often be sensitive to the needs of David and make particular allowances for David's needs, and we should positively encourage that wherever we can.

It is an interesting question as to whether the civil trial process itself redresses perceived power imbalances between parties and feels 'fair' or even satisfying in the broadest sense of meeting party needs. They sit equidistant from each other and from the judge, usually towards the back of the court. They may each have the opportunity of giving evidence on oath to the judge and entering the limelight of the witness box. Whether or not they can have what they feel to be their 'day in court' or 'their say' in a satisfying way will depend upon the rules of procedure and evidence. If they have been required to 'tell their tale' in a written witness statement in a manner compliant with the CPR, with only limited rights to add to it, except as probed by the opposing party's cross-examination, they are unlikely to feel comfortable. One of the perhaps underrated values of mediation - which I encounter time and again in clinical mediations - is the value for parties of having the floor to tell those present about the impact of adverse events on them and their family, to be heard perhaps for the first time, unfettered by the rules of evidence as to relevance and admissibility.

Mediators can offer such an opportunity to each party and help them both hear and listen and respond to such important expressions of both thoughts and feelings in ways that set a proper context for later discussions about the merits of the legal dispute. The freedom which the mediation process affords to disputants in this regard is one which we mediators should be proud of and seek to offer to those who come to us. We make it possible for honest conversation between disputants in (and because of) mediation's confidential environment which frankly the litigation process prevents and obstructs. I will now usually have a prior conversation with lay parties to prime them about the opportunity they will have to talk about the impact of events on them, enabling them to prepare well for that opportunity.

This is not to found public arguments in favour of extending mediation on its transformative powers. It is plain that Hazel Genn reacted badly to some of the mediation literature from the USA which seeks to elevate mediation into a social revolution. There is such rhetoric to be found there, but not much of it, I would argue, in the UK. As a matter of principle, I am not ashamed to offer and promote the value of self-determination as opposed to externally imposed adjudication. But I have never felt it likely that a judge would be persuaded to sanction a party refusing to mediate on the grounds that the disputants have been deprived of the chance for personal transformation. While Hazel Genn did not restrain herself from rhetoric herself, her criticism of the romantic language found in US mediation literature is cogent and understandable. Interestingly, Charlie Irvine's article written in response to the shock of hearing her Hamlyn Lecture in Edinburgh cautioned even we UK mediators about the language we are tempted to use, and the need to tie what we say to what we do. He wrote:

> *I make the following assertion: mediation rhetoric is often out of step with mediation practice. Indifference to norms like justice and fairness may still feature in mediation rhetoric but I believe it ignores the 'facts on the ground' of daily practice.*
>
> *To return to Professor Genn, she is in a way doing mediators a favour. By presenting us in our most feeble light, she shocks us into re-thinking what we say about ourselves. If we can bring our rhetoric more closely into line with practice, that must be more honourable and better for clients.*

3. What is the proper relationship between the civil courts and mediation provision?

Hazel Genn noted that:

> *there is an interdependency between the courts as publicisers of rules backed by coercive power, and the practice of ADR and settlement more generally. Without the background threat of coercion, disputing parties cannot be brought to the negotiating table.*

While it may come a surprise for business people to learn that negotiation can apparently only start if there is a threat of coercion, ultimately if freestanding negotiation does not work, then claimants can elect to use the civil justice system to seek a remedy and mobilise the courts' coercive powers to enforce participation of the chosen defendant. Of course, with the Pre-action Protocol system in England & Wales, defendants still have plenty of opportunity to seek adequate information and engage in negotiation to forestall litigation if they so choose.

So, three subsidiary points on this question:

(i) Should the courts positively recognise mediation and even order its use as a proper part of modern dispute resolution provision?

My answer to that question is an unsurprising Yes, and I welcome the high degree of co-operation that is entailed. Also entailed is the obligation on mediation to satisfy the doubts and queries of the judiciary about its practices. We have to earn judicial acceptance of the privacy which we assert (and judges mostly accept) is the reason that the process is successful. We have to make as clear as we can the ethicality inherent in the way we operate. I talk further about ethical challenges later, but first want to review the nature and detail of the interdependency between courts and settlement processes as it currently stands in law in England & Wales - my apologies for not having researched the position more in Scotland. The position remains quite controversial and unclear in a number of respects, which will need working out. The main change in atmosphere emerged from the Woolf reforms and the Civil Procedure Rules introduced in 1999, with the courts taking case management back from the legal profession; encouraging settlement by ADR, with trial to be regarded as a last resort; and devising costs sanctions for unreasonable litigation conduct before as well as after issue of proceedings, even on winners, as *Dunnett v Railtrack* established (and was recently reinforced by the Court of Appeal in *TMO Renewables v McBraid*). No mandating of mediation then, but clearly now in England & Wales at least, there is a firm commitment by both senior judiciary (notably the Head of Civil Justice and Master of the Rolls, Sir Geoffrey Vos) and government to see automatic mediation integrated into the court process for small claims of up to £10,000 in value. The Small Claims Mediation Service offering free one-hour telephone mediations, is to be expanded. But the pressure for reform in England & Wales also comes from the Ministry of Justice, a body never universally loved by the judiciary, and suspected of budgetary plotting. Such moves would have been unheard of until the last 20 years or so. Until 1998, the courts in England & Wales have been almost entirely uninterested in stimulating settlement.

The Court of Appeal may take an opportunity to review that part of the *Halsey* judgment relating to whether ordering ADR and mediation offends ECHR Article 6 in a case called *Churchill v Merthyr Tydfil CBC*, due to be heard in the early summer, concerning Japanese knotweed claims.

One welcome consequence for the changed relationship may at last be the abolition of the acronym ADR, or at least the removal of the 'A'. For whatever 'A' may best stand for - appropriate, ancillary, adjuvant, associated, attractive - mediation and related activities (other than arbitration) should never be described any more as 'alternative'. The number of judges and commentators who have allowed themselves to think that mediation is a competitive alternative to litigation has seriously warped its development, and we should not use language that drives a wedge between the court resolution and mediation. Equally unattractive are 'compulsory' and 'mandatory'. I used the word 'integrated' a moment ago - watch this space over whether this becomes the favoured term.

(ii) To what extent should mediators be accountable to the civil justice system, or are they to be afforded special privileges?

There is still no recognised mediation privilege in England & Wales absolutely preventing judges from being invited to consider what happened behind the veil of a mediation. 'Without prejudice' privilege certainly and automatically applies. It can be (and has been) waived by the parties, over which the mediator and mediation provider has no control. One party usually comes unstuck in doing this, as the judge will have preferred the

reasonableness of the other party when told of the discussions. Without prejudice privilege is subject to a number of exceptions, which judges are still in the process of examining and working out in decided cases, though there is a reluctance to invent new exceptions. On the whole judges are very reluctant to allow a party to tell them what happened during a mediation, but occasionally someone persuades them to venture in. Mediator views will vary on this. There are those who wish to argue that the veil of confidentiality should be treated as sacrosanct, and judges should never under any circumstances be allowed to peer behind it. Whether they would go as far as the law in California which has reportedly made mediation so private that the court refused to rectify a settlement agreement when patently a nought had been omitted or inserted from the settlement agreement to produce a recorded outcome that one party at least denied was correct. There are equally those who feel that some of the protections afforded by the ordinary law of contract as to vitiating agreement based on misrepresentation, duress, undue influence, illegality or mistake must be allowed to operate to some extent. A balance will be needed.

Furthermore, parties usually contract in the mediation agreement (Note: never mediate without a proper agreement to mediate!) to treat mediation discussions as confidential as regards the world. It is still not clear from any Court of Appeal level decision whether this is any different in extent from 'without prejudice' evidential privilege or whether it is wider. One decision suggests it is wider and (unlike WP privilege) enforceable at the suit of the mediator. But this is one judge's view.

The effect of the usual requirement that settlement terms are only binding if in writing is still not clear. Some judges have given effect to this: some have not. There have been issues over when the mediation ends, and thus when the terms of the agreement to mediate (including any provision requiring settlement terms to be in writing and signed to be binding) cease to have effect.

Mediators have on occasions been ordered (or apparently consented) to give evidence. They have done so only in two or three cases. This makes uncomfortable reading for mediators and if there is one message I would urge everyone here to take away, it is to commit to resisting any party or judge who asks you to give evidence as a mediator of what happened during any mediation you ran. It is usually possible to prove important points without compromising the inherent neutrality of a mediator.

These are the controversial areas on which the question of mediator and mediation accountability arise in practice. How will these problems get worked out? Not, I suggest by Parliament. The thought of the House of Commons or the Scottish Parliament or a Select Committee debating delicate issues relating to the confidentiality of mediation discussions or the compellability of mediators fills me with horror. As to judicial precedent, it is possible that a case may one day percolate to the Court of Appeal which will provide the opportunity of authoritative rulings on the extent of privilege and confidentiality. In some ways it is surprising that mediations have not thrown up more controversy than they have so far.

(iii) Does the growth of mediation enhance or do damage to civil justice?

