

# The Sound of One Hand Clapping: The Gill Review's Faint Praise for Mediation

The long-awaited Report of the Scottish Civil Courts Review, chaired by Lord Gill, was published in October 2009.<sup>1</sup> The array of ills it seeks to remedy is forcefully expressed: the service to the public is “slow, inefficient and expensive”, procedures “antiquated” and remedies “inadequate”.<sup>2</sup> Public confidence is so low that some businesses enter into contracts specifying English jurisdiction (perhaps the worst rebuke conceivable to Scottish lawyers). The case is thus made for radical change.

And change there is. The creation of a third tier of civil judiciary, the significant raising of the lower financial limit for Court of Session litigation<sup>3</sup> and two new courts (a sheriff appeal court and a national personal injuries court) are concrete attempts to improve the performance of the civil court system. But what of alternatives to litigation? Neutral onlookers may have anticipated a significant role for alternative dispute resolution (ADR)<sup>4</sup> for three reasons:

- the Review's remit required it to have regard to “the role of mediation and other methods of dispute resolution in relation to court process”,<sup>5</sup>
- in response to similar conditions in England and Wales, the Woolf Report and subsequent Civil Procedure Rules (CPR) placed mediation at the heart of reform of the civil justice system;<sup>6</sup>
- The Business Experts and Law Forum (BELF) Report of November 2008 recommended that the courts incorporate consideration of mediation into “standard case management processes”.<sup>7</sup>

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<sup>1</sup> *Report of the Scottish Civil Courts Review* (2009), available at <http://www.scotcourts.gov.uk/civilcourtsreview/>.

<sup>2</sup> *Review*, i.

<sup>3</sup> From £5,000 to £150,000: *Review*, 21.

<sup>4</sup> While the *Review* mentions “other forms of dispute resolution”, it refers almost exclusively to mediation. With the exception of arbitration, there is little evidence of other forms of ADR in current use in Scotland.

<sup>5</sup> *Review*, 1.

<sup>6</sup> Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995). See also S Roberts, “Settlement as civil justice” (2000) 63 MLR 739.

This note examines the means available to civil justice systems to encourage the use of mediation; describes what the Review actually recommends; and hypothesises about the reasons for this choice.

## A. OPTIONS FOR ENCOURAGING THE USE OF MEDIATION

The Review starts positively enough: significant numbers of respondents thought mediation could help with the early resolution of disputes.<sup>8</sup> Noting that litigants tend to be more positive about mediation than the legal profession, it rehearses a number of reservations<sup>9</sup> (although none of the claimed benefits)<sup>10</sup> before declaring itself “satisfied” that mediation can help parties reach a negotiated settlement, “in many cases... the outcome most desired by all sides”.<sup>11</sup> Taking these sentiments at face value, how might the Review encourage greater use of mediation?

### (1) Mandatory Mediation

In many jurisdictions policymakers have introduced an element of compulsion.<sup>12</sup> Generally the judge diverts the case to mediation at an early stage in the proceedings. If parties settle, no further judicial input is required. It takes little imagination to see the attraction of such

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<sup>7</sup> *Report by the Business Experts and Law Forum (BELF)* (2008) para 3.2.1 (available at <http://www.scotland.gov.uk/Publications/2008/10/30105800/0>).

<sup>8</sup> *Review*, 165.

<sup>9</sup> It cites the constitutional right of access to the courts, the need for precedent, cost, and the belief that the system already encourages early settlement of disputes.

<sup>10</sup> The BELF report cites speed, cost and self-determination. To these could be added confidentiality, the preservation of business relationships and the potential for creative solutions.

<sup>11</sup> *Review*, 169.

<sup>12</sup> See, in England, H Genn and others, *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure* (2007). In Canada: R G Hann and others, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report - The First 23 Months* (2001). In Italy: G De Palo and P Harley, “Mediation in Italy: exploring the contradictions” (2005) 21 *Negotiation Journal* 469. In Australia: D Spencer, “Mandatory mediation and neutral evaluation: a reality in New South Wales” (2000) 11 *Australasian Dispute Resolution Journal* 237. In Germany: K Funken, “Court-connected mediation in Japan and Germany” (2001) University of Queensland School of Law Working Paper No 867. In the USA: R Wissler, “The effectiveness of court-connected dispute resolution in civil cases” (2004) 22 *Conflict Resolution Quarterly* 55.

schemes where courts are overwhelmed by litigants and plagued by delays. Some studies characterise mandatory mediation as the necessary “kick-start” to introduce a new and unfamiliar process;<sup>13</sup> others are more sceptical.<sup>14</sup>

## **(2) Costs sanctions**

A more subtle form of encouragement sees the courts penalising those who unreasonably fail to consider mediation via costs awards. Closest to home, the English CPR instructs the courts to take into account “the efforts made, if any, before and during the proceedings in order to try to resolve the dispute”.<sup>15</sup> A considerable body of case law has grown up in relation to these rules, defining and limiting the extent to which an unreasonable refusal to mediate will affect costs.<sup>16</sup> Nonetheless, the threat of non-recovery of legal costs is significant.

## **(3) Spelling it out**

Another, less punitive, method of encouraging mediation is to require parties to narrate in their averments what steps they have taken to resolve their dispute. This variant also features in the English CPR where all of the pre-action protocols contain this or similar wording: “Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered.”<sup>17</sup>

## **(4) Systemic support**

Lastly, a civil justice system that seeks to support the use of mediation can take steps to enhance its credibility. Clarifying the position on confidentiality and the admissibility of evidence from mediation would help Scotland to comply with its obligations under the 2008 European Directive on cross border mediation.<sup>18</sup> A more forceful step would be to afford special status to mediation outcomes, rendering them more readily enforceable.<sup>19</sup>

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<sup>13</sup> C McEwan and R Maiman, “Small claims mediation in Maine: an empirical assessment” (1981) 33 Maine LR 237; Wissler (n 12); Hann (n 12).

