

The Use of Mediation to Settle Civil Justice Disputes: A Review of Evidence

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There is an increasing desire in many quarters to develop a culture where litigation is the last, rather than first, resort method of addressing civil disputes. Arguments for encouraging the use of mediation are manifold, but reliable information about current usage levels and effectiveness is scant. This paper presents findings from a limited review of published evidence for the use of mediation in non-family civil justice disputes, in a range of Scottish contexts and in the English civil courts. It brings together research and literature that offer suggestions for future policy and practice intended to encourage use.

Main Findings

- The use of mediation for civil justice disputes is scattered and diverse. Access to services in Scotland is not equal across sectors or geographically.
- Reliable data about levels of use and outcomes are hard to locate and systematic, national mapping of provision is not currently available.
- Public and professional awareness may need to be raised to widen use.
- Increased use would allow more people to access just resolution of civil law problems that they currently cannot afford, or choose not, to tackle through litigation.
- People often do not want to go to court, or they desire remedies the courts cannot grant that may be achievable through mediation.
- Assessing the effectiveness of mediation is not straightforward: comparisons with litigation are seldom conclusive in terms of money and time saved, especially over the longer term.
- Mediation can facilitate more agreeable, balanced settlement than litigation, enhance understanding, aid the continuation of relationships, and have wider social, community benefits.
- Substantial cost and time reductions have been made possible through the use of mediation by UK government departments and in the family and commercial spheres.
- The identification of cases which are more, less or not suitable for mediation must be undertaken with reference to key criteria, the significance of which varies for different case types.
- Timing of mediation, the willingness and informed expectations of the parties, and preparation for participation are critical factors that influence the likelihood of a satisfying resolution.
- Questions about funding, regulation, training for mediators and non-mediators in the justice system, quality assurance and ethics all need to be explored.
- Efforts to increase mediation use may require wide-ranging reforms of the civil justice system in order to create a more consistent, integrated, facilitative framework for mediation.
- Inter-agency co-operation is vital in promoting and supporting services.
- Piloting of project and funding models is important, particularly with the prevailing dearth of comparable baseline data from other dispute resolution methods.
- Long-term monitoring and varied research approaches are needed.

Introduction

In recent years, there has been increasing interest in mediation as awareness grows of its potential use in supporting the resolution of a wide range of dispute types. There have been several studies and evaluations of family and commercial mediation, the areas in Scotland where the practice has been concentrated over the last twenty years. This paper focuses, however, on evidence from other spheres of activity.

Obtaining an overview of mediation usage in Scotland is not straightforward, partly because use has developed in a piecemeal way, in disparate sectors. Usage levels appear to be lower than in England and Wales, where there is an apparent greater acceptance of ADR (alternative dispute resolution) in the legal domain. Increased use of mediation may have been partly facilitated by the existence of a formalised Community Legal Service and by the Court Procedure Rules brought in following the Woolf Review, as well as being encouraged by a UK government adoption of ADR as an intrinsic aspect of its own practice.

There have been recent, positive Scottish developments, for criminal and civil matters and different service sectors, but a comprehensive picture of the Scottish use of mediation to resolve civil disputes has yet to emerge. Reliable data on usage and provision in different contexts and areas are scant.¹ However, the Scottish Mediation Network is currently mapping mediation activity across the country. This information will be accessible, on-line, in an up to date and interactive digital format, in 2005. It also maintains an on-line directory of mediation services.

Nonetheless, concerns raised in a 1996 survey of ADR in Scotland (Mays and Clark) about under-use remain, as do issues around training, regulation, the courts, funding, and low awareness. That snapshot revealed that most mediators in Scotland had been able to secure no or little experience after training. This was still the case in 2001 (SCC 2001).

There is a limited evidence base on the effectiveness of mediation in resolving civil disputes. Empirical studies tend to focus on individual projects or a specific sector (e.g., the NHS, or neighbour disputes), so data are not often comparable and must be contextualised. The user populations and referral routes can also differ and have an impact on outcomes.

