



Mediation Matters!

The quarterly newsletter of the
University of Strathclyde Mediation Clinic

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Editorial



This is the first anniversary of *Mediation Matters!*. Another bumper issue with the usual contributions, as well as some interesting articles by members of the Clinic. Charlie Irvine, the Director of the Clinic, covers two important topics in his quarterly column, *From the Director*. Additional funding from the Scottish Government will enable the Clinic to expand its service so that all Sheriff Courts across Scotland will have access to pro bono mediations in Simple Procedure cases. Charlie also discusses the extent to which mediators should give advice to parties in facilitative mediation.

One of our Co-Chairs, Andrew Boyd, provides an update on Board activities and Pauline McKay covers the latest developments in the Clinic. In the first issue of this newsletter, we heard from the mediators who are part of a pilot project, each providing a comprehensive service in a specially allocated Sheriff Court, and dealing with all referrals from that court from initial contact with the parties to completion of the mediation. One year later, we have asked them for an update on developments in their courts.

Lisa Cattanach, a Chartered Quantity Surveyor and lead mediator in the Clinic, has provided some interesting insight into how mediation could assist in construction disputes. A recent criminal prosecution heard in the English courts raises important questions for mediators. Lucy Letby, a nurse, was convicted of the murder of seven newborn babies and the attempted murder of another six babies. Lorna Kelly discusses whether it was appropriate for mediation to take place between Lucy Letby and the senior consultants who were raising such serious allegations about her actions.

In my column, *Patrick's Ponderings*, I ponder on some aspects of settlement agreements, as well as the nature of the evidence that a Sheriff might accept. Our Assistant Editor, Adrienne Watson, who is responsible for the wonderful layout of this newsletter, is going to write a regular column, *Research Conversations*, interviewing former Strathclyde Master's students on their dissertations. I was privileged to be the first interviewee, and I am sure that we will enjoy some very interesting interviews in the future.

Aunt Minerva again answers questions from 'Worried' who, I am pleased to say, is not a mediator in the Clinic. This time porridge seems to be the topic of discussion and we thank Aunt Minerva for her contribution yet again. Alan Jeffrey has provided an informative, yet light-hearted report back on the *Scottish Legal Awards* where, once again, the Clinic won the award in the Community Contribution category.

And, finally, we have included some of the reports from the Clinic's *Annual General Meeting*, for those who were not present. Thank you to all the contributors, and to Adrienne for her sterling work, and if anyone would like to contribute an article for a future issue, please let us know. I can be contacted at p.scott@strath.ac.uk.

Enjoy this issue and have a great festive season. The next newsletter will be published at the end of January.

Patrick Scott
Editor

From the Director



On this rather lovely autumn day two Clinic-related things are on my mind. Both have been a long time coming. First is the recent announcement that the Scottish Government has asked the Mediation Clinic to extend our service to another 17 courts. This

means we will be serving 35 of Scotland's 39 sheriff courts, providing free mediation for anyone involved in a Simple Procedure case. The second is a more personal announcement, that I finally submitted my PhD thesis after nine years. I interviewed 24 people, all of whom had experienced mediation either from the Clinic or from Edinburgh Sheriff Court Mediation Service, and learned a huge amount about what our work feels like to our consumers.

The first of these has significant practical implications. The Clinic needs to start building working relationships with sheriffs and sheriff clerks in other parts of Scotland. Although Zoom has made it much easier to conduct mediations anywhere, I don't underestimate the challenge of working in new areas with new people. Trust has to be earned. We operated in Glasgow Sheriff Court for three years before Simple Procedure expanded demand to another three courts; and then for another three years before the rapid expansion prompted by the pandemic and arrival of remote mediation in 2020.

Mediators are at the heart of our work. This expansion should provide additional opportunities for those who would like to do more, and I hope we will be able to forge partnerships with local educational institutions (as we already do with St Andrews in Kirkcaldy). I continue to be impressed at the smartness and flexibility practitioners show in dealing with our existing caseload, and I'm optimistic that these qualities will win round those who are new to, or sceptical of, mediation. We will have to be patient, however. It generally takes a year or two for courts in a new area to gain confidence in referring parties to the Clinic. To help in this we are in the privileged position of being able to recruit a new member of staff. The Service Delivery Administrator will work alongside Pauline, enabling her to devote more time to

these developments. The next couple of years will be fascinating for the Clinic and for mediation in Scotland.

My other preoccupation, the slow-cooked PhD, has implications for the way we do our work. I'll doubtless say more in the coming months, but here are a couple of headlines. My main concern in doing the study was to learn more of unrepresented people's thinking on justice and fairness. I asked them about both, culminating with the key question: "Did you get justice?" I won't give away the answer just yet, but the lengthy pauses by some participants told me this was not a straightforward matter. I began to realise something that had never occurred to me before.

We have tended to stress the fact that in mediation the parties are the decision makers; this is what makes mediation so different from other processes like litigation or arbitration. However, as well as being decision makers they are also decision recipients. Inevitably the other party has a say in the outcome (or there will be no deal). Mediation participants have to put up with something their adversary has had a hand in shaping, and this seems to take the shine off the result. In fact most got a "good enough" result, but did not think it was "absolute justice." Very few gave an unalloyed "yes" to my question. I've come to think this is woven into the nature of mediation. The good news is that most parties were satisfied with the "good enough" outcome, even while feeling a pang of regret that they didn't get everything they wanted.

One other finding concerns the extent to which mediators offer legal or procedural input, or indeed any information at all. This need not be legal advice in the formal sense: it could include explaining the burden of proof, or how to lodge written evidence, or what happens next if the case doesn't settle. Nonetheless, it emerged that the lower risk option was to provide this sort of information. If parties didn't need it or want it, they were nonetheless highly appreciative of the offer. Here's a nice example of the sort of thing I heard:

"They said, look, we can't tell you what we think might happen, cos we don't know, it depends on the judge you get, they might think, oh you've got a fair case there. But they might, they might not agree... if I took it to court, it wouldn't be fairness that would decide, it would be the legal aspects of it which would decide whether I would win my case or lose my case."

When mediators said nothing, however, some parties expressed frustration or saw mediation as a kind of moral chat with no legal content. More troublingly, some thought the outcome plainly unjust but believed the mediators either lacked knowledge or were inhibited by their professional rules from saying anything:

"I would have liked some kind of guidance... that they surely were not allowed to produce, and I think it's, eh, a bit of a shame. Personally, it's just an opinion that they should voice, em, something."

There's lots to unpack in this, but I offer these thoughts as we head into a new and exciting chapter for the Clinic. I look forward to working with everyone in the months to come.

Charlie Irvine¹

Director, Mediation Clinic

¹ ***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 has recently completed his PhD research into mediation participants and their reasons for settling.***

From the Chair



It is that time of the year when the new Clinic Board is formed. We look forward to the contributions that the new Board members will make but are also grateful to the Board members who have decided to step down. Thanks again go to Craig Cathcart, Irene Murray and Elise Schwarz for the

significant contributions that they have made to the work of the Board.

Looking forward to next year, the Mediation Clinic has started planning for our next conference. This will be on Thursday 21st March and will be an online event. Please get that date in your diary. Regarding conferences, Mediate 2023 is taking place on Monday 13th November and is an in-person and online event, being held in Edinburgh and on Zoom. You can sign up on the Scottish Mediation [website](#).

If you have not already heard, we were again winners at the Scottish Legal Awards. Representatives of the Clinic attended this event, which was held in Edinburgh. It is reassuring that the work of the Clinic continues to be recognised in the legal community.

Finally, we are fortunate to be enjoying another edition of *Mediation Matters!*. There is a huge amount of work that goes into producing this excellent publication and we are grateful to Patrick and Adrienne for their editorial input.

Andrew Boyd¹

Co-Chair

¹ **Andrew Boyd completed the MSc in Mediation and Conflict Resolution at Strathclyde University in 2013. Andrew currently works for the Scottish Centre for Conflict Resolution as their Mediation and Conflict Resolution Advisor. Andrew is also on the mediation panel of the Scottish Legal Complaints Commission and is a consultant mediator with Common Ground Mediation. Andrew has been volunteering with Strathclyde Mediation Clinic since its inception.**

Save the date...

Learning through practice

The next Mediation Clinic Conference will be held online on
Thursday 21st March 2024

More details to follow soon...

Clinic News



We are fresh from another win for the Mediation Clinic in the Community Contribution category at the [Scottish Legal Awards](#). The hard work of all the contributors was recognised by the legal community, which

is sponsored by [Frasia Wright Associates](#). The award night held in Edinburgh was celebrated well by everyone who attended.



L-R Frasia Wright (Frasia Wright Associates), Alastair Sharp, Pauline McKay, Andrew Boyd (Mediation Clinic) and Des Clarke (Comedian and Host)

As mentioned in a previous newsletter, we have launched the Ailie Barclay Award in memory of the Clinic's friend and colleague who passed away recently. The award recognises students who have undertaken the most mediation sessions in the Clinic over the past year. We are delighted to announce the first Award winners as Alan Jeffrey and Oyinkro Olobio.

The International Mediation Clinic Network met again in August and saw presentations from the Mediation Clinic and from Toby Guerin, Associate Director at Center for Dispute Resolution, [Maryland Carey Law](#). Toby explained how their Center operated and was kind enough to show results from a recent survey on mediation clinics. The presentation can be viewed [here](#). The [Global Alliance for Justice Education \(GAJE\) Mediation and Negotiation Conclave 2023](#) was organised by the National Law University Odisha (NLUO) Centre for Mediation and Negotiation and took place in August on Zoom and in person. Through Dr Akshay Verma, Co-Director of the Centre who participates in the

International Mediation Clinic Network, I spoke at the event on Zoom on *Introduction to Mediation*. This was a fantastic opportunity to promote the Clinic. It was well attended by students from India, and I look forward to hearing what the NLUO do next.

