

Mediation Under Simple Procedure: One Year On

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University of
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Glasgow

Introduction

Scottish Mediation and The University of Strathclyde Mediation Clinic (USMC) were delighted to host a seminar on the operation of Simple Procedure.

The new rules encourage the use of alternative dispute resolution and sheriffs are referring parties to mediation in a number of courts, including Edinburgh, Glasgow, Paisley, Falkirk, Kilmarnock, Dumbarton, Stirling and Airdrie. The purpose of the event was to learn from good practice and recommend improvements.

Our seminar brought together key stakeholders involved in Simple Procedure in a discussion to allow sharing and reflection on experiences to date.

We were delighted to welcome sheriffs, Scottish Courts and Tribunals Service, Scottish Government, Edinburgh Sheriff Court Mediation Service, USMC, Scottish Legal Aid Board, Audit Scotland, Carnegie Trust, academics and mediators.

At the end of this paper recommendations are made which we believe will enhance the experience of our justice system for those seeking to resolve disputes. The recommendations are drawn from the presentations and discussions that took place and are put forward by Scottish Mediation and USMC for further discussions with key stakeholders with an interest in simple procedure and the effective operation of the justice system.

Setting the Scene

After a Chair's introduction from Graham Boyack, Director of Scottish Mediation, we first heard from Walter Drummond-Murray from the Scottish Government Justice Department

Walter began by reminding us that Simple Procedure can be traced back to the 2009 Scottish Civil Courts Review.

The "Gill" Review described Scotland's civil justice system as "slow, inefficient and expensive" and its procedures as "antiquated". The post-Gill reform process led to the setting up of the Scottish Civil Justice Council and, in turn, the new rules with their inbuilt encouragement for ADR.

The next step will be the arrival of "Civil Online" this year, bringing the vision of a single portal for civil claims one step closer. He said the event was also timely because of the Civil Justice Council's forthcoming review of Simple Procedure rules. He welcomed the efforts being made to raise awareness of mediation as a way of resolving disputes.

A Mediator's Perspective

Ailie Barclay gave her perspective as a mediator who has mediated on Simple Procedure cases in a number of Sheriff Courts.

Ailie is a solicitor and Lead Mediator with USMC and has carried out more mediations under Simple Procedure than anyone else on the Clinic's rota.

She spoke about the significance of these relatively modest cases to the individuals involved, giving some examples of resolution in seemingly entrenched matters.

She also underlined the importance of clear information for unrepresented parties and the benefits of sheriffs' taking the time to explain and introduce mediation.

Judicial endorsement plays a key role, both in ensuring parties consider mediation seriously and in the possibility of a positive outcome.

Finally Ailie highlighted that mediation can provide valuable outcomes for the parties that are well beyond the scope of a judicial decision.

A Sheriff's Perspective

Our next speaker was Summary Sheriff Derek Livingston from Falkirk Sheriff Court, where USMC has been providing mediators since May.

Sheriff Livingston described his enthusiasm for mediation as a way of encouraging early resolution. In his view there are a number of simple procedure cases where an evidential hearing would be highly daunting for unrepresented parties and where the remedies offered by the court don't achieve what they need. He gave an example of a mediated agreement between neighbours that included continuing shared maintenance and an annual, amicable, meeting, commenting that he would not have the power to impose such a solution.

Sheriff Livingston made a plea that as referral to ADR is in the rules resources must be found to ensure consistent provision across Scotland. He pointed to courts in the Central Belt relying on pro bono mediators and the remainder having to refer parties to Scottish Mediation Helpline (with a cost of £50 per hour per party).

He pointed out that a great deal of court time could be saved by having successful mediations avoiding, on occasions, several days in court and the use of court staff and sheriffs. There was often also a great deal more satisfaction for those who came to a mediated resolution rather than having their case determined by a sheriff.

An Academic's Perspective

Finally Charlie Irvine, Director of USMC, provided a brief roundup of ideas from other jurisdictions.

He spoke of the “nudge” approach used in Alberta, Canada and a number of US States where voluntary mediation is provided through an opt-out rather than opt-in scheme. The idea is that by tweaking its “choice architecture” the civil justice system can encourage processes that are known to lead to beneficial results while retaining their optional character.