Government use of ADR

In 2001, the then Lord Chancellor's Department (LCD), now the Department for Constitutional Affairs, formally pledged

that UK government departments and agencies would settle disputes by mediation or arbitration wherever possible. This applies to reserved matters only. The LCD have since reported on the use of ADR by the UK government (LCD 2002, 2003). The findings for 2002-03 are striking, with a 1200% increase in *attempted* use of ADR compared with 2001-02. Only 27% of second parties agreed to ADR, but 89% of these settled without recourse to a hearing with evidence.² In contrast, a survey of twenty-one English and Welsh councils found that mediation use was still very low (Nabarro Nathanson 2003).

The effectiveness of mediation

Experiences in the UK and beyond point to some potential cost-effectiveness and the positive impact mediation can have on court time and resources, while its social and community benefits are increasingly widely understood. Nevertheless, assessing the effectiveness of mediation to achieve enduring, successful and cost-effective solutions to civil disputes, is not simple. Outcome data almost always derive from schemes where users have been offered or advised to use mediation on the basis of a professional assessment, or are self-referrals, perhaps in projects that exclude complex cases. Fundamentally, the results of mediation cannot be simply compared with those from using legal remedies, and success must be judged from various perspectives.

Certain categories of cases are seen to be more or less suitable for mediation than others. The following are generally regarded as inappropriate for ADR: cases of international wrongdoing, abuse of power, public law, human rights and vexatious litigants; where a legal precedent is needed to clarify the law or inform policy; where settlement would not be in the public interest; or because of a party's past conduct.

Factors with a general bearing on the progress and success of mediation include:

- the nature of the case;
- the stage at which mediation is, and would be best, initiated which will vary;
- uptake should usually be voluntary and arise through informed choice;
- the experience, skills and knowledge of the mediator are important;
- the expectations of all involved must be clarified throughout the process;
- various mediation models may be needed.

The cost-effectiveness of mediation

Mediation clearly has some potential to save money and time, compared with going to court or a tribunal. For example, UK government savings of more than £6 million have been attributed to the use of ADR (LCD 2003), legal aid reductions appear to have been made through the use of family mediation, and there are often savings in the commercial sphere for businesses using mediation.

However, defining and measuring monetary savings are difficult. The terms and criteria for judging the cost-effectiveness of mediation are not straightforward and must be context-specific. Claims about savings should be treated circumspectly as they may, at worst, derive from a simplistic comparison of average case costs for the parties at resolution.

Reliable assessment of the cost-effectiveness of mediation requires consideration of various factors. For instance, subsidised or voluntary sector mediation may be available to the parties for free or at no more than a nominal fee, but the costs to providers or funders, and the wider impact of such, are not taken into account. Charges for services are often below what would be a realistic commercial rate which might be unsustainable over time.

Mediated cases may also often be simpler than ones requiring a judicial solution. Furthermore, although many small claims and summary cause cases could be mediated, some evidence shows that potential savings are highest where large sums are involved, less in cases where resolution costs and reward opportunities are low.

An English study in the mid-nineties aimed to compare the range of costs incurred by those involved in mediated disputes and their representatives with the expense of pursuing a litigation-based solution (Dignan et al 1996), the challenge being to compare approaches with fundamentally different methods, aims, contexts and outcomes. The report was based on two national surveys focusing on community mediation services and local authority health and environmental health departments. It concluded that mediation can be cheaper and widen access to justice and have important social benefits.

Recent research for the Scottish Executive compared costs and outcomes of mediation and legal remedies for neighbour disputes and anti-social behaviour cases, selected randomly from mediation services and local authority investigations (Brown et al 2003). It found that litigation cost fifteen times more than mediation, but that costs must be contextualised, particularly as cases following a legal route may be more

complex, requiring specialist involvement and more time. Indeed, the legal actions examined tended to include serious underlying or exacerbating factors (violence, drugs or other criminal activity) in contrast to the more moderate disputes that were mediated. A comparison of Scottish and English approaches to neighbour disputes showed that savings were achieved when mediation was used, but questioned whether this would change were mediation to be more professionalized (Hunter et al 1998).