We are also excited to be offering a work placement to Year 3 LLB students as part of their Work Placement module. Megan Sharp is working in the Clinic one day a week throughout Semester 1 and getting to know our mediators and processes, as well as liaising with the parties. We hope this valuable experience will inspire her to volunteer at the Clinic and take mediation forward in her law career.

Our referrals are still high and an important part of moving the mediation process forward is our Intake Process (speaking with each party in dispute before going forward for mediation). We provide training for Undergraduate and Postgraduate students to assist with this process. Our training is taking place now and any Clinic members who are interested should contact mediationclinic@strath.ac.uk

The additional funding from the Scottish Government is fantastic news and will allow us to expand our service across most of Scotland. We cannot wait to get started promoting our service across the various sheriffdoms.

And finally, we are now working towards our 2024 conference which will be run online this year. We will be looking for volunteers to assist in the organisation and the operation of the event during the day. If any Clinic members would like to be involved, again, please get in touch.

Pauline McKay¹
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, Lothian and Borders Mediation Service and other community organisations.***

A pilot project - update

By Ben Cramer, Tom Scade, Elise Schwarz, Andrew Boyd

In the first issue of *Mediation Matters!* we featured a pilot project which was started in several Sheriff Courts. A few Sheriff Courts were allocated to specific mediators, who were tasked with attending to all the referrals to mediation from that particular court. A year later, we have asked the mediators from those courts to provide an update. Of the original mediators allocated, only Ben Cramer remains, with the new mediators now working with the other courts. What follows is their update on developments in those courts.

Tom Scade – Ayr Sheriff Court

I have been carrying out mediations in the Clinic since September 2021, during my first year of the Master's in Mediation and Conflict Resolution. I did a large number of mediations as an assistant and many intakes, which I found particularly useful. I was accredited as a mediator with Scottish Mediation when I became lead mediator in the Clinic in August 2022.

I asked if I could take on a Sheriff Court mainly to gain further experience in court mediations.

I saw my first cases from Ayr Sheriff Court in January 2023.

In total, 11 cases have been referred to me. I had a planned vacation in Australia for 3 weeks in April and I do not know if any cases were dealt with by others in my absence.

Of these cases one was found unsuitable for mediation due to the Claimant's aggressive and intransigent attitude, and another had a mediation arranged and then cancelled at the last minute due to work commitments of the Claimant, but the Claimant then decided he did not wish to mediate.

- Five have reached a settlement agreement.
- Three have failed to reach a settlement agreement.
- One case is still active awaiting mediation.

Advantages

This method of managing cases has some advantages:

1. The mediator arranges contact with the parties, carries out the intake or pre-mediation, arranges suitable dates for mediation, and then arranges the mediation. This allows the development of a better relationship and rapport with the parties.
2. This also removes significant administrative load from the Clinic Co-ordinator.

3. Any documentation and relevant e-mails are stored on my university SharePoint folder which can be shared with mediators with a university e-mail address. This assists co-mediators and assistants.
4. I keep a spreadsheet of the progress of my cases – when received, dates of contact, when mediation e-mail sent, when mediated, outcome, reflection and summary done, which can be accessed by the Co-ordinator.
5. Over time it is hoped that I will develop a relationship with the Sheriffs and Sheriff Clerk.

Difficulties with this system

1. The court provides minimal information on the parties which includes only name, address, and e-mail address but no information on the dispute.
2. No telephone numbers are provided which prevents quick contact with the parties and I believe disempowers the mediator, who is in their hands regarding timescale of the mediation. The Clinic Co-ordinator has contacted the Sheriff Clerk and asked for telephone numbers to be added to the original court contact e-mail, but this has not happened. We are asked to turn cases around quickly and having telephone numbers is one factor which would help mediators to do this.
3. The process is time consuming due to a combination of sending multiple e-mails to parties, first requesting they phone you to arrange an intake interview and often several telephone contacts to arrange suitable times for mediation. The Clinic is then asked to appoint an assistant or a co-mediator. There follows a telephone contact with them to discuss the case. Then a formal invite to mediate is sent. Not infrequently mediations are cancelled at the last minute due to illness or unexpected work commitments, and the process starts again. This is all, however, work which helps reduce the Co-ordinator's significant workload.

4. Another court mediator has suggested that the process involves about 5 hours of his time. I would suspect it is more than that.
5. There is a question of whether this model is sustainable for all courts.
6. This model may restrict access to cases for other mediators in the Clinic.
7. The assistant and co-mediators miss out on doing the pre-mediation, which I see as the important part of this model. I try to overcome this by having a mini pre-mediation with each party and the mediators before the start of joint sessions.

Positives

I believe this process with the mediator carrying out the intake, in essence a pre-mediation, has significant benefits in building rapport and trust, and I believe the mediator can better prepare the parties for the mediation, such as providing relevant information and advising them on collating their opening statement.

The process can be improved and speeded up.

A middle ground retaining some of the benefits of this system would be for mediators to take on individual cases and carry through the whole process.

I believe direct contact with the Sheriffs and Sheriff Clerk is important and that is my next step. I intend to attend some case management discussions on Zoom, and I am going to visit the Sheriff Clerk in person.

Ben Cramer – Airdrie Sheriff Court

Since July 2022, I have handled thirty-one mediation referrals made to the Mediation Clinic from Airdrie Sheriff Court – approximately one case every ten days. Here is a summary:

- Three cases are currently open.
- Two cases settled with only minimal input from me: in one a consumer received a full replacement and the other involved debt repayment.
- Sixteen cases went to mediation, of which 12-13 reached a settlement agreement either during the session or subsequently. (I'm aware of only one settlement agreement that wasn't enacted to the satisfaction of the claimant, and in this case, they chose to accept a partial fulfilment and drop their claim.)

- Seven involved someone who either declined mediation or was uncontactable.
- In three cases, I was able to facilitate some exchange of information or negotiation: one of these reached a written agreement that later failed; and another may settle before its 'review of mediation' hearing.

Subtracting my three open cases, from the court's perspective I imagine this could be seen as twenty-eight referrals to mediation of which thirteen did not need further input from the Sheriff. (In one settlement agreement, we asked the Sheriff to decide on time to pay, interest and expenses.) This is a settlement rate of just under 50% of referrals. I do not know how many Simple Procedure cases the Sheriff Court receives, what percentage are referred to the Mediation Clinic, or how they are selected – which limits my interpretation of these Airdrie figures:

- 90% of referred cases engaged with negotiation or mediation, of which 50% reached agreement.
- 51% of referred cases agreed to mediation, following which there was a 75% settlement rate.

In preparing this update for the newsletter, I was initially drawn to examine the ten cases that did not get to joint session, wanting to understand more about why people might not want to, or did not get to, mediate. In three of the ten cases, one party was uncontactable – it happened to be the respondent who was unreachable in every case, which of course makes sense given the claim is being pursued by the claimant. In a further three cases, only the respondent declined mediation.

In one case, both the respondent and claimant declined joint session. My impression and memory were that the respondent simply said they were not going to talk to the claimant because they did not like them.

There were also three cases in which the claimant declined.

I think I was drawn to examine these rejections to understand more about the parties' understanding of, and relationship to, mediation. I also found myself thinking that I could improve my practice by responding to participants' resistances to mediation and attracting them to the process so they could benefit. So, what can I learn and how might I change my practice after considering these rejections?

In the first three cases, the respondents did not reply to me. Two of these had the same claimant. In the third I discovered from the claimant that

“court happened without any letter or email send [sic] to me so case was dropped so was complete waste of time, clearly going through the correct route isn't the way to go”.

In each case it's possible that my written correspondence was not received; and possible that it was simply ignored. What might I change? Perhaps there is some wording I could find that would be more appealing to these respondents. How might I discover how mediation can be of value here? What was needed in these cases?

In the fourth case, the respondent's reason for rejecting mediation was simply that there were complications and errors in how the respondent had been named. Although he conceded he was party to the dispute, he had been advised not to mediate, since he hadn't been properly named as a party to the Simple Procedure case. I explained that they might get another opportunity to mediate after the details of the claim had been corrected by the claimant.

In the fifth case, the respondent seems to have been advised by a solicitor not to mediate since they assessed that the claimant was trying to extort money and not reach an agreed settlement. Is this a good reason not to mediate? Might there be benefits from mediation even where this is actually the case? I would say yes, if only for the learning experience and the possibility of reaching a favourable negotiated outcome. Could I have done something better? Perhaps speak with the solicitor. Although in this case, the respondent had been disturbed by the claimant posting material online which named individual members of staff – an indicator, perhaps, of relative unsuitability for mediation.

The respondent in the sixth case replied to me several months after I first made contact. On receiving his emphatically conclusive reply, I simply thanked him, rather than proposing we talk about the situation. If I had received the response much sooner, I might have invited him (out of habit) to do an intake call.

The seventh through ninth cases were ones in which parties declined joint session but wished to convey information and proposals to each other – and in which I ended up accidentally acting as a go-between for a rather open-ended period of time. It's illuminating and humbling to be alongside disputants in the fire of interpersonal conflict, but I found the experience of these cases

unsatisfactory and anxiety provoking because I felt that no settlement, closure or understanding was immediately reached. In all three cases the conflict was influenced by identity and/or deeper social complexities. One involved parties who were previously friends; one neighbours; and one a business relationship over several transactions. How could I have worked with these parties more helpfully? In each case it's possible that my written correspondence was not received; and possible that it was simply ignored. What might I change? Perhaps there is some wording I could find that would be more appealing to these respondents. How might I discover how mediation can be of value here? What was needed in these cases?

Reviewing the tenth case I found, rather embarrassingly, that I had wrongly addressed my reply to the claimant's email rejecting mediation. I'm imagining this was an autocomplete error, or my unconscious avoidance of the case in which the claimant wrote of being subject to 'abuse' and the respondent seemed to me to be a vulnerable party who could expect protection from the court. Whilst I would have preferred to avoid this error, my memory is that the claimant also declined a follow-up call, and I was conscious of not wanting to pursue or pressure them. Double-check mail autocomplete!