For example, in Calgary (small claims limit \$50,000 Canadian) the Mediation Coordinator conducts the preliminary sift for suitability (with some 10% of cases being sent directly to a judge); parties must then attend the opening section of a mediation where the mediator explains what’s involved. If they don’t wish to continue they may ask then the court to fix a trial. If they remain the mediation proceeds and, as in most parts of the world, around 70% reach a resolution.

What's Happening Elsewhere?

Charlie Irvine went on to describe experience from other jurisdictions.

- Telephone mediation in England & Wales, with very high rates of settlement, satisfaction and compliance. Edinburgh Sheriff Court Mediation Service and USMC have been offering telephone and Skype mediation with positive results.
- Scandinavian research affirming that small claims which were mediated were significantly more likely to contain "creative" elements beyond cash settlement.
- A 2014 case in the High Court of Rajasthan. Following a successful mediation both advocates applied to the court for a refund of court fees: this was granted.
- US research indicating that participants in small claims mediation described:
 - Greater sense of responsibility
 - Reduction in belief that the other side need to learn they're wrong
 - More issues more fully resolved
 - Greater sense of voice
 - Greater satisfaction with the judicial system.¹

¹ Eisenberg, D. T. (2016). What We Know (and Need to Know) About Court- Annexed Dispute Resolution. South Carolina Law Review, 67 (Forthcoming), 1–18.

What's Working Well?

Comments from General Discussion

- It's clear that mediation referral can take place at any point. Most occur at First Written Orders or Case Management Discussions. Figures from USMC indicate a higher settlement rate for cases taken on the day at court (73% v 54%), though this is not reflected in the Edinburgh Sheriff Court Mediation Service where 79% of cases come from First Written Orders. Written referrals undoubtedly involve more pre-mediation work from the Clinic or Mediation Coordinator.
- Judicial endorsement is helpful. Where parties see that the court takes mediation seriously they appear to do the same; for example sheriffs describing the scheme, suggesting a discussion with mediators and the provision of rooms.
- Expectation management: mediators spoke positively of sheriffs taking the time to outline the potential legal issues in a case. This helps to avoid parties (represented or not) entering mediation with unrealistic expectations.
- Summary sheriffs are also seen as helpful. Having a judicial specialist in Simple Procedure has worked well and the additional level of case management means parties are often better prepared for negotiation.
- Case types – a wide variety. The commonest are goods and services, unpaid bills, landlord/tenant, personal debt and motor vehicle disputes, but some more complex disputes also come to mediation such as succession, intellectual property and breach of contract.

Ideas for Improvement

Comments from the General Discussion

- Judicial training – although some has already been provided additional training in the use of mediation could help to ensure consistency.
- Clear information about the mediation process: cost, availability, how to access. This will enhance access to justice particularly for unrepresented people.
- Location? Pressure on court premises, but location in the courts seems a positive endorsement. Online provision should be further exploited.
- Early input from sheriffs – at First Written Orders stage, could sheriffs provide some indication of the practical and legal issues in a case? This may help manage unrealistic expectations.
- Expenses rules – these are now complex and confusing: greater clarity would be welcome. The 'trap' of cases from £3-5,000 being subject to Summary Cause expenses rules has caused some real injustice for unrepresented parties and should be reviewed.
- The arrival of Civil Online ought to improve matters. It would be logical to insert a mediation step into the process of raising an action under Simple Procedure, alongside other information and advice. This could be a default step (using an opt-out model) or an option (using an opt-in model).

Moving Forward

The discussion ended with a positive vision of partnership between the courts and mediators in the interests of enhancing access to justice.

There is evidence from other jurisdictions that a positive experience of mediation reflects well on the whole civil justice system.

For the future we need consistent provision, clear information and skilled, professional mediators.

All require a review of resources and the “choice architecture” of Scottish civil justice.