This has been an underlying theme among commentators, including Hazel Genn, who espouse the view that mediation deprives the courts of the oxygen of precedent by leading to settlement. There are a number of quick points to be made about this view.

- There seems very little shortage of precedent - there are plenty of published Law Reports and decisions on BAILII;
- Few judges seem to be twiddling their thumbs without work to do - rather the reverse;
- Arbitration is a far fairer target for this criticism than mediation, in taking adjudicated outcomes away from the courts which could provide useful precedent;
- To criticise mediation (which always leaves a direct route back to trial if settlement is not achieved) is to criticise settlement as a whole;
- Settlement based on self-determination is desirable if possible, and is what declaration of the law is essentially meant to facilitate, so that citizens can regulate their affairs within judicially declared rights and obligations.

By weeding out cases capable of settlement, the cases which remain intractably unresolved will be worth trying. Not every case is worth a judge's time, as they have often commented in cases where they express regret or surprise that it was not mediated first. This is not a process merely to save the Government the cost of funding civil justice properly. In 2008 the government was open to criticism for diverting profits from the civil courts to fund the criminal

courts. In 2023, the government are arguably not even funding the criminal courts properly. The purpose of providing a principled, efficient and enhanced settlement process like mediation is to provide exactly what Hazel Genn argued for - "*a well-functioning civil justice system [which] should offer a choice of dispute resolution methods. We need modern, efficient civil courts with appropriate procedures that offer affordable processes for those who would choose judicial determination*" and, we might clarify, with good settlement processes built in on the way to trial as part of that choice of dispute resolution methods.

4. Does the greater informality and privacy of the mediation process demand higher and more transparent ethical standards of mediators?

I think we should answer 'Yes' to this question, while accepting that the high standards to be expected of mediators are hard to police. No one really knows whether a mediator is acting neutrally except mediators themselves. We have to draw any necessary line between building rapport and not descending into collusion, because at some level we prefer one party or one party's case to the other's. The standard which I try to set for myself is to ask myself whether, if the other party had been able to see and hear what I said in private to their opponent, would they have regarded it as done in an acceptably neutral and non-collusive way?

We hold ourselves out as operating under published Codes of Conduct. These usually provide that we will:

- be competent and prepared;
- charge fairly and not to 'churn' fees by prolonging a fruitless mediation;
- be fair, neutral and impartial;
- disclose any (even apparent) conflict of interest;
- not act for any party later without everyone's written consent;
- observe the Model Procedure, especially as to confidentiality;
- self-insure against professional risks;
- withdraw if so asked by one party, with an additional right to choose to withdraw in certain defined circumstances;
- be responsive to a defined complaints procedure.

These principles do not cover every area for ethical debate which mediators confront. For instance:

- Mediators should, it is said, never knowingly convey an untruth. Are you careful never to do so or to challenge a party who asks you to do so?
- Have you ever felt you were being asked to convey a threat which might lead to loss of 'without prejudice' privilege?
- Have you ever been given information or seen a document or expert report in one room which you know would make a difference to the basis on which the other party might consider settlement, but you have not been allowed to reveal its existence?
- Have you ever learned privately of illness or insolvency of one party who has declined to allow you to reveal this to the other party?
- Have you ever felt that a deal was illegal, or involved money-laundering or tax fraud, perhaps by simply putting an untrue date in a document?
- You have (you think) spotted a legal or factual weakness in one party's case which the other party has not mentioned or perhaps even spotted. How do you handle such a situation?
- A party uses discriminatory language: how do you challenge that without damaging rapport or losing neutrality?
- Codes make no mention of the facilitative/evaluative spectrum of mediator intervention. Might shifting from one style to another have risked upsetting your neutrality? Let alone your indemnity insurance.
- How do you deal practically with power imbalance between parties or where not all parties are represented?

Such questions can give rise to awkward decisions, often at very short notice, and being a mediator is a lonely business. We strive to act with integrity, but it is not always easy. All partisan professionals are subject to regulation which seeks to promote ethical practice. Judges and arbitrators operate in the presence of both parties as well as external professional scrutiny. Mediators alone spend time with each party in private when the possibility of influencing outcomes inevitably arises, and when external scrutiny is impossible.

There is no time for detailed debate of these issues now. But time must be made for it by all mediators. In truth we need all the support we can derive from a collegial approach to working as mediators, trying to anticipate tricky situations in advance and working on shared ways of dealing with them. A mediation clinic or membership of a mediation providers' panel is the ideal way to build up such support.

A fourth significant recent event

I signalled a fourth significant event or series of events in my opening. These started with a working party (of which I was a member) established by the Civil Justice Council in England & Wales to look at the place of ADR in civil justice, which reported in November 2018. This in turn led to a report from the CJC called *Compulsory ADR* (note the absence of a question mark) published in June 2021, which suggested that mandating ADR was neither illegal nor undesirable, subject to certain parameters, and that *Halsey* was wrong on this point. Last Monday I attended an online conference at which senior MoJ civil servants outlined the growth of small claims mediations integrated into the civil justice system, basing it on a policy switch from adversariality to consensual disposal, though with the courts always available to decide unsettled cases, and with no pressure placed on parties to settle.

Also contributing was Professor Dame Hazel Genn KC, now the Director of the UCL Centre for Access to Justice. She confirmed that she never thought *Halsey* was right on ECHR Article 6, reminding us that *Halsey* ruined the only previous trial which piloted automatic referral. She raised some useful benchmark questions about how a more integrated use of mediation might be tested out. In a nod to her earlier views she said "*We all know that mediation is successful, especially if it is voluntary*". But there was no dismissal of mediation as being "*just about settlement*" nor (notably) any criticism of the fact that policy-makers might be undermining the position of civil justice by a value shift away from precedental trial towards consensual disposal of disputes.

Also speaking was Dame Sarah Asplin DBE, a senior appeal court judge who chairs the Judicial ADR Committee. To hear a senior judge talk of mediation as forming an inseparable part of the civil justice system, "*sewn into its fabric*", as contrasted with "*the long shadow of trial*", noting that recently published court guides now talk of "*dispute resolution*" (omitting the word "*alternative*"), and the need for wide and better education of the public, the legal profession and the judiciary was music to my ears, and largely answers the questions which I posed at the start of this speech. She referred to CEDR's recently published 10th Mediation Audit as evidence of a long way still to travel.

To quote finally from that CEDR Audit's main conclusions:

> *Mediation has arrived at its desired destination within the mainstream of the litigation system, but its race is far from run. The move towards mandatory mediation appears to be the next challenge on the horizon, and this Audit suggests that our profession is well placed to meet the need.*

In terms of the opportunity still out there, it comments:

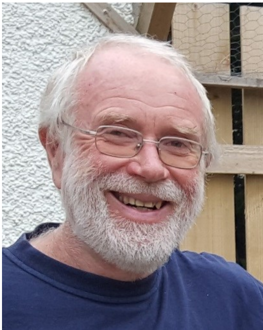
> *Our historic growth to a total of around 17,000 mediations a year is certainly an impressive achievement, but with some 247,000 contested civil law cases in England and Wales each year, the need (and opportunity) is still vast. So, with new approaches, and new areas for implementation of mediation, we are still evolving, but the journey has not ended.*

But we mediators are indeed embarked on a journey with clearer objectives and a greater assurance of success than ever before. My best wishes for everyone's continuing journey - both at this conference and in your future planning and work wherever this takes you.

[1] ***Tony Allen is probably the UK's best-known mediator specialising in clinical negligence disputes and has been recognised as such by legal directories since mediators were first rated. He practised as a solicitor in Sussex for over 30 years and was accredited by CEDR in 1996. In 2000, he joined CEDR as a full-time Director and mediator, and also training mediators for CEDR in Europe, Africa, Asia and North America. Since 2011 he has been a self-employed mediator and trainer and is a member of CEDR Chambers. He has mediated throughout the UK (including Scotland), and in Ireland and South Africa. He is also recognised as an authority on the law relating to civil mediation, and lectures to a number of university law faculties, the judiciary and other legal organisations on this topic. He was a member of the Civil Justice Council Working Party on ADR and Civil Justice. The second edition of his book Mediation Law and Civil Practice and also his new book Mediating clinical claims were published by Bloomsbury Professional in 2018. He is a co-author of The ADR Practice Guide: Commercial Dispute Resolution. He regularly writes articles for the CEDR website. Further information can be viewed at https://www.cedr.com/about-us/people/tony-allen/ and http://allensmediate.com/index.php?page=5.***

How to prevent a slip 'twixt the cup and the lip!

Workshop presentation by Patrick Scott[1]



Introduction

The University of Strathclyde Mediation Clinic provides a mediation service in a number of Sheriff Courts across Scotland, in Simple Procedure cases (or small claims as they are known in some other jurisdictions). I take referrals from the Kilmarnock Sheriff Court. How this works is that I receive an email from the Sheriff Clerks, providing me with the names of the parties and their contact details (usually an email address, with or without a phone number, and occasionally just a physical address). I then contact the parties and arrange a pre-mediation meeting, if the parties agree to mediate (and sometimes even if they don't). This workshop is about how to obtain a high conversion rate of referrals to mediations, and a good settlement rate.