I'm grateful for this opportunity to review and present some findings from the cases I've handled over the last year, and want to finish with three positive testimonials I've received from Airdrie participants:

“I found the mediation service very helpful. It supported me in pursuing [sic] what I believed I am entitled to and allowed me to have my say freely, and without interruption. Although a resolution wasn't achieved in this case, I don't believe this is a reflection of the service, which was a very positive experience. [Although mediation didn't work and my court claim wasn't successful] I sold the item privately with full disclosure on its condition for twice the amount [the respondent] offered me [in mediation] so I didn't lose overall”.

“I appreciated your intervention and I did find it very helpful, even if we were not able to reach a satisfactory resolution”.

“[Although we didn't reach settlement, the mediators] set the foundation for a constructive dialogue and were impartial throughout. They certainly helped progress matters along the course of resolution and would recommend their use for disputes of any kind”.

Elise Schwarz – Hamilton Sheriff Court

Since I took on Hamilton Sheriff Court in March/April of this year, I have been referred 15 cases. Six of them were not suitable for mediation, for various reasons.

Of those suitable, six have settled, two resulted in no settlement, and I currently have one case outstanding.

Charlie Irvine (the Director of the Clinic) and I had hoped to have a meeting with the court to discuss mediation in general but were informed there would be a change in Sheriffs in the Autumn, and were asked to wait until the new Sheriffs were in position. I think these changes can account for the slowdown in referrals too.

Andrew Boyd – Dumfries Sheriff Court

I have been the assigned mediator for Dumfries Sheriff Court since March 2023. During that time, I have observed the benefits to the parties, and also to the mediator, of the assigned mediator model.

Dumfries Sheriff Court makes referrals to the Clinic without having had a case management discussion and no court papers are provided. Initially I email the parties to arrange individual Zoom pre-mediation / intake meetings. In my initial emails, I introduce myself as the mediator who will be working with the parties throughout the mediation process. This approach has resulted in a significant increase in the conversion rate, with almost all cases converting. There is little doubt that by building rapport with the clients at these pre-mediation / intake meetings, there is the opportunity to start 'mediating' at an earlier point in the process, than if an intake was carried out by someone else.

Having an assigned mediator also results in a higher settlement rate, again I believe as a result of the earlier start in the process of active mediation and the greater opportunity to build mediator rapport.

So, there are clear advantages to the assigned mediator model, but it does involve a much greater time input by the mediator, which not all Clinic mediators are able to provide. On a personal note, apart from the benefits to the parties and despite the greater time involved, I find the assigned mediator model much more fulfilling.

What can the construction industry learn from the Clinic mediation process?

By Lisa Cattnach¹



For over 30 years I have worked in the construction industry as a Quantity Surveyor and for more than 20 of those I have been actively involved in the dispute resolution field, primarily acting as an Adjudicator or

representing parties in adjudication. As a practising Adjudicator and Accredited Mediator, I consider there is a place for various methods of dispute resolution in the construction industry. Whilst adjudication is an excellent form of ADR for certain disputes, over the years my interest in mediation has grown and with it my curiosity as to why the construction industry has not embraced this process. The nature of the dispute and the parties' attitudes to one another can be determining factors in respect of the appropriate method of dispute resolution. In 2014, I undertook the RICS mediation training course and became an Accredited RICS Mediator and envisaged a steady flow of mediations. However, that proved to be more challenging than anticipated.

Whilst the construction industry does use mediation as a form of ADR, and I have been involved in a number of cases, from my personal experience there appears to be a real reticence to embrace mediation. From my own perspective, I consider that mediation is a process that the construction industry should be positively engaging with, working together to resolve disputes and building an industry that is less contentious for generations to come. We will never get rid of disputes; they are a fact of life. However, we should be looking at how best to resolve these when they do arise. If the impact of Covid has taught me anything, it is that time is precious, and life can change in a flash, a reality over which you have no control. If there is a more time and cost-efficient way to manage disputes and prevent the breakdown of working relationships, I for one would actively encourage parties to explore all options.

I have been working with the Mediation Clinic for over 18 months. During this time, I have been involved in a variety of mediations from building related matters to

tenancy issues. The various mediation outcomes have got me thinking about what the construction industry could learn from the process being carried out by the Clinic. It is quick and cost effective, and it is free. However, what if a form of mediation of this nature could be provided for low value disputes in the construction industry for a fixed fee?

At present, if a sub-contractor has a low value dispute of, say, below £20,000, it is limited in its options for resolving the dispute if negotiations break down. Whilst the Construction Industry Council (CIC) and others introduced the 'Low Value Disputes Model Adjudication Procedure 2nd edition' (LVDMAP) for disputes under £100,000, it is still a 28-day process and the fixed Adjudicator's fee ranges from £2,000 to £5,000 depending on the value of the dispute. By way of example, a dispute with a value of £20,000 would attract an Adjudicator's fee of £2,500 and that does not include any cost the parties may incur getting advice in respect of the dispute. The Adjudicator is also bound by the terms of the contract when reaching a decision in respect of the dispute, whereas, in a mediation, the parties are not. Furthermore, once the parties commence the adjudication process, they are handing their dispute to a third party to decide it and they no longer have control over it, unlike in a mediation where the parties are in control of the outcome.

In the mediations that I have been involved in over the years, one of the key benefits of the process, in my opinion, is that parties can be creative in their solutions. I think that this could be beneficial in small value disputes in the construction industry, where cash flow is so important. Parties are able to create a payment plan or an alternative to payment, such as goods in lieu of payment. This could allow disputes to be resolved amicably with less time and money spent on dealing with the dispute for all involved.

Another takeaway that I have a great appreciation of from working with the Clinic, is that a number of disputes are based upon a misunderstanding of the facts or the events by those involved. When parties are brought together by the mediator these misunderstandings or miscommunications can be clarified. Often that is enough to unlock the dispute and

parties can then reach a settlement. I see the same with some disputes in the construction industry. The construction industry is notoriously contentious with differing parties seeking to create confusion in an attempt to gain the upper hand. In fact, I was at a meeting recently when I explained to a party that I struggled to follow the presentation of their claim. I was advised that this was done deliberately to cause confusion to the other side! That confusion can result in parties spending money on consultants' fees unnecessarily and a dispute being protracted. How much better would it be if parties could refer the matter to a model of mediation similar to that which the Clinic provides? The confusion would be cleared up quickly and hopefully the dispute would be unlocked for a settlement to be achieved.

The timescale is another key component in small disputes. As mentioned above, the LVDMAP is still a 28-day process. The mediations carried out by the Clinic are scheduled quickly and are usually concluded in between 2 to 4 hours. For a small subcontractor, a quick resolution is what they require to get matters resolved. Surely this is a better proposition for resolving a suitable dispute.

Another key learning point for the construction industry is 'it's good to talk'. Nowadays, I think there is a tendency for people to hide behind emails rather than picking up the phone and having a discussion. Invariably you can end up in ping pong emails that get nowhere in resolving a matter and simply take up time and cost money. Whilst a phone call may not necessarily resolve the dispute, it allows parties to keep a better line of communication open and as such, more chance of a matter being resolved. Again, the mediations carried out by the Clinic bring parties together and provide them with a monitored and confidential setting to discuss their dispute and possible solutions. There is no hiding behind emails.

Personally, I also feel with mediation there is more chance of parties maintaining relationships following resolution of the dispute, as they have created the settlement. When the matter is passed to a third party to resolve, in my experience, parties become more entrenched, and relationships are often irrecoverable. More than ever, given the challenges of securing future profitable work, maintaining relationships with clients, contractors, subcontractors or consultants is important for future working.

As I have already stated, the construction industry is notoriously contentious, and such disputes are not going

to be eradicated. However, finding a better, more suitable way to resolve a dispute is an important step forward in making the industry one that is appealing to work in. There is no 'one size fits all' method for resolving a dispute, and mediation will not be appropriate for all disputes. However, if there was an effective, quick, low-cost model of mediation available for small value disputes, I think this could be a good stepping stone to encouraging the construction industry to embrace mediation as an effective form of dispute resolution. In my opinion, the construction industry could learn a lot from the mediation process being conducted by the Clinic, which in turn would bring benefits to the industry.

¹ ***Lisa Cattanach is a Chartered Quantity Surveyor and is a Director at Construction Dispute Resolution Ltd. She is an Accredited RICS Mediator and a Registered Practitioner with Scottish Mediation, and a lead mediator with Strathclyde Mediation Clinic. Lisa also acts as Adjudicator and is a registered Adjudicator with the RICS in Scotland, the RIBA, CI Arb (Scottish Branch) and UK Adjudicators. Lisa is also an Accredited RICS Expert Witness.***

When mediation might cause harm: reflections on the Lucy Letby case

By Lorna Kelly¹



Along with the rest of the country, I was horrified by recent coverage of the Lucy Letby trial and her subsequent conviction (*"Nurse Lucy Letby found guilty of murdering seven babies"*).² Having worked in the NHS throughout my working life, I read with

discomfort the revelations after the trial about the missed opportunities to stop her actions. And as a fledgling mediator I was particularly struck by an emerging story concerning mediation.

In the aftermath of the court case, there was a lot of attention paid to how the concerns of the paediatric consultants in the department were dealt with. Two of the consultants described how they were required to have a mediation session with Lucy Letby and were forced to apologise. They were particularly aggrieved at how their valid concerns had been somehow diminished and cast as a relationship dispute. The basis of their concerns appeared to have been overlooked in favour of getting everyone back to work.