Mediation Under Simple procedure : One year On

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SIMPLE PROCEDURE EDINBURGH SHERIFF COURT MAY-DECEMBER 2017

(ESC Mediation Service started receiving Simple Procedure referrals in May 2017)

1. Referrals

	No of referrals	First Written orders Referral/Court referral	Agreed to mediation	Went to mediation	Settled before the mediation took place	Did not go to mediation
Total	91	79%/21%	73%	57%	16%	27%

2. Mediations

	Number of Mediations	Success Rate
Total	46	70%

3. Types of Mediation

Face to face-pre-arranged meeting	39(85%)
Same day mediation (court day)	2(4%)
Telephone	3(7%)
Email + phone	2(4%)

4. Types of Claim

Refund for faulty goods and services	18(39%)
Non payment of invoice	12(26%)
Landlord/tenant dispute	7(15%)
Underpayment/overpayment of wages	7(15%)
Compensation for damages	12(2%)
Breach of copyright	1(2%)

SIMPLE PROCEDURE Scottish Mediation Helpline

1. Referrals

Aberdeen	1
Kilmarnock	1
Edinburgh City	3
Kirkcaldy	5
Glasgow City	1
North Lanarkshire	1
Livingston	5
Stirling	5
Unkown	1
Total	25

2. Nine mediations have taken place.
3. Four mediations have resulted in an agreement.
4. Feedback

Mediators have been advised to take payment up front.

The parties (normally party 2) take time when sending back forms and getting in contact as they have been ordered to go to mediation and don't really want to proceed.

People who get in contact are often disgruntled that they have to pay for mediation, as they assume that they have already paid a court/lawyers fee.

There can be some confusion with the parties over mediation being voluntary. In some instances the parties receive an order to go to mediation from the court. This can be confusing particularly when the voluntary nature of the process is explained.

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SIMPLE PROCEDURE TO JAN 2018	Glasgow	Paisley	Falkirk	Kilmarnock	Airdrie	Dumbarton	Stirling	Total
No of Referrals	159	20	10	12	2	3	2	208
No of Referrals that turned into cases	46	16	10	9	1	1	1	84
No of Cases that Mediated	39	16	10	9	1	1	n/a	76
No of Cases that Settled	21	9	10	5	0	1	n/a	46
% of Cases that Mediated against those that turned into cases	85%	100%	100%	100%	100%	100%	n/a	97%
% of Settled Cases against those that Mediated	54%	56%	100%	56%	0%	100%	n/a	61%
Average Amount Claimed	£1,991	£2,415	£2,444	£2,444	£2,128	£4,700	n/a	£2,687
Average Settlement Amount	£1,147	£1,236.38	£1,184	£388	n/a	£1,966	n/a	£1,184
Average Settlement Amount as %	58%	51%	48%	16%	n/a	42%	n/a	43%

Overall: Type of Mediation	No of Cases	Settled	% Settlement Rate
Ordinary	63	37	59%
Shuttle	4	2	50%
Telephone	5	4	80%
Skype	3	2	67%
Assistance from Clinic eg email	1	1	100%
Total	76	46	61%

Type of Case that mediated	Nos
Building Work	10
Factors	9
Goods and Services	15
Landlord/Tenants	13
Personal Property	4
Unpaid Bills	8
Vehicle Related	8
Employment	3
Other	6
Total	76

Appendix 3.



Appendix 3.

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	Cases	Mediated	% of cases referred that mediated	Number Settled	Number settled mediated cases as %
Intake Procedure: Settlement Rate for all Courts					
Cases taken on the day at Courts	26	26	100%	19	73%
Cases referred from courts - for mediation at later date	182	50	27%	27	54%
TOTAL	208	76	37%	46	61%

	Cases	Mediated	% of cases referred that mediated	Number Settled	Number settled mediated cases as %
Intake Procedure: Settlement Rate for each court					
Cases taken on the day at Courts at Glasgow	9	9	100%	6	67%
Cases taken on the day at Courts at Falkirk	9	9	100%	9	100%
Cases taken on the day at Courts at Paisley	8	8	100%	4	50%
Cases taken on the day at Courts at Kilmarnock	n/a				
Cases taken on the day at Courts at Airdre	n/a				
Cases taken on the day at Courts at Stirling	n/a				
Cases taken on the day at Courts at Dumbarton	n/a				
TOTAL	26	26	100%	19	73%