First Point of Contact

What is the first point of contact between mediator and party?

When I started preparing this presentation, I intended discussing the process from when a mediation is referred by the court to the mediator, and the mediator contacts the parties. It then struck me that the first step actually precedes that - that is when the court advises the parties that the matter is being referred to mediation. Whether at a Case Management Discussion or on Written Orders, what the Sheriff says to the parties is important. And can play a pivotal role in whether the parties agree to mediation and their attitude to the process.

It is consequently important for the mediator to ensure that the Sheriff is comfortable with the process and, importantly, knows what the mediator will be doing at the mediation. It is difficult to encourage parties to do something you know nothing about. How the Sheriff raises mediation with the parties, can play a significant role in getting the parties to agree to mediate.

There are two different procedures that the Sheriff can adopt, and I don't believe that one is better than the other. What is important is that whatever approach is followed, it is done properly. I have had the benefit of experiencing both methods of referral from the Kilmarnock Sheriff Court.

How the Sheriff raises mediation with the parties, can play a significant role in getting the parties to agree to mediate.

Referral at Case Management Discussion

The Sheriff may adopt the softer persuasive approach, suggesting mediation to the parties at a case management discussion. It is important that, if this approach is followed, the Sheriff has a good knowledge of mediation and is able to 'sell' it to the parties. The Sheriff can gain an impression of what the parties' attitude is to mediation.

The advantages of this approach are:

1. It can increase the settlement rate, with the Sheriff selecting suitable cases and only referring those cases more likely to settle.
2. The parties are more amenable to mediation and often want to please the Sheriff.
3. Sometimes the Sheriff discusses the matter with the parties and points out some of the potential difficulties that they may have, should the matter proceed to a hearing.

The disadvantages of this approach are:

1. It is more time-consuming, both for the parties and the court as there has to be a Case Management Discussion.
2. It has the added disadvantage that, if one or both of the parties has legal representation, legal costs or expenses are incurred.
3. And, finally, it may exclude parties from the opportunity to mediate, if they were not initially keen to do so.

Referral on Written Orders

Another approach is to refer the case to mediation on written orders. In this instance it is important that the parties feel compelled to make contact with the mediator. It is then up to the mediator to 'sell' the concept of mediation to the parties. In some ways, this is a preferable

approach as the mediator is often better placed to do that and can also determine whether the matter is in fact conducive to mediation. If parties feel compelled to mediate and you, as the mediator, are of the view that either the matter, or one or both of the parties, are not suited to mediation, you can advise the parties that you don't believe that it is viable to have a joint session, and that the matter should be referred back to court. And, having attended the pre-mediation meetings, the parties can advise the Sheriff that they tried mediation, but it did not succeed.

The advantages of this approach are:

1. It is quicker and cheaper than requiring parties to attend a Case Management Discussion.
2. Receiving a Written Order from the Sheriff is quite formal and has a sense of authority about it.
3. The mediator may be in a better position to explain mediation to the parties and perhaps better able to deal with any questions that the parties may have.

The disadvantages of this approach are:

1. It is sometimes difficult for the Sheriff to know which parties to refer to mediation and which not.
2. A recalcitrant respondent can delay proceedings.
3. The parties don't have the benefit of the Sheriff's comments on their matter.

The current Sheriff in Kilmarnock was particularly careful in wording her order referring parties to mediation and sent it to me for my input, before adopting it. In the order, the Sheriff introduces the Mediation Clinic and the mediator by name, qualifications and experience, and sets out in some detail the procedure that will be followed. She also says the following in the order:

> *Mediation is a voluntary process and parties will not be forced into a settlement they do not want. All mediation is about is exploring the possibility of settling a case without further court procedure. Parties are encouraged to approach mediation with an open and constructive attitude in line with their responsibilities as set out in the Simple Procedure Rules. ………*
>
> *In the small number of cases where no settlement can be reached through mediation, it remains open to either party to come back to the court by submitting an Application to Restart Form to seek a judicial decision on the case.*

My First Point of Contact

My first contact with the parties is usually by way of email. My email reads something like this:

> *Dear Peter,*
>
> *I am a mediator with the University of Strathclyde Mediation Clinic. The Clinic operates a mediation service in a few Sheriff Courts, one of them being Kilmarnock. The Clinic is independent of the court and is a free service. I have been advised by the Sheriff's Clerk that the Sheriff has identified your case as one that may be suitable for mediation. If you wish to mediate, the procedure will be the following:*
>
> 1. *I will send you an Agreement to Mediate, which I would request you and anyone else who is going to attend the mediation, to sign and email back to me.*
> 2. *I will then need to have a private meeting/session with you, which will take about 20 minutes.*
> 3. *Thereafter, we can arrange a date for the joint mediation session, which could take about 3 hours (possibly less).*
> 4. *The private session and the joint mediation session will be on Zoom, unless you want to do them via teleconference.*
>
> *There may also be an assistant mediator involved in the mediation.*
>
> *Can you please let me know who will be attending the mediation and give me a few times when it would be convenient for a private meeting.*
>
> *If you have any questions, please let me know.*

The response that I can expect varies. In some instances, I get an immediate response, with the party expressing gratitude that I have made contact and immediately agreeing to mediation. Patience is still required as, despite the enthusiastic response, I will seldom be provided with the information which I sought. The second possibility is that I receive a response, but it takes a few days. The third possibility is that I don't receive a response. Sometimes I send a friendly reminder, other times I go straight to the last resort. This reads something like the following:

> *I have not had a response to my email. If you don't want to mediate, that is fine. Just please let me know. If I don't hear from you, I shall assume that*

you don't wish to try mediation and advise the Sheriff accordingly.

This final email always elicits a response. Quite often, the party informs me that they never replied previously as my emails went to their junk mail. Strangely, the third email never seems to go to junk mail...

Here is an example of a response:

This is in the hands of my legal representatives.

Most Difficult Conversion

Lionel sued Anthea for payment of £250, for a gold chain which she had bought on eBay. The chain was, according to her, defective. She complained and Lionel never responded timeously. According to him, he was abroad at the time. eBay said that, due to the lack of response, she was refunded the purchase price and she could keep the chain. Lionel was not pleased and sued her in the Kilmarnock Sheriff Court. She lives in England. Her insurance provides for legal assistance, and she was entitled to legal representation. Her solicitor raised a legal defence of a lack of jurisdiction. I sent several emails to Anthea but received no response. Finally, she responded by advising that she thought that her solicitor had contacted me. It transpired that the solicitor had tried to contact me but had mistyped my email address. In any event, the solicitor had no interest in mediation, and appeared content to go and argue the jurisdiction point and earn her fee which was paid by an insurer.

I had a pre-mediation meeting with Lionel and realised that he was suing Anthea as a matter of principle. I approached Anthea and asked whether she would be prepared to have a chat with me, to which she agreed. After speaking to her, and ascertaining her circumstances, I realised that Lionel's perception of her was very different to who she actually was. I persuaded her to give mediation a try and, at the time of writing, the mediation had not yet taken place.

Pre-mediation Meetings (or Private Sessions)

I am satisfied once I have a response. Now it is up to me. I arrange a private session and that is where the 'magic' has to take place. Sometimes, the session starts with a recalcitrant party, uncertain of what to expect, holding back, sometimes quite nervous, slightly afraid. I start by thanking them for meeting with me. '*Do you know what mediation is?*' I say. '*Well, I have an idea, but can you tell me?*'

'*Sure. You and the other party (I usually mention them by name) are going to have a discussion, a chat, to try and find a resolution that works for both of you. I am going to help you to do that. I may try and move the discussion forward in a positive way, but I won't decide the outcome of the matter, tell you what to do or give you any advice. But I am here to help you get what you want. Of course, I am also here to help the other party (who I name) get what they want. You have to do the work, but it will hopefully bring the matter to an end. And can I tell you what the main benefits are of mediation? Both parties are in control. You control the outcome. If you go to court, you give that control to the Sheriff.*'

Now it is up to me. I arrange a private session and that is where the 'magic' has to take place.

You will note that I avoid a discussion that is technical. I don't use unfamiliar terms. I try and keep it simple but effective. **And I don't read from a script.** I believe that that is important. I have mediated with mediators who read off their introduction. Anyone can see that they are reading it. It just doesn't have the same effect.

I also inform them that the mediation is confidential. '*Any questions*', I say.

If there are, I deal with them. '*Now please tell me a bit about your matter. I don't know anything about it. I am not part of the court structure and all that I receive from the clerks' office is the names of the parties and their email addresses.*' I could ask for the files from the court, but I don't need them. I prefer to distance myself from the court and leave it to the parties to tell me about their case. They seem to like the fact that I don't have the file.