Cost reductions are clearly possible but there is also evidence, from other jurisdictions and sectors, that mediation can be expensive

User satisfaction

Arguments for increased use of mediation are not founded on financial considerations alone, but also on such claims as that it offers a more constructive way of resolving disputes. Success must be judged by the satisfaction of the parties, at resolution and the longer term.

The claim that mediation is a more positive experience, with better potential for achieving closure, compared to the probable discomfort of a court one, might seem a 'common sense' observation. However, this should not be over-stated. Research has also shown that parties may feel less than empowered and relations may be no less damaged than if litigation were pursued; people may find the experience painful and distressing, and feel coerced into participation (Brown et al 2003; Genn 2001). Mediation can also magnify power imbalances if a skilled mediator does not manage these well. Furthermore, if one side feels that justice has not been done, or that they have compromised too much, success is doubtful. And, if residual or peripheral issues are unresolved in the settlement, the dispute may recur, possibly negating cost or time savings.

Refusal reasons can include when one does not wish to engage with the other party, fears reprisals or escalations, or wants an external judgement (Brown et al 2003). These can help to identify ways to encourage use. Having a choice of mediative models (e.g. shuttle mediation, group mediation, or co-mediation) also emerges as important for minority ethnic families (Pankaj 2001), community mediation (Mackay and Brown 1999) and applies to other client groups. Low enthusiasm for mediation can also arise partly from the amount of preparation required, with low value cases carrying little incentive.

Factors for success

Studies of specific services have demonstrated that early marketing of a service to potential funders and referral agents is critical (Mackay and Brown 1999) and that proper publicity can be a powerful determinant of success and should include clear explanation of mediation (The Housing Corporation 2001).

Other factors such as the route in and timing also influence success. One qualitative study of family cases, found that in 80% of cases both parties had consulted a solicitor before embarking upon mediation, and legal proceedings had commenced in 40% of cases (Lewis 1991). The success of family mediation, whether as an alternative or adjunct to the legal system, was influenced by several factors pertinent to other dispute types, including timing, relationships between parties and their approach to mediation, the quality of preparation and the quality of the mediation itself. The first research to look at the implementation of the community mediation concept by small-scale voluntary organisations in Scotland (Mackay and Brown 1999), raised key points about practice, methods, policy and research and underlined the potential contribution of mediation to widening access to justice.

Court-annexed schemes

Many people with a civil justice problem only consider mediation after embarking on litigation. Published evaluations of four court-annexed mediation schemes, including one in Scotland were considered in this review. In a free, voluntary scheme at Edinburgh Sheriff Court, linked to an in-court advice service,³ almost all clients lacked legal representation (Samuel 2002). The project helped as many through arms-length negotiation as through mediation.

A pilot scheme for low value non-family disputes, in the Central London County Court, did foster acceptable agreement and reduced conflict, but unsuccessful mediation could increase costs (Genn 1998). In 1996, the Court of Appeal initiated a scheme: all parties were invited to participate in ADR, but evaluation suggested that selective referral would be more effective (Genn 2002). Participants in successful mediations were largely positive, but some solicitors thought that they and their clients felt pressured to mediate, even when there was little scope to compromise. Mediators' approaches and parties' and advisers' expectations often mismatched. In 1993, the Commercial Court began identifying cases appropriate for ADR: judges could suggest use, or order the parties to attempt ADR, which was used in half of the cases where an Order was issued. Orders appeared to have a neutral or positive impact

on progress and outcomes, but a minority of interviewees believed they hindered the case (ibid). The scheme may have influenced practice, attitudes and advice given to clients, with mediation usage increasing towards the end of the four-years studied.