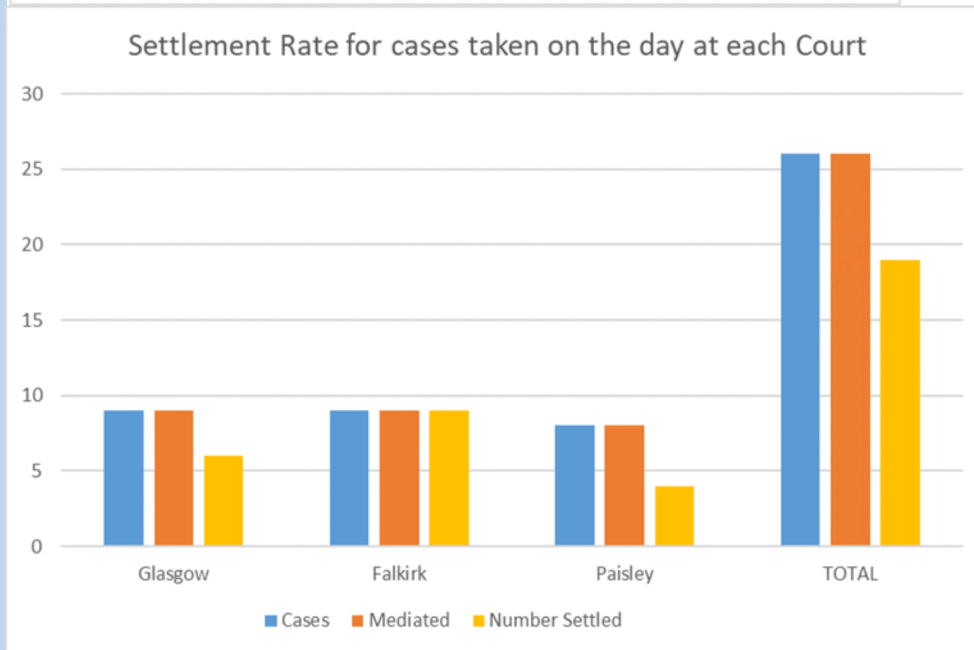
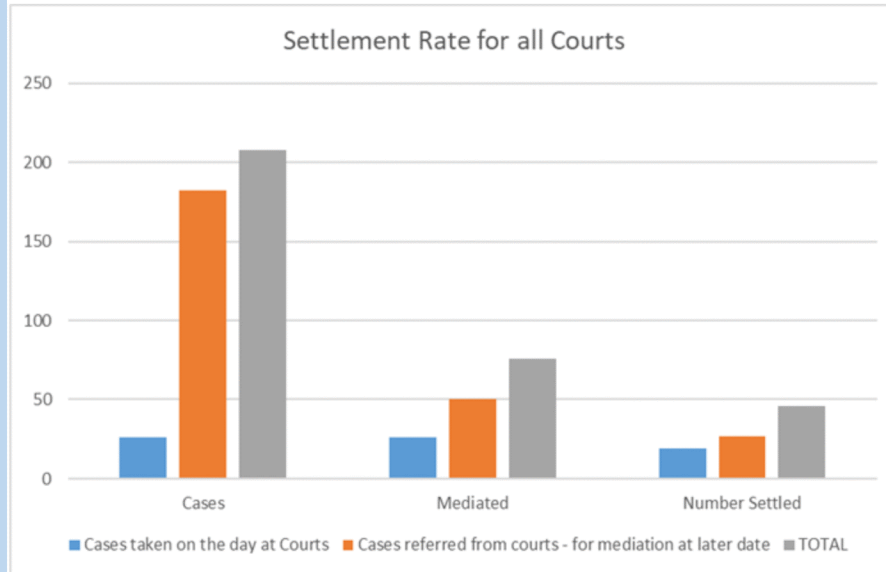
	Cases	Mediated	% of cases referred that mediated	Number Settled	Number settled mediated cases as %
Intake Procedure: Settlement Rate for each referral from:					
Glasgow	37	30	81%	15	50%
Falkirk	1	1	100%	1	100%
Paisley	8	8	100%	5	63%
Kilmarnock	9	9	100%	5	56%
Airdre	1	1	100%	0	0%
Dumbarton	1	1	100%	1	100%
Stirling	1	n/a	n/a	n/a	n/a
TOTAL	58	50	86%	27	54%

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Appendix 3.

University of Strathclyde Mediation Clinic - January 2018



These statistics were prepared with the help of Stephanie Muir and Haley Weir, student assistants funded by Strathclyde Alumni Fund.

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