I get the background and ask a few questions. In between, I chat. '*Where do you live? What do you do?*' I met with an old fellow once. He was a piper. I told him I played the bagpipes. That was the common ground that brought him around to trusting me. That is what this first stage is all about, building up trust. Both parties need to trust you. They need to think that you are in their corner. Some may disagree with this. But I make it clear that I am there to help both parties. The importance being that I am not creating the impression that I am a disinterested outsider. The parties want this. They need this. They need help. I am the one to provide that assistance. But to both of them. If

these sessions go well, half the work is done. I will say to a party '*I am on your side, here to help you get what you need, but I am also going to be doing the same for the other party*'. I often get the response, '*I know that you are impartial, but I feel like you are on my side*'. Those are magic words to hear. I aim for that with both parties. The parties then have complete trust in you and are quite happy to share confidential information, even if it is prejudicial to them.

I try and establish what each party is looking for. It helps me create a Zone of Potential Agreement, a ZOPA. They tell me, confidentially of course. If I can reach the point where the parties trust me, are comfortable with the process and are co-operative, a settlement will almost always result.

Once this process has been followed with both parties, I am ready to arrange a date for the mediation, which I then start with a joint session.

[1] ***Patrick Scott SC served as Chair of the Board of Strathclyde Mediation Clinic for three years, from 2019 to 2021. He is now the newly appointed editor of the Clinic's newsletter, "Mediation Matters!". Patrick is a lead mediator with Strathclyde Mediation Clinic and, in particular, mediates matters from the Kilmarnock Sheriff Court. He is on the Scottish Mediation Register and also serves on the mediation panel of the Scottish Legal Complaints Commission. After practicing as an advocate in South Africa for thirty years (the last seven as senior counsel), Patrick relocated to the Isle of Arran. He enrolled for a Masters' degree in Mediation and Conflict Resolution at the University of Strathclyde in September 2017, and graduated, with distinction, in 2019. His Master's dissertation was on mandatory mediation, and its effect on the parties' satisfaction with the mediation process ("Mandatory Mediation: Golden Goblet or Poisoned Chalice"). He is also a Board member of Mediation in Motion Mediators, a mediation organisation in South Africa and writes a column for their quarterly newsletter, "Let's Mediate!".***

From Theory to Practice

Workshop presentation by Leon Watson[1] and Adrienne Watson[2]

At the recent Mediation Clinic Conference, we presented a workshop on the challenges and rewards which new mediators experience as they move from studying mediation to working with parties in real-life disputes. Leon was filling in for Alan Jeffrey who, being a dutiful - albeit disorganised - son, had double-booked himself to both co-run this workshop and treat his Mum to a Mother's Day outing to Murrayfield. Alan kindly did his best to share his workshop expertise as Leon prepared to take his place.

Our resultant, rather ramshackle, workshop was predicated around encouraging the participants, both with us in the room and those struggling to hear what was being said via Zoom (apologies again for our technical ineptitude!), to discuss three topics with regard to their early mediating experiences. These being 'Tricky situations', 'Learning points' and 'Rewarding moments'.

We had surveyed a group of more experienced mediators prior to the workshop, asking them to cast their minds back to their first year of mediation practice and to consider the same points with the benefit of hindsight. They also kindly provided some words of wisdom for us to share with our participants. What follows is an attempt to summarise their collective responses and those of the workshop participants, in order to highlight those that most spoke to us, in the hope they may be of help to others.

Tricky situations

We began by asking everyone to consider, either in hindsight or hypothetically, a situation they had, or would, find especially troublesome to handle as a novice mediator. Responses brought up challenges ranging from parties disinterested in mediation or incapable of engaging meaningfully in the process, to handling outbursts of emotion and strong or abusive language, to managing oneself in the mediation room and looking after our own wellbeing after confronting cases.

Most striking to me was a question asked by an online participant relating to power imbalances; whether this is something one just senses or has to question parties on, and how one should go about managing them in a mediation. They received an excellent response from another Zoomer who had more experience mediating, particularly in neighbour and housing disputes. It was suggested that, depending on the type of imbalance - be it a numerical advantage for one party, an imbalance in levels of education, or able bodied and disabled parties - the mediator may need to tailor the face-to-face meetings between the parties to reflect these imbalances.

The more experienced Zoomer suggested that these imbalances don't necessarily need to be vocalised, (and we personally would hesitate to do so without having privately discussed our feeling of there being an imbalance with the 'weaker' party first) but that we ought to look out for them going into any mediation, and if we need to adjust for them that it is best to do so discreetly. In this regard, the work of Davis and Salem[3] is of great assistance and we would encourage anyone seeking guidance on this matter to read their suggestions.

Learning points

Our second exercise, which became severely truncated due to a shortage of time, invited our participants to consider significant learning points they had gleaned in their first year, or hoped to if they were yet to mediate.

Again there was a wide array of responses, highlighting the importance of confidence in oneself, both in terms of our qualities as people as well as mediators, sensitivity to the pressures parties may be under and how our use of language can alleviate - or exacerbate! - tension in the room, and that it may not be about what it's about - a delightfully mediator-y way of putting '*be mindful of underlying issues*'.

The question '*how does a mediator handle the disappointment of an unsuccessful mediation?*' was covered in a group discussion and elicited some prominent learning points. This is something we imagine every mediator has been confronted with at some point in their early practice - indeed perhaps thereafter.

Even though the answer given by a sage attendee resonated with us, one is often unsatisfied in the immediate aftermath of an unsettled dispute. The

sagacious answer? That the mediator's task is to facilitate a discussion between parties and that it is for the parties to reach an agreement, or in other words, we should attach ourselves to the process rather than the outcome. '*Easier said than done*' is how I've often felt implementing this particular wisdom.

However, our experienced online participant, who we sense would have contributed on this point had the technology allowed, expressed their own regret having, in their earlier practice, been overly fixated on models and getting parties to reach agreement, even where this may not have been in their best interests. We, as mediators, should try to ensure that parties leave the mediation on their own terms, whatever those terms might have been and however the mediator may have felt about them.

Rewarding moments

Combined with considering learning points, because why discuss just one thing at a time, we wanted to gather a collection of experiences that had been most rewarding in the early stages of a mediator's practice. Contributions on this topic were wonderfully heart-warming.

In varying terms, these largely related to the positive transformation in the relationship between the parties. These were especially and deeply moving in the accounts from our experienced family mediators, for example, a father saying that his daughter only remains living in the family home due to the mediation.

A story we were treated to in the room recalled a case of workplace mediation wherein the claimant unloaded an avalanche of pent-up frustration and hurt upon their employers, who for their part were entirely taken aback and empathetic to their employee's pain. This resulted in the claimant coming to appreciate the damage that their own behaviour had wrought on those around them and, unbeknownst prior to mediation, this opportunity for self-expression was all they had really needed. This resolved the matter.

Mediation is by no means a simple process, but a very fulfilling one. Parties are often genuinely grateful for the mediator's time and effort and appreciate that they have had the opportunity to be heard.

Words of wisdom

Having somewhat rushed the latter stages of the workshop, we left attendees - at least those physically present - with snippets of advice kindly provided by our survey respondents. The most poetic of these encouraged new mediators to '*Feel the scary wind, and tuck in just under the wing of a more confident flyer*', which, at least for those of us fortunate enough to benefit from the opportunity to develop our practice through a Mediation Clinic or a similar service, is an opportunity not to be squandered. Perhaps mediators should follow the sage advice which John Sturrock KC imparted during his superb WOMACC presentation - be kind!

Feel the scary wind,
and tuck in just under the wing
of a more confident flyer

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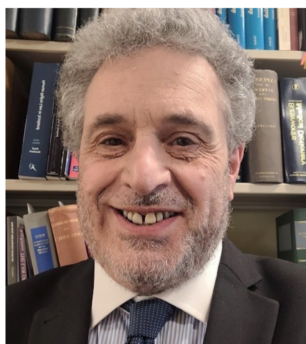
[1] ***Leon Watson is a recent graduate from the LLM Mediation and Conflict Resolution course at the University of Strathclyde, and volunteer mediator with Strathclyde Mediation Clinic.***

[2] ***Adrienne Watson became an Accredited Mediator in 2016. In 2021 she began studying for an MSc in Mediation and Conflict Resolution at the University of Strathclyde where she volunteers with Strathclyde Mediation Clinic.***

[3] *Davis AM and Salem RA, 'Dealing with power imbalances in the mediation of interpersonal disputes' (1984) 1984 Mediation Quarterly 17.*

Making the most of mediation in Simple Procedure - a Sheriff's perspective

Workshop presentation by Sheriff Derek Livingston[1]



Good afternoon and thanks for inviting me. What I say today constitutes entirely my own thoughts and does not represent the Scottish Courts Service, the Scottish Government or the judiciary.

My apologies for the difficulties I've caused by contracting Covid, but I am delighted to be here, albeit virtually.

Let me start by saying I cannot praise the University's Mediation Clinic highly enough for its ability to solve seemingly intractable problems between people whose relationship is at best cold and often downright hostile. Such is my admiration for the Clinic that I made the decision some months ago to miss today's Celtic v Hibs match for this Conference. Those who know me well will know that my absence from a Celtic home match is rare indeed.