While of course this is an extreme example on many levels, it left me wondering what it must have been like to be the mediator in that case. What prompted the decision to mediate? What did the mediator know about the background and wider context of the case? Did the Trust's discipline and grievance process enable a 'bad actor' to manipulate it for their own ends by a counter claim of victimisation? Did a desire for early or informal resolution mean that issues weren't robustly investigated? While all these issues may become clearer in the forthcoming public inquiry, they raise questions for us now which are relevant to contemporary ethical considerations in mediation, including the types of cases we may see through the Mediation Clinic: power, process, apology and knowing when to stop require further consideration.

Power

Power imbalance is a key theme in mediation, and we are encouraged to be alert to potential power

imbalances both in deciding whether mediation is the best option, and within mediation itself. This case challenges the assumptions we may make about the balance of power. On the face of it a group of consultants may seem to have greater power than a nurse: as a more powerful profession and as a group of older, more experienced people - mainly men - in conflict with a younger woman (*"they treated it as 'a case of doctors picking on a nurse'"*).³ It reminds us to look beyond the superficial, and to understand the ways in which parties to mediation may manipulate the process or draw on power from other sources (in this case senior managers, and the threat of referral to professional regulators).

Process

Mediation is often part of, or an alternative to, a wider process. Whether that is an employment process, or legal process such as the majority of cases in the Mediation Clinic. This case raises considerations of when mediation is appropriate, and whether it should be voluntary or mandatory. Commentators have already noted, with the benefit of hindsight, that this particular case wasn't suitable for mediation at all given the seriousness of the concerns raised.⁴ While mediation has the potential to bring about a swifter and more lasting resolution, and enable underlying relationship issues to be addressed, the challenge when used as part of HR or legal processes is that it may be done instead of investigation of wrongdoing. This is why mediation is not advised, for example, where there is a history of abuse. When mediation is recommended or mandated as part of another process, we as mediators are dependent on there having been robust decision making to determine that mediation is appropriate. Mandatory mediation is a particular concern in this regard, as it may undermine the consensual nature of mediation and also creates the risk of mediation being used as a form of punishment or deflection (*"there was a theme coming through of clinicians raising concerns and 'being put into mediation'"*; *"it's almost like weaponising that process"* and *"it seems to be a way of delaying action"*).⁵ So, as mediators we need to be alert to that risk and understand where the impetus to mediate has come from.

Apology

“To be instructed to send a letter of apology to Lucy Letby was just flabbergasting.”⁶ There was a visceral sense of injustice from the consultants at having been forced to apologise to someone who later turned out to be a mass murderer. The power of apology is a key tool in mediation, but this case reminds us to consider what makes an apology meaningful and that a forced or fake apology can make matters significantly worse.⁷ In my own experience of workplace mediation, one of the things that can make people reluctant to join mediation is a fear that they will be made to give or accept a meaningless apology and that none of the underlying issues will be resolved; this case will undoubtedly influence people’s preconceptions of what mediation is like.

Knowing when to stop

Would any of us have called a halt to a mediation in these circumstances? The voluntary nature of mediation, and the safety net of reverting to a court or other formal process, is a key strength of mediation. However, there may still be perceived pressure within mediation to reach a settlement. As a mediator it can feel like a failure to end a mediation without settlement; parties may feel that pressure too, either because it has been suggested by the court or because they just want it to come to an end. Do we have the courage as mediators to recognise when a mediation should not continue, and would be better dealt with through another process?

The role of mediation in the story of the Lucy Letby case taps into an underlying fear that many mediators will have about whether some of the most vocal critics of mediation may be right. Are we guilty of looking for settlement at any cost, and not a ‘just settlement’?⁸ Are there risks that significant wrongdoing will go unchallenged or unpunished? It prompts us to be alert to the context in which we are asked to mediate, who has instructed or suggested the mediation, and the appropriateness of mediation. At the heart of mediation is a sense of voluntarism and self-determination, that both parties enter the process willingly and seek to reach a solution which they own. So as mandatory mediation expands through court processes and in contexts like workplace mediation, we need to continue to consider what this does to people’s expectations of mediation and ability to participate freely. And to be prepared to stop when it does not feel right.

I will look out with interest for the inquiry into the Lucy Letby case and in particular what it says about the way concerns were managed and how mediation may have become part of the problem; and in the meantime, I will continue asking myself a lot of questions to be sure I’m alert to the risks of being caught in the middle as a mediator.

¹ **Lorna Kelly is at present completing her MSc in Mediation and Conflict Resolution at the University of Strathclyde.**

² <https://www.bbc.co.uk/news/uk-england-merseyside-65960514>

³ <https://www.theguardian.com/uk-news/2023/aug/18/lucy-letby-whistleblower-babies-would-have-survived-if-hospital-had-acted-sooner>

⁴ https://www.linkedin.com/posts/jenefervivings_lucy-letby-without-doubt-this-is-a-horrific-activity-7098749143166144515-3_Mr/

⁵ <https://www.bbc.co.uk/news/uk-england-merseyside-66668023>

⁶ <https://www.theguardian.com/uk-news/2023/aug/19/doctors-were-forced-to-apologise-for-raising-alarm-over-lucy-letby-and-baby-deaths>

⁷ See, for example, Charlie Irvine ‘The Proposed Apologies Act for Scotland: Good Intentions with Unforeseeable Consequences’ (2013) *Edinburgh Law Review* 17 (1) 63 on the risks of inadequate apologies and the criteria for a good apology

⁸ Genn H, ‘What is Civil Justice For? Reform, ADR, and Access to Justice’ (2012) *Yale Journal of Law and the Humanities* 24(1) 397

Patrick's Ponderings by Patrick Scott¹

A few points to ponder



This column is about my ponderings. I don't necessarily have the answers, but I pose points for consideration and possible later discussion. In this column I want to ponder on three points.

The first point is the status of settlement

agreements. I am sometimes asked by parties what the position will be if a party fails to comply with the terms of a settlement agreement. Whilst mediators are not supposed to give advice, it does appear to be a valid question. After all, who else can a party pose that question to?

I tell parties that the settlement agreement is a valid, binding and enforceable agreement. In law, a novation takes place. In other words, the original debt is replaced by a new debt. This has legal implications, such as when prescription begins to run. What if a party fails to comply with the terms of the agreement. Ideally, the aggrieved party should be able to go back to Court and ask the Court to make the settlement agreement a decree of the Court. It is for this reason that I always insert a clause in the settlement agreement stating that the Claimant will have the case dismissed at Court once payment has been received. That keeps the action pending, until performance has been completed.

Recently, however, I had an interesting matter. It was in fact the Claimant who had to perform in terms of the settlement agreement. The facts, in brief, were that the Claimant had overpaid the Respondent, but would owe one further payment once the Respondent had completed his work. The settlement agreement provided that the Respondent would repay an amount of money to the Claimant, complete the work and, once complete, the Claimant would pay him the balance of the contract price. Thereafter, the Claimant would have the claim dismissed. However, in this matter the Claimant was a tad naughty. The Respondent refunded to her the overpayment and completed the work. Instead of paying him, she had the claim dismissed at Court. This precluded the Respondent from approaching the Court to enforce the agreement. So, he had to institute a fresh action and sue her on the settlement agreement.

This brings me to the second point to ponder. Payment of an agreed settlement amount in instalments. Let us assume a settlement in the amount of £1200, payable in instalments of £100 per month. The Respondent fails to pay the first instalment. The default is in respect of £100. All that a Court could enforce is payment of an amount of £100. The Clinic's Agreement to Mediate prior to recent amendment gave the Claimant the option of either enforcing the settlement agreement or disregarding it, in the event of default. That provision has now been removed. One way to deal with this is by way of including an acceleration clause in the settlement agreement. An acceleration clause provides that, in the event of one instalment not being paid, the full amount of the indebtedness immediately becomes due and payable. This enables a Claimant to seek payment in full in the event of default.

My final point to ponder relates to the presentation of evidence. In another recent mediation, a Claimant in England will need to present evidence at the hearing from several couriers to prove delivery. To get the couriers to Court will be a major issue. During reality testing, I raised this with the Claimant. The response was that the evidence would be presented by way of witness statements. This led to me pondering whether that would be permitted. Whilst I have no doubt that witness statements should be permitted in certain circumstances, the problem with a statement is that, if the evidence is in dispute, the veracity of the statement cannot be tested. The Respondent cannot cross examine a witness statement. I wonder whether witness statements would be permitted and, if they were, what weight the Sheriff would attach to that evidence.

¹ **Patrick Scott completed the LLM in Mediation and Conflict Resolution course at Strathclyde University 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 SLCC Panel of Mediators and volunteers as a lead mediator with Strathclyde Mediation Clinic. He has also recently been appointed to the Board of Trustees of Scottish Mediation.**

Research conversations....

Patrick Scott¹ discusses his LLM dissertation with Adrienne Watson²



Members of the Mediation Clinic have been researching diverse aspects of mediation for many years.

This series of interviews looks at some of the research our students and established academics have undertaken. We will be discussing the lessons that have been learnt, the impacts of the research and recommendations for those who are yet to undertake their dissertations.

Our first interview is with our Editor, Patrick Scott, who completed his LLM dissertation, *Mandatory Mediation: Golden Goblet or Poisoned Chalice?*³ in 2018.

Mandatory Mediation: Golden Goblet or Poisoned Chalice?

Key findings:

- *Mandatory mediation extends the parties knowledge of mediation.*
- *It promotes mediation as a dispute resolution process.*
- *The parties are generally very satisfied with the process.*

What brought you to the Mediation and Conflict Resolution LLM course at Strathclyde?

It wasn't my intention to study mediation but, in 2016, whilst practising as an advocate in South Africa, I was persuaded by a colleague to register for a 5-day mediation course that was presented by Mediation in Motion, a mediation group established by another colleague of ours. I had absolutely no idea that it would lead to me becoming a mediator.