Some common findings from across these studies have general relevance.⁴

- Willingness to use mediation, even when gratis, is low.
- Timing is critical - and early on may not be best.
- Whether a case really is suitable must be considered carefully.
- Mediation can reduce court time, but truly comparable information for other routes is needed.
- Cost savings are unclear.
- It can lead to more acceptable agreements and higher customer satisfaction, but these need further study to confirm these and other factors.
- Mediation succeeds best when there is a relationship to maintain.
- Most mediated cases reached resolution and did so earlier than litigated ones.
- Available data do not reveal if agreements have endured.
- Mediation can widen access to justice for those who cannot afford litigation.
- Evidence does not suggest especial advantage from schemes being court-annexed or not, in terms of outcomes.
- Civil Procedure Rules introduced with the Woolf Review may have made ADR more attractive in England and Wales.
- Failure to reach settlement through mediation can raise overall costs.
- Court schemes demonstrate the potential importance of mediation within an integrated CLS in addressing unmet legal need.

Considerations for the future development of mediation

The literature cited above suggests possible pointers for how to encourage and support the use of mediation in Scotland, some of which are summarised in this section. Ways to identify, and then counter, factors that may militate against increased use clearly have to be considered.

Some of the literature observes that negative public perceptions of the legal system generally must be addressed in tackling a lack of knowledge or negative assumptions about mediation. Empirical studies of mediation underline the importance of ongoing improved marketing, awareness-raising, monitoring and customer feedback for services.

Studies of court schemes and family mediation provide instructive findings for thinking through how to integrate services with existing processes and underline the value of pilots.

Careful consideration of other jurisdictions and contexts outside of the civil justice mainstream may help with the identification of funding models, a critical issue, as high quality, professional mediation services may be as unreachable for many as other legal services, particularly while the legal aid system appears to be more geared towards traditional litigation.

The Scottish Consumer Council (2002) has also recommended that a strategic funding framework may be essential for mediation to be as effective as possible. It argues that there are lessons to be learnt from the way in which family mediation services had to justify themselves to various funders. It notes that cost savings may not be realised for years and that the experience cannot be neatly measured.

Better understanding of the role and benefits of mediation may need to be fostered within the legal profession and the public. The proportion of people who evidently settle disputes informally, or not at all, due to perceived or real impediments to accessing justice, mean that courts are only one locus for mediation. Relevant, reliable and widely available advice could contribute to encouraging early participation in mediation and support efforts to widen access to justice. Key lay advisers and 'front desk' court staff may also need to be better informed, and a longer-term strategy might encourage increased inclusion of mediation in university curricula.

The stated commitment by the UK government to use ADR sent out a clear message to the public and private sectors and wider population, while Court Procedure Rules,

introduced after the comprehensive Woolf Review of civil justice, may have encouraged the English legal profession to exploit ADR.⁵ This suggests that efforts to nurture a Scottish justice culture, where mediation is an intrinsic element, might be enhanced if they occurred within the context of a consistent supportive framework, where inter-agency co-operation would be critical.

Small claims and summary cause rules currently encourage Scottish sheriffs to resolve disputes before a case proceeds to a hearing with evidence, but it has also been suggested that this might be strengthened through, for instance, legislation or additional rules (SCC 2001).

Procedures, quality control and mediators' accountability and ethics all require close attention, but there are uncertainties about how to regulate the market, while averting any stifling of growth or excessive restriction.

Finally, the available evidence suggests a need for further research and external monitoring of any services, including long-term investigation of whether mediated settlements and client satisfaction endure, to inform strategy and policy in relation to mediation.

Resources

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1 Commercial companies and groups produce their own activity figures.

2 These figures do not include cases settled by informal negotiation processes not included in most definitions of ADR (e.g., resolving personal injury actions in meetings).

3 This was the main referrer, with a quarter of small claims and summary cause clients being referred, usually before raising an action or before the case had called in court. Linking mediation and advice services can facilitate early referral.

4 DCA-supported court schemes in England and Wales are being evaluated (see. e.g., www.northernmediators.co.uk).

5 The DCA is also supporting mediation pilots in forty courts across England and Wales in 2004.

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