I thought it might be helpful to start by speaking about my time working in Falkirk and how mediation operated there in simple procedure cases which basically comprise most cases, except for personal injury and eviction, in which the sum sued for is £5000 or less.

The simple procedure rules, which can be found on the Scottish courts website at simple procedure - scotcourts.gov.uk, provide around 30 references to Alternative Dispute Resolution and the obligation of all participants to consider it. Initially however this seemed a fairly pointless exercise without funding. Indeed, it is unfortunately not infrequent for legislation to be aspirational with no straw being provided to make the bricks. To be clear Alternative Dispute Resolution is taken to effectively be anything which takes the case out of court, for example, private arbitration but for today's purposes (and in practical terms) I'm dealing with mediation.

Fortunately, the Mediation Clinic meant that the lack of direct funding for mediation has been much less of a problem than anticipated in the courts in which I have been working, although I have my doubts that those behind these court rules were aware of the Clinic's existence or of its willingness to help fill the gap, but maybe I am being unfair. There are still I think a number of areas where there is no provision although that has improved.

The simple procedure rules, which can be found on the Scottish courts website at simple procedure - scotcourts.gov.uk, provide around 30 references to Alternative Dispute Resolution and the obligation of all participants to consider it.

Once I'd secured the services of the Clinic, and the agreement of the court authorities to utilise it, I decided, after discussion with the Clinic, that the best way of proceeding, in the pre-Covid days, was generally to have the mediators in court to effectively provide a one-stop service. This occurred when the parties were present for the case management discussion which, as you may know, is a procedural hearing at which the sheriff will try to resolve matters, clarify areas of dispute and generally get to see the whites of the parties' eyes. Most parties are unrepresented, and it may well be their first time in court. I also saw it as important, within reason, to reduce expectations and advise which parts of the case were irrelevant. Two frequently occurring examples are that I don't care, legally speaking, which party a dog might be happier with. As the law stands, I simply have to determine matters based upon legal ownership, and all the videos of a happy looking Fido with one or other party are generally irrelevant. I advise of that and tell the parties that I won't allow evidence on it. Another example is that, as things started to go wrong, one or other party, was (or at least was perceived as having been) rude to the other, and parties perceive this to be relevant to the outcome of the matter. I advise them to the contrary.

Having advised which parts of the case were irrelevant, I would advise about mediation, that it was free, and it was only a few yards away from the courtroom in which they were sitting. It was ready and waiting and would happen that day and, perhaps most importantly, anything said at mediation (other than agreement being reached) could not

be relied upon at an evidential hearing. There was really nothing to lose. Some parties reluctantly agreed to mediation and, to their surprise, resolved their dispute. This avoided much stress and nervous tension, both for the parties and the sheriff!

Unfortunately, Covid got in the way and since then simple procedure case management discussions are generally held by video conference, making things in my view much less user-friendly for those who might take advantage of mediation.

The parties are no longer gathered in court and my frequent impression is that they feel far less impetus to engage in mediation for a variety of reasons and, even when they do, the rate of success is less. There is also less opportunity to make the parties understand the potential problems with their case in advance of mediation. They are also often less nervous about a court hearing from their living room than they would be appearing in the Sheriff Court. Many of you may feel this last point is very much a positive about virtual hearings, but I think it does affect the successful utilisation of mediation services.

I understand that simple procedure case management discussions with parties physically present will return but, as with many things, the advent of Covid seems to have provided a convenient excuse, long after the danger had lessened significantly, to do things differently. In my experience I do not find conducting cases by video to be particularly good except for minor procedural callings. In other cases, particularly where a party is unrepresented, a party may have no access to the internet. Even if that party does, the connection may be poor or there may be a lack of privacy or simply a lack of ability to utilise a computer.

Once Covid arrived and procedures changed, it was far more difficult to persuade parties to accept mediation. One might agree and the other would not. Or one of them simply didn't respond.

Which brings me to the whole issue of when and when not to refer to mediation. It is of course the case that a court has no power to order a party to mediation, but a referral is basically a steer from the court. That said, I do prefer to canvass mediation with parties before a referral to avoid wasting time and resources, although that may not always be possible.

It is of course the case that a court has no power to order a party to mediation, but a referral is basically a steer from the court.

In my opinion most cases, subject to the proviso about willingness, are suitable but there are a number of types of cases I will not refer. In the first place I will not do so if there are indications of control issues most frequently found in domestic scenarios where one party may be afraid of the other, whether or not this is justified. The most common example is where there is already a non-harassment order against a party, in other words the court has determined, for example, that one party should stay away from the other. If there are bail conditions preventing contact, again mediation is in my view not an option. Where both parties are represented by solicitors, I am reluctant to refer the matter to mediation without it being requested. I also do not refer road traffic cases involving damage to vehicles to mediation where the parties are legally represented and at least one of them is an insurance company. I also personally don't see mediation as appropriate where there is a stark divide on the facts and one party clearly is not simply mistaken but lying, for example where the respondent says he paid the claimant personally in cash and the claimant is adamant that no cash was ever paid. If a case is completely hopeless, I will probably not refer it either. To give an extreme example, I had a case yesterday in which there was the wrong claimant (the mother misunderstanding that representing her son was not the same as making herself the claimant), the wrong respondent or defender (the person you dealt with at the limited company garage is usually not the party you should be suing) and a claim which seemed to be based entirely on the premise that because something had gone wrong with the car 150 miles after its MOT, the garage had to be liable without any evidence to back this up, despite time having been given for the claimant to obtain a report. That was so hopeless I simply had to dismiss it without wasting anyone's time further.

On the other hand, mediation is appropriate where it is clear that parties could do with talking to each other but need someone to facilitate it. There are often serious trust issues which the intervention of a third party can at least mitigate and stop those who watch too much criminal court dramas on television from automatically saying 'black' if the other party says 'white'. In many cases there may well be a situation where neither party is completely right nor wrong. This is particularly the case in disputes

about work quality and second-hand cars. Again, I see it as useful to reduce expectations, where justified, and point out that a second-hand car cannot be expected to be perfect on the one hand but on the other, it should not have any major faults (subject to any agreement to the contrary). I remind people that the Consumer Rights Act does mean that the price and age of the vehicle have to be taken into account. A reminder too that there are two sides to the story and the outcome may be uncertain can also help. A poorly made kitchen or dress may not be obvious to the average ignorant sheriff, who in any event is not supposed to make too much use of personal opinions and knowledge but to hear evidence on the matter. The sheriff may need to hear evidence from someone who knows what he or she is talking about regarding the standard to be reasonably expected. Without that, if the parties differ, the sheriff's decision may well be particularly unpredictable.

Neighbour disputes, if the referral works, are arguably the most rewarding form of mediation. After all you can decide you will never darken the doors of *Dodgy Car* and *Kitchen Co* in the future, but you have far less control over your neighbours. Even if you take the radical decision to move house, that may not be easy to do as it may depend upon the terms of your lease or whether you can sell your house, quite apart from the problem of finding suitable alternative accommodation.

This brings me to one of the beauties of mediation. As a sheriff, I generally can only give a party what that party has asked for in a claim form, or less. I cannot give more or something radically different. Mediation allows for lateral solutions. So, with thanks to Marc[2] for reminding me of some of these, a dispute in Falkirk between neighbours, four in number, which started with the chopping off of overhanging branches but then literally and figuratively encroached on much else, was one in which monetary compensation was claimed. Had I found for the claimant that (or less) was all I could have awarded. The wonderful people from the Clinic brokered an agreement which included regular meetings between the parties, a protocol before any work was carried out which might affect the other and generally a way in which the various neighbours could live and engage in harmony. None of that could have been imposed by me, quite apart from the fact it would have been unrealistic to do so. No further issues between these parties have arisen in court to my knowledge and they can hopefully co-exist and not experience the loss of quality of life often caused by a hostile relationship with a neighbour.

In another case, a dispute arose over the quality of materials and whether they were identical in colour to previous material used in a landscaping job. It was clear to me that the claimant was looking for better than she had, perhaps in error, ordered and I pointed this out to her. The same stone several years on may look quite different when laid next to a more aged stone which is now weather-beaten. Ultimately, through shuttle diplomacy, agreement was reached whereby the claimant provided new materials and the respondent carried out installation work free. I am not sure it was justice, but mediation assisted both parties to reach a resolution they could both live with. It was also not something which was claimed, or which I could have ordered.

As a sheriff, I generally can only give a party what that party has asked for in a claim form, or less. I cannot give more or something radically different. Mediation allows for lateral solutions.

Another case which resolved at mediation involved the hardy perennial of an arguably faulty central heating system being discovered immediately after a purchaser moving into a new house. These are the bane of conveyancing solicitors' lives. The purchaser simply replaced the faulty boiler with a much better one whilst preventing access for inspection purposes. The seller conceded the thermostat had been faulty. It was pointed out to parties that for the court to make an informed determination it would require an expert report and there were also issues of betterment which itself might be offset if nothing equivalent to the previously installed system was available. Parties accepted mediation. Both were concerned about the cost of a report and time off work for a case the sheriff had said might last at least two days. Eventually, and after considerable negotiations, parties agreed the cost of a new boiler (different to what the claimant had paid) by both obtaining their own quotes from the same shop.