Then, in 2017, I moved to Scotland. I investigated whether I could carry on practising law within the Scottish

system. In South Africa, I was the equivalent of a King's Counsel, but in Scotland my qualifications were not recognised. I would have had to write a number of exams, undergo pupillage and commence practice as a junior advocate.

At this time, I reflected on the mediation course that I had done and looked into my options. Although I had passed the course, I didn't have any practical mediation experience, and I wasn't able to meet the requirements for registering as a mediator with Scottish Mediation. Whilst searching the internet for ways of gaining experience, I came across the Master's course at Strathclyde. The new academic year was about to start, so I had to make a very quick decision and I wasn't sure whether I would be accepted on the course as I hadn't studied since completing my LLB in 1982. Fortunately, after finding all the necessary paperwork and submitting my application, I was accepted onto the course just in time to attend the first class.

What has your involvement with the Mediation Clinic been?

Shortly after my first class, the Clinic held its AGM which I attended, and I was immediately keen to get involved. Over the following years, as well as being a mediator, I served on the Board and for three years I was the Chair.

In 2019, I also started what later became a pilot project, where I took on the administration of all referrals to mediation from the Kilmarnock Sheriff Court. I administer the cases referred by the Sheriff and work with the Clinic's assistant mediators to help the parties resolve their disputes. The Covid-19 pandemic arrived a few months after the start of this project, which put an end to in-person mediations. Fortunately, we successfully moved the mediations online and this project has now been extended to other Sheriff courts across Scotland.

Since 2022, I have also been the Editor of this newsletter for the Clinic.

When did you start planning your LLM dissertation and how did you decide on your area of research?

I started thinking about it quite early on in the course. I suppose I was always going to write something related to the courts because of my legal background. I was

interested in the court-referred mediation which the Clinic does and was particularly drawn to the concept of mandatory mediation. While quite a lot had already been written about mandatory mediation, I particularly wanted to explore what the parties think of this – how satisfied are they with the process?

What research methods did you use and why?

I thought about interviewing mediation parties to obtain their views, but I didn't think I had enough contacts at the time to do this successfully. So, I concentrated on studying the literature. The university's online library was a great resource which I miss having access to since finishing my studies.

Did you encounter any particular challenges, if so, how did you overcome them?

I found that there weren't many studies, surveys or statistics relating to the parties' satisfaction with mediation. While I did find some good papers, I had to content myself with some fairly old studies. Also, the geographical spread of the literature was concentrated in America, but I did manage to find useful articles particularly from the UK, Canada, the Netherlands, Malaysia and Russia.

What did you gain from your dissertation?

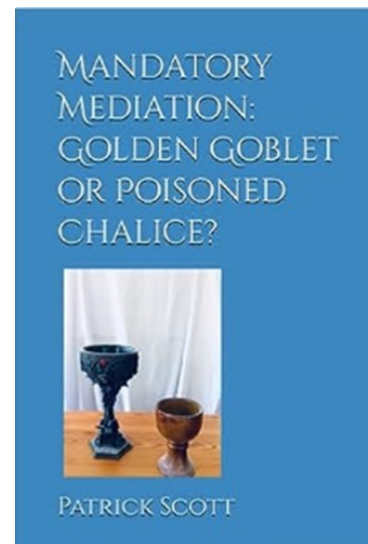
My research satisfied me that mandatory mediation works; it was comforting for me to feel that I was participating in a positive scheme. I think I would have felt differently if I had come to the conclusion that mandatory mediation is a poisoned chalice which should not be inflicted on the parties.

The dissertation also gave me a good perspective on how parties think, and that has often helped me to deal with parties over the years.

If you were to do your dissertation now, would you change anything about it?

If I did my dissertation now, I would probably send out a questionnaire to parties to get first-hand feedback about their mediation experiences. I have now mediated about three hundred matters for the Clinic and would have a better source of information to draw on.

In my mediation practice, I generally request feedback from the parties. I am pleased that their responses generally support my dissertation findings that parties, who would have declined mediation without the Sheriff's direction, have been happy with the outcome.



How did you manage the work for your dissertation and what advice would you give to students who will be working on their dissertations next summer?

I started reading extensively around the subject very early on. I was travelling a lot to classes as I live on the Isle of Arran, so I had plenty of time to read around my dissertation topic, in total I probably read about 400 articles!

I decided to treat my dissertation as a 6-month full-time project, which worked well for me. I tried to work for eight hours every day from Mondays to Fridays, as I felt that was the only way I would be able to get through all the work and do a proper job.

The supervisors are able to provide feedback on one chapter and I found that very helpful in giving me the confidence that I was heading in the right direction.

I would also advise students not to leave the work until the last minute - if you run out of time, you can't make it up and your only option will be to cut your research short.

You recently published your dissertation, what led you to do this?

I have been asked for copies of my dissertation over the years and I wanted to send something more professional than a basic Word document to people making the request.

I was also hoping that it would be more widely read. In particular, the dissertation's findings are very relevant to members of the Mediation Clinic and the Sheriffs in Scotland. I hope that Sheriffs who read it will feel more confident about compelling parties to attend mediation.

How did the publication process work and would you advise others to follow a similar route?

At the time, my wife had published a book through Amazon, and I realised that it was quite an easy process and absolutely free of cost. As I didn't need to make any editorial changes to my dissertation, it was simply a matter of putting the text into the Amazon templates, which took less than a day to do. I would recommend that anyone who has written a good dissertation should consider publishing it.

¹ ***Patrick Scott completed the LLM in Mediation and Conflict Resolution course at Strathclyde University 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 SLCC Panel of Mediators and volunteers as a lead mediator with Strathclyde Mediation Clinic. He has also recently been appointed to the Board of Trustees of Scottish Mediation.***

² ***Adrienne Watson became an Accredited Mediator in 2016. She recently completed the MSc in Mediation and Conflict Resolution at the University of Strathclyde. Adrienne volunteers as a mediator with Strathclyde Mediation Clinic and is Assistant Editor of the Mediation Matters! newsletter.***

³ Scott, P (2023) *Mandatory Mediation: Golden Goblet or Poisoned Chalice?* Available at: [Mandatory Mediation: Golden Goblet or Poisoned Chalice?: Amazon.co.uk: Scott, Patrick: 9798856207483: Books](https://www.amazon.co.uk/dp/9798856207483)

Aunt Minerva's Agony Column

By her earthly intermediary Alastair Sharp¹

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 another query from 'Worried' of Kinlochsporrán. The names and some of the facts have been changed for confidentiality purposes.

TODAY'S PROBLEM

Dear Aunt Minerva

It's me again from Kinlochsporrán. I seem to have a bit of a sticky problem. We all love our porridge in Kinlochsporrán and it is believed that it was over the hill in Glenspartle where the original porridge spurtle was invented.

Worried, From Kinlochsporrán

The Background

As everyone will know, the World Porridge Championship is held annually at Carr Bridge in the Cairngorms and attracts entries worldwide. Agnes McGonnagal was due to attend to represent our community.

Much enthusiasm was engendered in the village and Angus who was Agnes' partner, arranged with Duncan, the owner of the only coach in the area, to charter it for a round trip to Carr Bridge on the day Agnes was to perform. Duncan was at first a little reluctant as he'd made a provisional arrangement to take the junior school shinty team to the semi-finals of the regional tournament at Fort William. However, he was persuaded and the deal was concluded over several glasses of McSporran 15-year-old. The precise conversation between them is of some relevance to the mediation as will appear hereafter.

The great day approached, and Agnes was milking the family cow, Matilda, when disaster struck. The milking stool gave way and Agnes collapsed under Matilda who promptly sat down on the distraught Agnes, and both had to be rescued by Angus with the help of the family

Clydesdale, Hercules. The doctor and vet were called, and bedrest and restoratives were recommended.

This meant that Agnes could not go to the Championship and the villagers decided that there was no point in them going. Unfortunately, Angus had not thought to ask them to pay for their tickets in advance. Duncan tried to resurrect the shinty team trip, but they had already arranged alternative transport. Duncan asked Angus what he was going to do about it and Angus shrugged his shoulders and offered him a large malt to make up for it.

Duncan was not content to let matters rest there. He claimed there was a contract with Angus to hire his coach and he wanted payment, especially since he had turned down the trip with the shinty team. Angus retorted that the fee was going to depend on how many villagers came on the trip and as none did then nothing was due. Duncan disagreed and said that, at the very least, he was due the hire cost of the shinty trip, which was his normal hire for one day, and the extra due to the anticipated full coach was the bonus which caused him to drop the shinty one. This conversation ended acrimoniously with Angus snorting "you'll get nothing off me" and Duncan grunting "we'll see what the Sheriff thinks then".

Duncan initiated a Simple Procedure Claim for £1000 in the Kinlochsporrán Sheriff Court based upon a verbal contract that Angus had agreed to pay his normal hire fee of £500 plus a further £500 as an agreed bonus, as he had guaranteed a full coachload. Angus defended by claiming that the deal was dependent on the coach being full and that as no one went on the trip he owed nothing. The Sheriff paused the case for mediation and the parties were given my name, and I have had preliminary discussions with both parties over the telephone.

The Questions

1. Duncan has been making inquiries as to Angus' background and has discovered that he left Glasgow in a hurry, having been involved in dubious drugs offences but nothing was ever proved in court. Duncan wants me to use such information to discredit Angus either by me suggesting to Angus that he was involved in the drugs scene or by letting him do so in the joint session. Should I do one or the other?
2. Agnes is now fully recovered (and the milking stool is repaired) and wants to know how she can help as she doesn't want acrimony in the village. She has offered to make porridge for all the villagers who were to have gone on the trip every Sunday for a month, and for three months for Duncan and his family. How do I deal with this kind offer?
3. The shinty team won its match and are now in the finals. The President of the Shinty Club wishes to restore harmony in the village as two factions are developing. He proposes Crowdfunding to compensate Duncan for his loss. He has told Duncan and Angus of his idea. Should I encourage this and if so in what manner?