I have not gone into the blood sweat and tears expended by both the mediators and the parties in these matters, since it is not something of which I have first-hand knowledge and no doubt Marc and Charlie, and others can

tell you about that. I can inform you that these cases took hours to mediate as well as huge amounts of patience by the mediators.

My impression generally too is that the parties, after a successful mediation, are both happy and relieved and even after unsuccessful ones they are often unstinting in their praise for the efforts of the mediators.

Whether mediation should be made compulsory is something I was asked to address today. That said, I don't think I'm really more qualified than anyone else here and less so than many to say. With that caveat I can see arguments both ways. The first point is a resource one. I would be completely against it if there are people who, looking to mediate, cannot get to mediation due to a shortage of mediation facilities which are free or very inexpensive. It would, in my view, be a mistake to exhaust a resource which is in short supply on people who would not be there had they not been forced. In saying that, I take account that some of the unwilling may resolve things despite that.

If there is a sufficiency of resources, I think there is a much stronger argument for compulsion. In saying this, I am not simply referring to simple procedure cases but all types of cases heading for a forum dealing with disputes. In the first place these disputes can use up a huge amount of resources. That may well be the parties' own time and money, but also the time of witnesses and the people of the courts and tribunals dealing with the case. None of that of course touches the human element, including the stress and uncertainty and, in particular in family cases, the fact that a solution brokered through mediation may work a lot better than one imposed by the court. For reasons mentioned earlier, some cases may not be suitable for mediation, but many others may be worthy of a go. One popular myth however I would like to dispute is that solicitors often deliberately up the ante. Generally, I have heard this from disaffected people unhappy that early settlement has not proved possible. So, the divorcing person who made no mention of his (usually it is his) pension then gets aggrieved when his soon to be ex is advised she has a six-figure claim for that. The solicitor is just doing his or her job and would be negligent not to make enquiries about assets and to advise accordingly.

On that point, in my view, if a party is legally represented either the solicitor should be present at mediation or at least available to advise on any potential resolution. To put to bed another myth, no party is ever forced by his or her solicitor as to whether or not to compromise, although strong advice may be given by the solicitor. The decision is ultimately that of the client. Most, but I accept not all, solicitors in fact do a good job of filtering some of the more extreme and irrelevant assertions of their clients which, if communicated, would make a resolution less likely. Gratuitous insults will often not be conveyed. Most solicitors, being a step back from matters, will try to informally mediate and try to avoid correspondence being a stream of consciousness from their respective clients. If they don't, they should do.

I think that I am correct in saying that in England there is some sort of compulsory mediation in family cases, but I have no idea if it meets with any sort of success. I do, however, hear horror stories from England of legal aid being unavailable in family cases, resulting in many litigants conducting these cases in person. The knock-on effect is that cases are much more difficult to manage and indeed it is cited as a reason why some judges have retired early. I also know there is, or at least was, for raising employment tribunal proceedings, an obligation to offer conciliation through ACAS but I understand the opponent can simply refuse to engage. I don't know if anyone here has experience of these or similar schemes and is in a position to provide a more informed view on the matter.

In Scotland things may change. Section 24 of the *Children (Scotland) Act 2020* requires the Scottish ministers to arrange a pilot scheme under which a court may only make an order under the *Children (Scotland) Act 1995, s 11* (orders in relation to parental rights including residence and contact) where the parties have attended a mandatory alternative dispute resolution meeting at which all the options available to resolve the dispute are explained. That said, it is now 2023 and there is no pilot scheme as far as I know imminent. I can, however, envisage serious difficulties, unless there are a number of qualifications. In a fairly substantial number of cases urgent orders are sought. Is there to be an insistence, before dealing with these, that parties have attended such a meeting? What happens too if one of them fails to show? Mediation funding is only to be available based on legal aid eligibility. The assessment of that is rarely a quick process, nor a generous one, despite what you may read in the *Daily Mail*. I have never really understood the persistent passing of legislation which the government fails to implement for years.

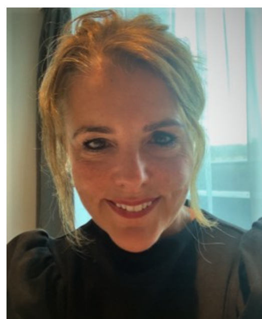
With that I will conclude. I am sorry that Covid has prevented me being with you physically today and from chatting in person over lunch and coffee, often an invaluable and enjoyable part of the day. I hope what I have said is of some interest and I'm happy to hear your views.

[1] ***Sheriff Derek Livingston graduated LLB at the University of Glasgow before joining the Glasgow firm of Joseph Mellick in 1978 where he served his apprenticeship. From there he joined Naftalin Duncan & Co , becoming a partner in 1981. His work was initially both in the criminal and civil spheres before specialising in the civil side of things taking a particular interest in housing and welfare law but engaging in the full range of civil work as well as regularly carrying out night work for a newspaper. In 2007 he was appointed as a part time sheriff and in 2016 as a summary sheriff at Falkirk. He is now a full sheriff in South Strathclyde Dumfries and Galloway. His appointment as a summary sheriff coincided with the inception of Simple Procedure and a load of rules which pointed parties to mediation and Alternative Dispute Resolution. To his disappointment although not surprise he discovered that although sheriffs had a duty to try to have parties engage in these processes no signposting of resources took place. He met Professor Irvine at a seminar on Simple Procedure at the University of Strathclyde and arranged for mediation services to be made available at Falkirk and became a big fan of the concept***

[2] *Marc O'Krent, the mediator from Strathclyde Mediation Clinic.*

What we learn from our own practice

Workshop presentation by Ben Cramer[1] and Alison Welsh[2]



The interests and responses generated in the '*What we learn from our practice*' workshop are collected in a googledoc which you can access at the following link. You are encouraged to visit the link and leave a response in the form of a link to a resource, an idea or question, an experience or word of practical guidance.

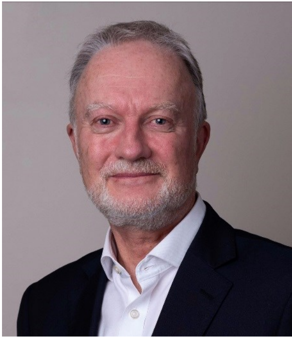
https://docs.google.com/document/d/1C9lfCsnpl6hy-EQMZ-07obVXO6u9rqrf0dTl5993IVg/edit

[1] Ben Cramer was born in Tooting, South London and grew up living with his family on the South Coast of England, in a village at the foot of the South Downs, and then in Cambridge. He returned to South London for university, living there with friends for almost a decade, before moving to Edinburgh where he has lived since 2011, now residing with his partner in Newhaven. Ben graduated, with distinction, from the University of Strathclyde MSc in Mediation and Conflict Resolution in 2018 and has been cultivating a mediation practice over the subsequent four years, co-mediating with the University of Strathclyde Mediation Clinic, Edinburgh Sheriff Court Mediation Service, Restorative Solutions and Scottish Mediation. Thanks to a recent pilot project at the Mediation Clinic, Ben is handling all referrals from Airdrie Sheriff Court. Ben is currently enrolled for a doctoral degree at the University of Strathclyde and is interested in writing that conveys what happens in mediation.

[2] Alison Welsh is an Accredited Mediator who Lead mediates with the Mediation Clinic and is the main point of contact with Hamilton Sheriff Court, she also mediates privately. Having studied Business and Psychology at the University of Strathclyde in the 1980s, Alison then went on to have a long career in Human Resource Management and Employment Law. In 2006 she helped establish and manage an HR and Employment Law consultancy firm, Square Circle HR, which supported small to medium-sized organisations with outsourced HR and legal support. In 2018, following the acquisition of Square Circle by a law firm, Alison joined the University of Strathclyde's Masters Course in Mediation & Conflict Resolution. Her other interest is in Holistic Therapies being qualified in Reiki and Reflexology.

The World Mediators Alliance on Climate Change

John Sturrock KC[1]



A quick show of hands:

- How many of you are concerned about the impact of climate change?
- How many of you have brought a reusable water bottle with you today?
- How many of you make travel choices with your carbon emissions in mind?
- How many of you think about your environmental impact when you mediate?
- How many of you take active steps to reduce the carbon emissions of your work?
- How many have signed the Mediators' Green Pledge?

We're told that:

"*Unless countries dramatically scale up their efforts to counter the climate crisis, the world faces a global catastrophe*", the words of the United Nations Secretary-General António Guterres recently.

Progress since COP26 in this very city, attended by some of you, has been disappointing and not nearly adequate to meet the targets set in order to prevent emissions increasing beyond what will be safe for us as a species.

Apparently, we are currently heading towards temperatures by the end of this century that will be 3°C higher than before the industrial revolution. The effects of that are frightening.