Answers

1. No. Firstly these are unproven rumours, and you should never use such, either yourself or by allowing a party to use them. Even if they were established by proven convictions, it is not the function in a mediation to test the credibility of evidence. That may be a matter for the hearing before the Sheriff but not at mediation level.
2. This is indeed a very kind offer. It is, however, outwith the scope of the mediation. As Agnes is not a party to the litigation, she cannot be a formal part of a resolution. However, it indicates that there is good will on Angus' side which may percolate through. There is no reason why Agnes should not let the community know of her kind offer provided it is not linked to part of a settlement. If everyone has their

snouts in Agnes' porridge trough, it might engender an atmosphere of peace and reconciliation which could beneficially influence the actual parties.

3. An interesting proposal this. Again, outwith the actual case and cannot be used as a bargaining factor. If, however, it was successful and Duncan felt financially satisfied, it might help. It is thinking outside the box, which is what we encourage, but you must tread very carefully. It cannot be part of a settlement between the parties. It could only be used as a reason for Duncan discontinuing the claim. One problem could be that it lets Angus off the hook, which might rankle Duncan. You cannot propose it but you could ask the parties whether they would like to defer any mediation to see what happens. If they both agree, then revisit the matter after an agreed period of time and the Sheriff can be asked to continue the pause correspondingly.

Good luck Worried.

Aunt Minerva



Photo by [Markus Spiske](#) on [Unsplash](#)

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

Aunt Minerva's Agony Column, Mediation Matters!

Scottish Legal Awards 2023

By Alan Jeffrey¹

In high school I won an award for ‘charitable giving’ when I organised a sponsored silence in honour of Children in Need, encouraging a dozen or so of my peers to refrain from speaking for a day. As an adult, it occurs to me that I received this award not for the amount of money raised (certainly less than £100), but instead I was being celebrated for providing the stressed and fatigued state schoolteachers with a day of relative calm. This was my last brush with adoration, having not been gifted an award since that day at 15 years of age, or indeed been invited to watch others deliver overly-long speeches at their own glitzy celebrations.



That was, of course, until Friday the 29th of September 2023 when I was invited by Pauline and Charlie to join their table at the 20th Scottish Legal Awards at the Edinburgh International Conference Centre. I like to think this is because I have been a tremendous asset to the Mediation Clinic over the past year, but I have my suspicions it has more to do with my perceived lack of sociability making me available to attend on a Friday night, and the event being held less than a mile from my home. Either way, it was nice to be invited.

It was an especially nice event to be invited to due to the Clinic’s nomination for the Community Contribution Award, a prize the Clinic has been very fortunate to



either win or receive a highly commended nod in the past few years. Surely if you're going to win one of these glitzy prizes this is the one to win, given the air of altruism that comes with it.

A quick sojourn to the pub before the event saw me introduced to Alastair and his lovely wife Anne, both dressed beautifully for the occasion, but a special shout-out to Alastair’s red tartan troosers. In the cosy confines of the pub, I was also reunited with Pauline, Patrick, Andrew, and James who is just beginning his second year on the MSc and regaled us with his fascinating former work in China – I recommend you buy him a pint and grill him on this at some point! Speaking of stories of past lives, Patrick was asked no less than five-thousand times during the evening “*Why did you move from South Africa to Arran?!*” and I watched with humour as his initial generosity of spirit to tell the story waned through the evening. Patrick transitioned from storyteller to book-seller through the course of the evening, directing people to his wife’s book, *With Sunshine Comes Shadow*, (available on Amazon) to tell the story in a deeper more thoughtful way than could be gleaned over a pint and loud music. In all seriousness, it looks like a fascinating and bittersweet read that would answer that question and more.

A notable absence from the event was our Director himself, Charlie Irvine, who could not be in attendance due to having to submit his thesis a few days later. Whilst he was deeply missed there were several comments made, I shan’t share by whom for I don’t want to out myself before my dissertation mark is back, that really, as the head of a University course he shouldn’t leave things to the last minute, and he should have been prepared weeks ago! But I wouldn’t have the guts to say that out loud, or indeed in writing...

It was then time to walk down Morrison Street to the venue, a veritable catwalk of formality as we swished down the road in our kilts, dresses and tuxedos. At the venue, which was filled with a bevy of model-like lawyers in beautiful outfits, I was introduced to Carol and Elaine whom I had not met before, and though I wasn't able to speak with them as much as I would have liked, seemed very lovely. Our group was then completed by Eunice, who also just having completed her dissertation, was ready to enjoy a nice relaxed night out!

Conversation flowed nicely over dinner which was Scottish smoked salmon (****), slow cooked beef (***) and honey crème brûlée (*****). I discovered that Pauline has worked for Strathclyde for 33 years(!), Andrew has holidayed in the same place every year for about as long, Eunice has a YouTube channel dedicated to conflict resolution, Anne and Alastair's daughter is doing amazing things in community theatre down in London, Patrick supports any British rugby team over his native South Africa and James was deeply upset by this fact, remarking, "*Even England!!!*". Sadly, I learned very little about Carol and Elaine as I was at the opposite side of the table and didn't make the effort I should have. However, they seemed to have a great time entertaining and being entertained by Alastair, Anne, Patrick, and James.

Then, having fed on good food and good banter, it was time for the award ceremony. The real reason we had all dragged ourselves away from Netflix, pyjamas and takeaways, had begun, hosted in genuinely amusing fashion by radio DJ Des Clarke, whose use of vulgar language contrasted nicely with the formality of the occasion. We didn't have long to wait either, as the Community Contribution award was up first. With 11 phenomenal nominees, the odds were not necessarily in our favour. However, due to the outstanding calibre of the nominees, the judges had decided that two organisations deserved the win, and we were delighted when the first name read out...was ours! We had won the first award of the evening, and Andrew, Alastair, and Pauline took the stage to accept the award, have their photo taken with the host and enjoy their few minutes of fame. As they returned to the table, we all took turns to have our photo taken with the slab-like award, a heavy brick, potentially a good murder weapon for an updated version of Cluedo, and take a little bit of the credit for ourselves/our LinkedIn profile.

The award ceremony went on for another hour and it was nice to see how genuinely people seemed to be excited about being nominated and/or winning. It challenged my attention span to sit through the whole thing, a



consequence of our win being announced first, but I managed it without too much fuss as it was a fairly well-paced event. However, a sign perhaps that the LLM/MSc could play a valuable role in bringing in new fresh energy to the Mediation Clinic was evidenced by the fact that the majority (perhaps all?) of us left the venue for our beds as soon as the awards concluded, choosing to skip the music and drinks that would follow.

The highlight of the night though was surprisingly not from the event itself but occurred on the journey home, as I, a non-drinker, drove Andrew and Patrick back and we spotted a badger in the middle of the road! (alive, I may add). This was the first badger sighting for me and completely overshadowed the win, for which I do not apologise.

All that is left to say is a huge congratulations to all the students, staff, Board members, lead, and assistant mediators at the Mediation Clinic whose hard work and time made the win possible. We all get to share a little in the victory of the night and I'm sure if you'd like to get your photo taken with the monolithic slab of an award, Pauline can facilitate that!

¹ ***Alan Jeffrey has just completed 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.***





University of Strathclyde Mediation Clinic

Annual General Meeting 10th October 2023

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The **Strathclyde Mediation Clinic Annual Report 2023** is available [here](#).

Introduction from the Director

Welcome to our Annual Report. 2022-23 has been another busy year for the Mediation Clinic, as you can read below. We continue to provide an important service to the Scottish justice system, helping largely unrepresented people work out practical resolutions to their disputes. The Scottish Government's continued (and increased) funding tells us how much that is appreciated by those responsible for it. At the same time those using our service have provided us with more and better feedback than ever, and I recommend reading their detailed comments in Appendix 5. We also continue to win awards, and I was delighted to learn that the Clinic won the Community Contribution Award at the Scottish Legal Awards last month.

At the same time the Clinic is part of a large university that aspires to be the "place of useful learning." Education is central to what we do, and it has been a huge pleasure to see generations of students, many of them now practitioners, build their skills and confidence working with real people on real cases. We continue to receive strong support from the Law School and the HaSS faculty.

In the pages that follow you will find a report from our Chairs, Alastair Sharp and Andrew Boyd; my own detailed report; one from our Coordinator, Pauline McKay; a new strategic plan; client feedback; and lots of numbers for the nerdy and interested. In case you are neither of those things, I will summarise some headlines:

• Referrals received from courts:	303
• Cases mediated:	173
• Cases settled:	117 (68%)
• Estimated saving to courts:	£117,096
• Commonest case types	Goods and services, unpaid bills
• Consumers v non-consumers	142 (41%) v 204 (59%)
• Unrepresented v represented	310 (90%) v 36 (10%)

I am also honoured to announce the Ailie Barclay award for the student who completes the most cases in a year. More on this in my report, below. I'd like to dedicate this Annual Report and our AGM to her memory.



Charlie Irvine
Director, Mediation Clinic

Chairs' Report (2021-2022)

We welcome all members of the Clinic to the Annual General Meeting of 2023 which has been an eventful year. We have continued the approach of having Co-Chairs of the Clinic as it seems to work for both us and the Clinic administration itself. We hope that the general membership also agrees. The major workload does of course lie with Charlie Irvine as our Director and Pauline McKay as our Co-ordinator. Each performs the miracles often required whilst dealing with the University authorities and Government departments.

You will have their respective Reports at hand which demonstrates this. Charlie's Annual Report is a comprehensive document including all relevant and vital statistics demonstrating our progress over the year. We thank them both for their invaluable efforts on behalf of the Clinic. We also would wish to thank all members of the Board including our new members since the start of last year Eunice Olatunji, Oyinkro Olobio and Andrew Reid, and our three departing members after long and industrious service, Irene Murray, Elise Schwarz and Craig Cathcart. We also thank our team of Intake Workers who are a mixture of Undergraduate and Post Graduate Students.

The Clinic is dependent on such volunteers to continue to progress and develop and we already have a number of candidates keen to take their place. As can be seen from the Agenda the election of officer bearers is to be carried over to the First meeting following the AGM in accordance with practice. We would however like to thank Irene in particular for her sterling work as Secretary and Tom Scade for his equally important endeavours as our Treasurer. Together with Pauline they have been the engine room of our Flagship Clinic as she ploughs through the usually calm but sometimes choppy waters of Mediation in Scotland.

A few topics that we must specifically mention notwithstanding Charlie's and Pauline's comprehensive Reports.

1. **Scottish Legal Awards**

We are still basking in the glory of the Scottish Legal Awards where we achieved joint first place in the Community Contribution category. A party of 10 attended on behalf of the Clinic and an excellent evening was enjoyed by all culminating in your Chairs and Pauline facing the flashlights and loud (very) music that seems to be an integral part of such occasions as they mounted the stage to receive the fine award itself. Our thanks to all those who put together the application and of course to all members of the Clinic who made it possible.

2. **Ongoing Projects**

Two major topics have been subject of much discussion and debate during the course of the year namely the **Standards** under which the Clinic should operate, and the **Constitution** under which it should exist. These raise important issues and have hence progressed slowly. Both have reached the stage of final formulation subject to adoption. Much work has been carried out by Craig Cathcart on the Constitution for which we give him our heartiest thanks as we do for all the work done by the Standards Committee who inter alia have been consulting (through Charlie) with Scottish Mediation as there is the obvious common ground to consider.

3. **Fair Justice System for Scotland (FJSS)**

This is an organisation set up by Silence Chihuri to further diversity in the Scottish Legal system. It held a Conference in the Signet Library during the year and your Co-chair Alastair Sharp attended together with Pauline for the half day conference which was well attended by many members of the Scottish Legal Establishment. Silence has approached the Clinic with a view to a joint programme and Charlie has had discussions with him as to a way forward. The matter is still at discussion stage, but FJSS is clearly a worthwhile organisation, and it is hoped we will be able to work with them in the future.

4. **Peacekeeping and Conflict Resolution Team (PACT)**

This is an enterprise set up by Jonathan Rodrigues a former student of Charlie's who was hoping to be able to set up a coordination with the University and Clinic in his home country. After certain negotiations it was determined that such an arrangement was not feasible as suggested but our relationship continues and may well bear fruit in due course.

5. **Mediation Matters!**

Our newsletter "Mediation Matters!" which started last year, continues to flourish. Our thanks to Patrick Scott for his hard work on producing this extensive tome and to all the Contributors who make it possible. Our congratulations also to Patrick as our former Chair on being appointed very recently to the Board of Scottish Mediation.

6. **Annual Conference**

We are all looking forward to our Annual Conference which this year is to be fully online. Many people do enjoy the interchange in person of a live event, but it has been decided that a well organised online event has significant advantages so this year (2024) there will be no sandwiches and sticky buns. We are still putting it together and looking for ideas so any suggestions as to topics and/or speakers are welcome.

7. **Ailie Barclay**

And finally, sadly in more ways than one, is the passing of Ailie. Carol is giving a tribute later, but I (your Co-chair Alastair Sharp) cannot allow this report to conclude without a small personal note. She was on Charlie's course with me and indeed Carol and others and we all struck up a lasting bond which included our little group visiting me in the Highlands on an annual basis until Covid struck. She was a lovely and quite simply marvellous person. She is greatly missed.

Alastair Sharp and Andrew Boyd
Co-Chairs: Mediation Clinic
10th October 2023

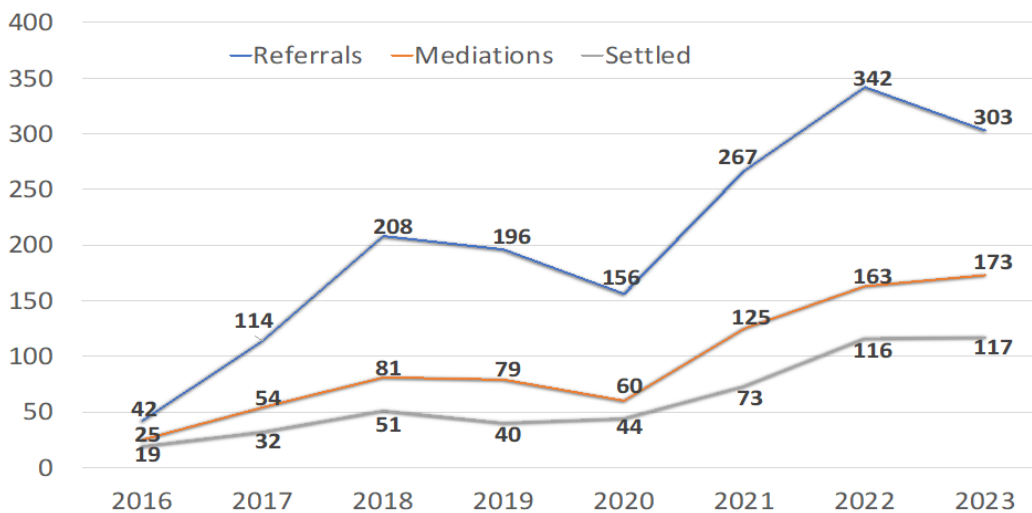
Director’s Report

Thanks again to Andrew and Alastair as they complete their second year as joint chairs. 2022-2023 has been another busy year for the Clinic as we continue to work in the thick of the justice system, helping consumers and small businesses work out their own solutions to legal disputes.

The quantitative-efficiency story

I’d like to start with some figures, perhaps because they’re a straightforward way to illustrate how much has been going on (see Appendix 1 for all the statistics).

Mediation Clinic referrals and mediations since 2016



We can see at a glance the increase in referrals when Simple Procedure was introduced in early 2017, and then again in 2021 after the pandemic normalised online mediation. The most recent two years have seen further growth, a tribute to some very hard-working mediators and the appointment of our full-time Mediation Clinic Coordinator, Pauline McKay, in March 2022.

In the past year, although the courts referred slightly fewer cases (303) we were able to mediate a higher proportion of referrals (173) and, of these, 117 settled (68%). The commonest case types were disputes over goods and services, building work, unpaid bills and motor vehicles. 142 mediation parties (41%) were consumers and 204 (59%) were involved in litigation in the course of a business or trade. 68% of claimants and 38% of respondents were consumers. Only 10% of claimants and 11% of respondents were represented. Taking these figures together we can see that Simple Procedure often involves disputes between consumers and businesses, but also involves businesses suing each other or their consumers. The relatively low proportion of represented parties, and our own experience, suggests that many of these businesses are small or even sole traders, including builders, small retailers and other tradespeople.

Looking at the big picture, since we began working with the courts in 2014, they have referred a total of 1,707 cases, of which 831 mediated and 544 settled. We recently began trying to estimate the saving to the Scottish courts when disputes do not need to continue to a hearing. There are no available figures for the cost of court time in Scotland but in 2018 the Law Society in England & Wales¹ found it took £2,692 to operate a court for a day. Making some assumptions² we arrived at a saving of £861 for each case that does not proceed to a hearing. That would point to justice system savings of £486,384 based on the 544 settled cases, without taking account of benefits to the parties in terms of potential cost, time and anxiety.

The qualitative-justice story

There is, however, more to mediation than that. Carrie Menkel-Meadow distinguished “quantitative-efficiency grounds” for promoting mediation from “qualitative-justice grounds”³ noting that “cheaper and faster is not necessarily the same thing as better.”⁴ This year has made me more conscious than ever that the Mediation Clinic is part of an educational institution. As I outline below, the Scottish Government has chosen to renew its funding support for the Clinic and, in an exciting new development, has asked us to extend our online mediation service to many more courts across Scotland. In proposing this expansion the Justice Directorate made it clear that this decision flows in part from the Clinic’s dual role as a service provider and commitment to being a centre of excellence for mediation. They also recognise that mediation isn’t just about numbers – it’s also about the quality of what we do.

As well as providing a service to the public we want to deliver the best mediation we can. A university, with its commitment to critical thinking, is an ideal location for this. One of the motivations for starting the Master’s programme at Strathclyde was to build a body of theory rooted in Scotland; my students’ early encouragement to start a mediation clinic pushed me into building a centre for practice too. The overall hope is that the Clinic brings theory and practice together and put them at the service of the public. As well as noting how many “cases” we have completed this is a good moment to ask how well we are doing in terms of quality and justice.

The best place to start is with the feedback we receive from mediation participants. In the past year nearly one hundred people have taken the time to complete our online survey and the results make fascinating reading – for the full report see Appendix 5, below. The great majority are clearly positive about the mediators, with almost all agreeing or strongly agreeing that they clearly explained what was involved, understood the issues and were fair and impartial. When it came to the outcome there was more of a spread of responses, with around a tenth disagreeing or strongly disagreeing that they were satisfied, and around a fifth that the result was fair. The most equivocal response of all concerned improving relations with the other party, with the largest subset neither agreeing nor disagreeing and only slightly more agreeing than disagreeing that this had happened. We can speculate about the reasons but, given the subject matter of many of our cases, it is perhaps not entirely surprising. When someone raises an action against another individual or a small business their main goal is almost certainly expressed in monetary terms, and Simple Procedure is not set up for anything else.

This is confirmed by the detailed responses to questions 15-17. One said their hope was: “a fair cash settlement” and it is clear that getting payment, sometimes full payment, is what a good many hope for. Some seemed quite pessimistic about their chances before the mediation took place.

Their assessment of what mediation achieved go further. A number of people express satisfaction with the money paid and some pronounce it “fair.” Twelve simply said “settlement.” Others demonstrate a more subtle assessment of risk, weighing up the time, hassle and prospects for success if they had to return to court. The overwhelming majority are positive about it.