Unless countries dramatically scale up their efforts to counter the climate crisis, the world faces a global catastrophe
United Nations Secretary-General
António Guterres

The Secretary-General also said: "*Commitments to net zero are worth zero without the plans, policies and actions to back it up. Our world cannot afford any more greenwashing, fake movers or late movers.*" "*We must close the emissions gap before climate catastrophe closes in on us all.*"

We're in deep trouble - and also, many of us, in deep denial.

Against this backdrop, I have been asking myself: what can I say which will be at all helpful on a Saturday afternoon?

Well, firstly, it's a great privilege to be invited to speak at this event and thank you to Charlie Irvine and your fellow organisers for arranging such an interesting Conference and for recognising the significance of this topic.

In true mediator style, perhaps what I can do is to ask some further rhetorical questions and then say a bit about the Mediators' Green Pledge:

- How seriously do you really treat this topic, climate change?
- What is your reaction - honestly - to the news that we are on course for devastating changes within this century - that the 1.5 degrees maximum warming target is increasingly unlikely to be achieved?
- Where does all this lead you - really? What does reducing our carbon footprint mean to you? For example, should we each be capping the number of flights we take in a year - drastically? What would that mean?
- What other changes must we make to really address this?
- What are the implications - really - for you and your work?
- If we assume that the facts and the science - indeed the urgency - are now clear - and they are - what would stop us from making changes? Our business model? The expectations of others? Our sense of who we are? Our reluctance to change?
- Where would **not** changing leave us - and others, including our children and millions of people elsewhere - as we contemplate the future?
- If not us - you, me - then who? It is, after all, people like us who need to change what we do.

Food for thought…

This takes me to mediation and WoMACC. I don't want to spend time on the origins or history - it's all on the website - but a group of us from four continents have been meeting virtually for three years now, since just after the pandemic started, in order to devise and promote the Mediators' Green Pledge.

Indeed Charlie Irvine, in response to a blog of mine about mediation and carbon emissions, said: "*Perhaps it's time for some sort of mediator pledge to use the least environmentally damaging form of communication possible in any situation.*"

And at the same time, Anna Howard drew my attention to the Arbitrators Pledge for Greener Arbitrations!

Three years on, we now have 766 signatories to the Pledge from over 50 countries around the world, with 15 or so translations and more than 25 supporting organisations. And have held a number of well-attended online events. It's all on the website.

The Pledge is a flexible one and commits all signatories to reduce their carbon emissions - it's a personal commitment - and it's up to you to take responsibility…

It's deliberately not about being a climate activist or mediating climate change issues though of course these are also very important.

> *The Pledge is a flexible one and commits all signatories to reduce their carbon emissions - it's a personal commitment - and it's up to you to take responsibility…*

I read recently about 'climate conscious lawyering'. The New Zealand lawyer who used that description also said: '*This decade is crucial to averting a climate catastrophe which will adversely affect human rights and threaten the rule of law. Lawyers have an important role to play, both in our everyday legal practices and by stepping up to raise awareness and push for greater ambition.*'

Well, so do we mediators: this is about climate conscious mediating.

We have numerous suggestions about how to achieve this (see womacc.org).

It's very much a work in progress.

But it's not easy. I know myself that the pressure to mediate in person is very strong - and sometimes appropriately so.

So, this is not just about mediating using online facilities, though that is one way of reducing (not eliminating) your carbon footprint. (And of course, online is not the be all and end all in many parts of the world where internet access is still an issue.)

That takes me to my next point. Whether in person or online, mediation offers a distinctive way to reduce carbon emissions in many disputes.

Anyone who has been involved in mediation knows that, compared to most litigation and most arbitration, energy-consuming, expensive and carbon intensive as they usually are, mediation is relatively quick, often more efficient, less time-consuming and less-resource intensive. Or it should be.

Mediation offers a very sustainable means of resolving disputes, of achieving net zero - a greener form of dispute resolution if you like. And, as we've noted, the fact that it can work really well online in some / many cases adds to the benefits.

A while back, I wrote: '*In many ways, mediation is a classic example of finding a better way to use scarce resources which would otherwise be diverted to less purposeful activity, helping to reduce unnecessary cost, saving time and labour, building more enduring, creative outcomes and renewing what might otherwise be dissipated energy. In other words, traditional zero sum, adversarial, win/lose paradigms are bad for the planet, while mediation fits into the model of environmentally friendly options.*'

I believe that our collective aspiration should be to achieve net zero carbon civil justice systems and net zero carbon dispute resolution overall. And mediation provides a useful route to do just that.

How can we encourage the Scottish Government and Scottish Courts to see things this way?

Back to the Pledges. It all sounds great in theory but, again, what does it mean in practice?

How do we really promote it? Nadja Alexander, writing in Kluwer Mediation Blogs this week, on *Doing it Online*, albeit in a different context, said this: '*Do you talk to others about it or keep it mostly to yourself? And, if you do talk about it, do you just flippantly mention it as a throw-away line that everyone should hear, or do you really engage in deep conversations about what it means?*'

Well, in my case, to be honest… I am not sure I do really engage as often as I should…

Committing to the Pledge probably means sacrifice as well as commitment; on a personal level, I lost the opportunity to act as a mediator in a number of cases by adhering until the middle of last year to a mediating only online policy when understandably some people wanted to meet in person (including in the Maldives!).

But all of this is fine for me; what if you are just starting out? It's not so easy to assert a particular approach if those who wish to use your services are not so environmentally aware…

And I do also recognise the danger of being seen as too evangelical …Again, this is not easy stuff.

But it is something… And that is surely better than nothing. Our actions matter; we have to believe that we can make a difference. And have the courage to do so.

In Edinburgh, there was an exciting multi-media exhibition last year on the work of the artist, Vincent Van Gogh. He once said something along these lines: "*Great things are done by a series of small steps brought together*".

Let's all pledge to take at least those small steps now - and do great things together. We really have no choice.

Questions/comments/observations?

- What are you doing in your practice?
- What are the impediments?
- How can we help the move to a net zero carbon civil justice system - and net zero carbon dispute resolution?

[1] ***John Sturrock KC is founder and senior mediator at Core Solutions and also acts as a mediator with Brick Court Chambers in London. His work extends to the commercial, professional, sports, public sector, policy, government and political fields. He is identified as a Global Elite Thought Leader by Who's Who Legal, is a Distinguished Fellow of the international Academy of Mediators and has been a Visiting Professor at the University of Edinburgh. He writes extensively and recently published "A Mediator's Musings, Volume 2. He is founder of Collaborative Scotland, which promotes non-partisan respectful dialogue about difficult issues and he is one of the initiators of the Mediators Green Pledge. In 2019, John conducted a major review for the Scottish Government into allegations of bullying in NHS Highland and the subsequent "Sturrock Report" was well received across the public sector. He was a member of the Stewarding Group of the first Citizens Assembly in Scotland in 2019 - 2021. In 2019, John also co-chaired an Expert Group under the auspices of Scottish Mediation which produced a report entitled "Bringing Mediation into the Mainstream".***

Mediation Clinic Conference

Mandy Richards[1]

Upon my arrival at the Conference, I was greeted by students distributing name badges. I was directed to the refreshments. That's when I met our Chair, Dr Vanessa Collingridge, who referred to herself as Ness. A vivacious, passionate lady who did an excellent job hosting the conference in an upbeat, cheerful and professional way. Not surprisingly, as she is an award-winning broadcaster, author and coach.

She introduced our first speaker, Douglas Brodie, who described the challenges faced by mediation and community engagement. He sang the praises of the award-winning Mediation Clinic at the University of Strathclyde (Scottish Legal Awards 2021 Community Contribution Award to name but one) and recognised the hard work undertaken by Pauline McKay and Charlie Irvine. He spoke about the merits of the Clinic and it growing from strength to strength. He also thanked the sponsors, Anderson Strathern.

Next, we were in for an interesting and informative talk by our keynote Speaker, Tony Allen. Mr Allen, a solicitor of over 30 years' experience, is renowned for his expertise as a specialist in the field of clinical negligence disputes. An independent mediator from 2011, an author, lecturer, as well as a leading expert on law with regard to civil mediation.

He discussed the question of sanctioning for those who unreasonably refuse mediation. He referred to Lord Justice Jackson's endorsement of ADR in Civil cases and its position as '*unappreciated and under-used*', as well as the need for those in the field of Mediation to '*stay resilient*'. He alluded to Dame Hazel Genn's inferring that mediation "*is not about **just** settlement, it is **just about** settlement*" and advised that Charlie Irvine had responded to this.[2] He went on to discuss power imbalances and how mediation might be seen as '*challenging the role of civil justice*'. Also, the relationship between the courts and mediation.

He mentioned when clients are facing the 'monster', the justice system, we as mediators have a responsibility. He declared that the Goliaths have lessons to learn, and we have a role in coaching them to do that. He also said that clients wanting their day in court are sometimes disappointed depending on the procedural rules, and cross-examination may not allow the petitioner to have their say, yet we in mediation allow both parties to tell their story.