Over forty years ago two American researchers posed the question: “why do one-third of the litigants agree to settlements that they later claim to be *unfair*?”⁵ Our survey responses offer some insights into the same phenomenon from our own clients. Mediators reading the comments could note dissatisfaction with a rather too obvious solution of a “meet in the middle” settlement, particularly if they sensed pressure from the mediators to move in that direction. Some participants clearly had hopes beyond

paying or being paid, such as improved customer service or “the truth” coming out. Some wanted to receive the full amount, suggesting anything short of that would have been a disappointment. I was also struck by the person who said “Nothing – a waste of 4 hours of everyone’s time.” Having just submitted my PhD looking at the same issues I learned just how important it is to mediation parties to get some sort of outcome. Although one response felt something positive had come out of a mediation that didn’t settle, most did not. Something appears to be better than nothing, for most people.

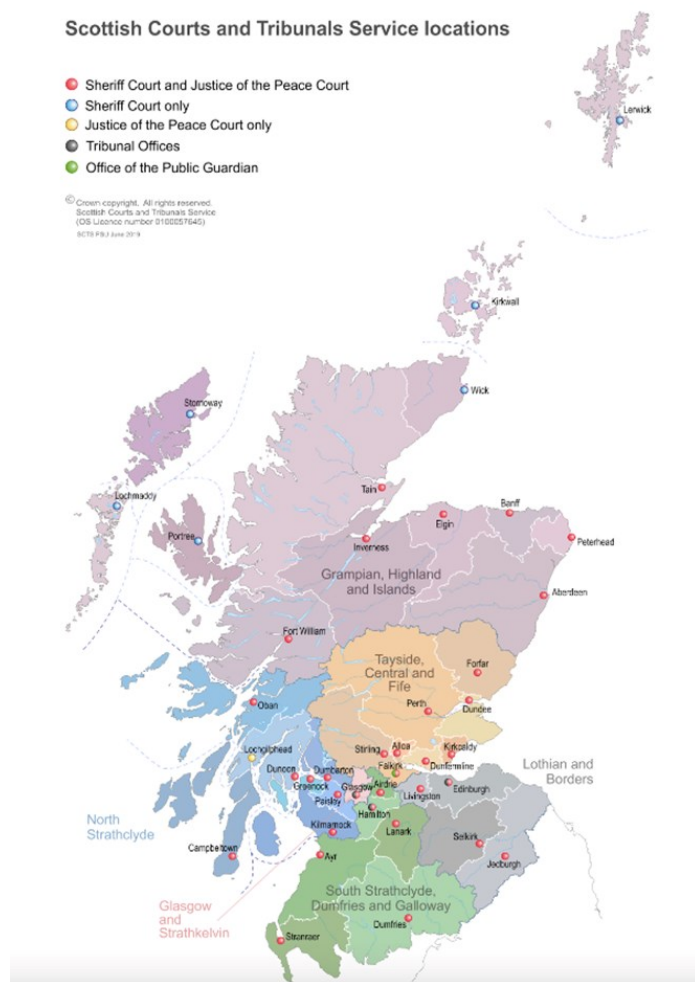
Having said all that, the final question about ideas for improvement suggests our mediators are generally doing an excellent job that is very much appreciated by our clients. That also reminds me of one of the findings from my thesis: the “good enough” settlement. For a great many people mediation’s value comes from a combination of pragmatism (getting a good enough result) and principle (getting what I deserve). Mediators are perpetually navigating the blurry line between them, and most of the time seem to do it pretty well.

Scottish Government funding

As I mention above, the Clinic has just had confirmation of additional funding. Since Scottish Government began contributing to our work in West and Central Scotland, I’ve been aware that they are troubled by a “postcode lottery.” Our services in 18 courts, along with the Legal Aid Board funded project in Lothian and Borders, mean that people who are referred to mediation can access a free service in four of Scotland’s six sheriffdoms, and part of a fifth.

Just before the summer the Justice Directorate approached the Clinic and asked if we would be willing to expand our service to cover the remaining courts. There are 39 in all, and the Edinburgh Sheriff Court Mediation Service covers 4, meaning we would be offering mediation in another 17 courts, including some of the most remote. The offer builds on the success of remote mediation and recognises that the Clinic’s system works well. After some discussion we accepted. The funding will enable us to expand the number of mediations taking place by employing a new Service Delivery Administrator and paying for more mediations each year. The advertisement for the new post has just come out and I look forward to working with Pauline and all our mediators to promote this service across Scotland.

The Clinic currently covers the sheriffdoms of Glasgow and Strathkelvin; North Strathclyde; South Strathclyde, Dumfries and Galloway; and part of Tayside, Central and Fife.



[Map of Scottish Sheriffdoms and courts](#)

Thanks

No Director's Report would be complete without thanking the many people who make the Clinic possible. I would particularly like to thank our volunteer board, who have continued to put time and energy into supporting our decision-making. A special mention goes to our Chairs, Alastair and Andrew, and to Craig Cathcart who has expertly brought together our first Strategic Plan (see Appendix 2). This will provide a principled foundation for the Clinic's activities in the coming years. Thanks also to those who have sat on various committees including the Standards and Fundraising Committees.

I would also like to thank Pauline McKay who has had to put extra time into the Clinic while I completed my thesis. The continued growth of the Clinic is a tribute to her skill and energy. One of her most inspiring contributions has been founding a new International Mediation Clinic Network. This brings together those running or interested in the clinical education of mediators from right around the world.

Finally, I'd like to thank all the mediators. Every single case requires energy, time, subtlety, skill, and patience and I never take for granted how much work goes into helping such a high proportion of our clients reach settlements they can live with. This is not easy. I'm continually amazed at mediators' resourcefulness and capacity to learn, and I look forward to working with many more in the years to come.

I finish by paying tribute to one of our first and busiest mediators, Ailie Barclay. A graduate of the LLM in Mediation and Conflict Resolution, Ailie sadly passed away in June and we greatly miss her. For several years Ailie volunteered both as a mediator and as board member and provided a great deal of wise counsel to Pauline and me. In her honour we have inaugurated a prize for the student mediator who completes the most cases in the previous year. This year's winners, sharing top spot, are Oyinkro Olobio and Alan Jeffrey. It seems a fitting tribute to Ailie to celebrate the next generation of mediators in her name.

Charlie Irvine
Director

¹ See <https://www.lawsociety.org.uk/topics/research/cost-of-day-in-court-new-analysis-by-law-society>

² a) Scotland is similar; b) Simple Procedure hearings last an average of two hours; c) Only 80% of the cases not settling will proceed to a hearing. This leads to a figure of (£2,692 x 40%) = £1,076.80 x 80% = **£861** per case.

³ Menkel-Meadow, C. (1991) Pursuing settlement in an adversary culture: a tale of innovation co-opted or 'the law of ADR'. *Florida State University Law Review*, 19(1), pp. 1–47, p. 6.

⁴ *Ibid*, p. 10.

⁵ McEwen, C. A. and Maiman, R. J. (1981) Small claims mediation in Maine: an empirical assessment. *Maine Law Review*, 33, pp. 237–268, 259.

Co-ordinator's Report

Fresh off the back of another win in the Community Contribution category for the Mediation Clinic at the [Scottish Legal Awards](#), we've had another busy year. Thanks to the [Scottish Government](#) we have been able to continue offering our service to 18 different Sheriff courts throughout Scotland. Additional funding will allow us to offer to more courts throughout Scotland in the coming months.

Looking back, as can be drawn from the figures, our referrals are still high; and an important part of moving the mediation process forward is our Intake Process (speaking with each party in dispute before going forward for mediation). We provided training for Undergraduate and Postgraduate students to assist with this process. The students tell us they enjoy volunteering, and it provides experience in dealing with parties involved in real-life disputes. Training is again due to take place in October 2023 and we value their assistance in dealing with our increasing caseload.

In March 2023, our 3rd Annual Mediation Clinic conference was hybrid for the first time, and it was a great success with over 50 attendees in person and online. Work is already underway on the 4th Mediation Clinic Annual Conference which will take place online only during March 2024.

Our process whereby there is an allocated mediator to a specific court continues to work well. We do not underestimate the amount of additional work this is for the mediators and would like to thank them for all their assistance. This has reduced the burden of intake from the Clinic support staff. Recent data showed that engagement in mediation is on par with those cases taken by the Clinic.

At present the Clinic has a membership of 60 with mediators based in the UK and overseas and application is currently closed to all but new Strathclyde students. We have been able to offer practical experience to a broad range of newly qualified mediators who hope to continue their mediation journey with us.

An extension of funding from [SafeDeposits Charitable Trust](#) allows us to offer assistance to private rented tenants and landlords in the midst of dispute and we are investigating various avenues to increase the demand for referrals.

An important step for us this year is developing the International Mediation Clinic Network which sees members from India, Canada, Germany, Czech Republic, Lithuania, Ireland, England, and Scotland. We are keen to move this forward and hopefully involve colleagues in the next Mediation Clinic Conference.

We have also seen the Clinic move towards updating our practice standards and developing our Strategy. The next step is our 5-year plan.

The Clinic offers a work placement to Year 3 LLB students as part of their Work Placement Module. Megan Sharp is working in the Clinic 1 day a week in Semester 1 and getting to know our mediators and processes as well as liaising with the parties. We hope this valuable experience will inspire her to volunteer at the Clinic and take mediation forward in her law career.

Finally, although we have lost our much-needed Mediation Clinic Assistant post, thanks to funding from the Scottish Government, we are in the process of recruiting an administrator to help deal with the demands of an increase in service across Scotland. Watch this space.

Pauline McKay
Mediation Clinic Co-ordinator

Save the date...

Learning through practice

The next Mediation Clinic Conference
will be held online on
Thursday 21st March 2024

More details to follow soon...

To subscribe to *Mediation Matters!*
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