We also heard a pertinent statement whilst discussing ethics. As he confirmed, no one else sees what we do. So, a question we might ask ourselves to ensure / confirm we are neutral and unbiased might be '*if the other party was there would they approve?*' As the Ministry of Justice confirmed a 700% increase in small claims cases there is much for us to do.

The floor opened for questions and a discussion relating to the lurking threat of sanctions in England and Wales ensued, as also the need to raise the profile for mediation. Tony suggested if perhaps a 'friend in Coronation Street' had mediation, this was met with laughter and the acknowledgement of the need for public awareness of what mediation has to offer. Tony informed us that "*confidentiality prevents us singing our praises and we need to be brave enough to recognise the parameters.*" He concluded that mediation is inseparable from the justice system, and it is sewn into its fabric. He stated the opportunity for mediation is vast and "*we are making that journey hand in hand*".

I don't know about the others in the conference but by this time, I felt inspired. I was ready to pick up a placard and join a march for Justice for Mediators and those who we serve! Thankfully we were informed it was coffee time, which I decided was the best option for me, as I didn't want to make a fool of myself in my one man / woman rally singing the praises of mediation and justice for all.

Next on the agenda was the '*From Theory to Practice*' a Mediation Clinic workshop with fellow students Leon Watson and Adrienne Watson. An interesting and honest depiction of what it is like to delve into mediation as a novice. An open, endearing, transparent sharing of experiences by them both. Which encouraged the same from their 'audience'. We covered topics such as triggering, insurance, being accredited and the possibility of civil mediation and family mediation achieving similar regulation. We also considered the power of 'sorry' and trusting the process. An attendee commented that the workshop was very stimulating, and I would definitely agree. As we left Adrienne offered us a little notelet of advice. Mine read '*Don't worry about what type of mediator you are. Be the mediator that the parties need in the moment.*'

Following this, we spent some time in group discussion with Charlie Irvine. I am a student of Charlie's, and I can say that he is held in the highest regard by his students. He

stressed the importance of getting the term mediation recognised and not to lose sight of this.

Lunch time had arrived, and I looked forward to the next workshop; '*What we learn from our own practice*', hosted by Alison Welsh and Ben Cramer, both mediators. Alison chatted about her own experience and how she felt that becoming more intuitive allowed for more fruitful mediation. We also discussed how reflection was important, how it takes time to learn, and most things come with experience. Both Alison and Ben accepted questions relating to tips of effective reflection, pearls of wisdom, how do you learn from success, if every mediation is different, mediation ethics and how to get an income stream from mediation. Some great insights from the seasoned mediators, Patrick Scott and Graham Boyack, who answered questions fired at them by those eager to learn. A huge mountain to climb but Ben and Alison reached the pinnacle without any issues. We all came away far more informed.

We returned to the main area and an interesting session began, '*The World Mediators Alliance on Climate Change*', which was presented by John Sturrock KC. John reviewed the Mediators' Green Pledge and contemplating the future. Currently there are 766 signatures and there are pledges from 80 countries. He gave us some ideas for action to reduce our carbon footprint. One action being to consider fewer face-to-face sessions and perhaps more interaction by Zoom. He also spoke about how we can help the movement to net zero impact. He certainly gave us some food for thought.

Finally, we arrived at the last session of the day, '*What have we learned from today?*' The panel discussion with Charlie Irvine, Tracy Reilly, Head of Consumer Markets at Consumer Scotland, Alison Welsh and Craig Cathcart who had graciously stepped in as Sheriff Livingston was unavailable. At this point I felt a mixture of regret that the day had come to an end and a sense of being mentally exhausted trying to take every opportunity given to learn from my peers.

Prior to presenting the panel, Charlie commented on what a great bunch of people had attended and how much affection was held by those people for the Mediation Clinic. As the panel settled and the questions came from the floor, the panel took turns, managed by Ness, to explain the challenges and the benefits that mediation provides. Tracy confirmed how much potential there is for mediation and the need for more progress. Craig eloquently spoke about the value and richness of communication and the necessity for the justice system to recognise the need for mediation and he reiterated Tony's description of mediators being the guardians of it.

Alison spoke about the different styles and approaches to mediation and the need for us to be more structured. She also referred to Tony's statement to imagine the other party in the room as we mediate to ensure we are doing a great job. Craig referred to the provision of mediation as a postcode lottery. Which would probably need a change of resources and some empirical research to identify what we do and the value of mediation. So, how do we communicate this to the public? Alison was eager to inform us that those who have undertaken mediation say they wish they had done it earlier. This sentiment was also confirmed by Charlie.

It seems that mediation has come a long way but still has a long way to go. The need for recognition and regulation is paramount. In my opinion, following the Mediation Clinic Conference, I felt honoured to belong to a group of people who are passionate and willing to take on those challenges. Who have a shared interest to be of service, to touch the lives of individuals and organisations and bring an opportunity to those who wish to mediate, to enable them to achieve a desired outcome, something they can live with, in a safe place devoid of blame and bias.

As I contemplated my return to Wales and the 11 hours journey which I had taken to attend the Conference, I can confirm it was so worthwhile. Thank you to those who organised it, the volunteers, Pauline and Charlie, the speakers and those who attended. What a fabulous day. I look forward to the next.

[1] ***Mandy Richards is currently studying the LLM in Mediation and Conflict Resolution at the University of Strathclyde. She studied at South Wales University and obtained a degree in Social Policy. She is a qualified holistic therapist and has worked as a life coach for 7 years. Prior to that, she worked as a money and debt adviser. She spent 7 years working for the Citizens Advice Bureau as an advisor. She has also worked on an emotional support line taking calls from those contemplating suicide and self-harm. Having just completed her Foundation course in Family Mediation, she intends working predominantly in that particular area. Mandy currently volunteers for Strathclyde Mediation Clinic.***

[2] *Irvine, Charlie. "Mediation and Social Norms: A Response to Dame Hazel Genn." SSRN, 2 Oct. 2010, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1686197.*

My experience of the Conference!

Andrew Reid[1]

Like many of my fellow students I am at the very beginning of my journey into the world of mediation, so when the opportunity to attend the Conference came around, I thought '*why not*?', it is bound to be a great learning experience. I was not disappointed. Although I do have to confess, the idea of taking myself in to the city centre at 9am on a Saturday morning, on a voluntary basis, was somewhat alien to me. However, the sight of a fantastic coffee and biscuit spread that had been arranged to greet us on arrival, assisted with balancing out the strain of early morning, weekend travel.

Before the Conference had even officially opened, I found myself snapping up many learning opportunities. As we stood in the foyer enjoying said coffee and biscuits, I was quickly in to conversation with other attendees who came to the Conference with a wealth of knowledge and a diverse background.

Once inside the main hall it was straight into opening the Conference with Professor Brodie delivering a very warm welcome. As I sat listening to Professor Brodie whilst scanning the delegates with my spare curious eye, something hit me. I was in strange territory, here I was in attendance at an early morning meet within the University of Strathclyde and everything was running like clockwork. There were no technical hiccups, no one was making desperate calls to the standby IT staff, no doors that were meant to be opened were locked shut and there was no need for any calls to security to arrange access to parking. It was clear that the Conference had been meticulously planned and the time and effort that had been put into it by the Clinic staff was clear.

Openings out of the way, it was time for the keynote speaker, Tony Allen, to address us. I found Tony's presentation fascinating. One of the burning questions that has been running through my head since I started the LLM is where exactly does mediation sit in law in the UK? I have often wondered where it might 'rank' and how it legally interacts. Whilst my studies have gone some way to give me an idea, I still had some unanswered questions. I think I probably mentioned to anyone who would listen to me that day that Tony's presentation cleared up every one of those unanswered questions. I enjoyed the very relaxed manner in which it was presented, and I found his teachings very easy to understand and very easy to place. He was a fantastic keynote speaker.

I also had the opportunity to interact with others in the workshops that had been very well planned out. I took a great deal from the '*From Theory to Practice*' workshop. Working on the assumption that it was going to do exactly what it said on the tin, I was eager to get involved. It was a fantastic experience. I was fortunate enough to find myself in a group with delegates with varied backgrounds and with a great deal of knowledge to share. I learned a great deal from them, and I have little doubt much of it will remain with me as I walk my way into practice.

Unfortunately, I was not able to attend the later part of the conference as I was called away to deal with a family matter, but not before I had the chance to sample some of the amazing buffet that was put on for lunch. Another reminder of the time and effort the staff at the Clinic had put into arranging the Conference.

For me as a student early into my mediation journey, I feel the Conference was an unmissable event and I have little doubt that I will be attending future Conferences.

[1] ***Andrew Reid graduated from the University of Strathclyde in 2022 with an LLB degree and is completing the LLM in Mediation and Conflict Resolution at the present time. He previously spent 6 years as a Main Battle Tank Soldier with the British Army before completing 18 years' service with Strathclyde Police and Police Scotland. He currently works for the Criminal Justice Department, as well as volunteering for Strathclyde Mediation Clinic.***

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