<sup>14</sup> See Genn and others (n 12).

<sup>15</sup> Civil Procedure Rules 1998, SI 1998/3132, r 44.5(3)(a)(ii).

<sup>16</sup> See Genn and others (n 12) for a useful discussion of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002 and related decisions.

<sup>17</sup> Ministry of Justice, *Pre-action Protocol for Defamation* (2006) para 3.7 (available at [http://www.justice.gov.uk/civil/procrules\\_fin/pdf/protocols/prot\\_def.pdf](http://www.justice.gov.uk/civil/procrules_fin/pdf/protocols/prot_def.pdf)).

<sup>18</sup> Council Directive 2008/52 OJ 2008 L 136/3.

<sup>19</sup> As suggested by T Schultz, “Regulatory Challenges Posed by the Enforcement of Mediation Outcomes” (2003, available at [www.online-adr.org/2ndUNECE\\_Talk.pdf](http://www.online-adr.org/2ndUNECE_Talk.pdf)).

## B. THE PUZZLE

Given its positive statements about mediation, one might imagine that the Review would opt for one or more of the above. It did not. Mandatory mediation was perhaps never likely. However, the Review specifically rejects both the second and third options and the fourth is not considered. What the Review does recommend is modest indeed: information on the Scottish Court Service website and leaflets, a small claims mediation service akin to the one recently piloted in England and Wales,<sup>20</sup> and a helpline.

Why such small beer? Given the Review's opening declaration that "minor modifications to the status quo are no longer an option",<sup>21</sup> why has it recommended just that for mediation? And what lies behind the assertion that these are not proper matters for the court to raise? Two significant factors may have contributed.

### (1) Selective evidence

The Review had a huge task, and can hardly be blamed for failing to get to grips with the vast quantity of research on mediation.<sup>22</sup> Nor is it surprising that a small country like Scotland should peek over the border and use conveniently accessible data, particularly given the paucity of comparable home-grown research. Nonetheless, there is a glaring omission from Annex D ("Mediation and other forms of dispute resolution in other jurisdictions").<sup>23</sup> Only one study from the USA is cited, and then only to support the notion that mandatory mediation achieves a lower settlement rate. In fact the study (of US government involvement in mediation) also finds savings *per case* of \$10,735, eighty-eight hours of staff time and six months of litigation time; comparable outcomes for mediation and litigation; and, contrary to Scottish assumptions, greatest use and success in the area of tort.<sup>24</sup> None of these details was noted.

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<sup>20</sup> This scheme has an upper limit of £5,000, is staffed by civil servants and takes place over the phone in the majority of cases (87%). It is one element of a Ministry of Justice policy "to mainstream mediation into the work of the courts": *Review*, 307-308.

<sup>21</sup> *Review*, 1.

<sup>22</sup> A search of the US legal database HeinOnline, conducted as part of the research for this note, yielded 45,000 articles on mediation.

<sup>23</sup> *Review*, 311-318.

<sup>24</sup> L B Bingham, T Nabatchi, J M Senger and M S Jackman, "Dispute resolution and the vanishing trial: comparing federal government litigation and ADR outcomes" (2009) 24 *Ohio State Journal on Dispute Resolution* 225.

It is widely accepted that the modern ADR movement originated in the USA.<sup>25</sup> Even a cursory overview of recent research provides rich and detailed evidence about mediation in the civil justice context. For example, a 2004 review article by Roselle Wissler examines ten small claims, twenty-seven general civil court and fifteen appellate mediation studies.<sup>26</sup>

Interesting findings that the Review might have noted include:

- Mediation is enduringly popular with users, with most reported as “highly satisfied”,<sup>27</sup>
- Compliance with mediated outcomes is high<sup>28</sup> (a finding replicated in Scotland);<sup>29</sup>
- The range of referral routes to mediation from outright compulsion, through judicial encouragement to voluntariness, had little impact on settlement rates.<sup>30</sup>

Recent literature is less concerned with whether ADR is appropriate than how it is used: “No further research should be needed to persuade policymakers about the potential efficacy of court-connected mediation programs... If [they] have not yet been persuaded..., further studies are unlikely to convince them”.<sup>31</sup> However, rather than looking to the jurisdiction where mediation has been most thoroughly evaluated, the Review seems to have focussed on the most sceptical research available.

## **(2) Influential voices**

Credited as a “distinguished commentator”, Lord Rodger clearly struck a nerve when, in relation to whether the courts should be seen as a last resort, he accused the Review panel of wishing the answer to be yes.<sup>32</sup> He recently spoke approvingly of litigants who incurred hundreds of thousands of pounds in expenses in a dispute over a piece of farm equipment worth £3,000, and asserted that “the problem in Scotland is not that we have too many cases,

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<sup>25</sup> S Roberts and M Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (2005) 45.

<sup>26</sup> Wissler (n 12).

<sup>27</sup> Wissler (n 12) 58, 65 and 74.

<sup>28</sup> See also C McEwan and R Maiman, “Mediating in small claims court: achieving compliance through consent” (1984) 18 *Law and Society Review* 11.

<sup>29</sup> *Review*, 300, referring to the Edinburgh In-Court Advice and Mediation Projects: “all the agreements were thought to have been honoured”.

<sup>30</sup> Wissler (n 12) 60 and 69.

<sup>31</sup> J Lande, “Focusing on program design issues in future research on court-connected mediation” (2004) 22 *Conflict Resolution Quarterly* 89, 97.

<sup>32</sup> Lord Rodger of Earlsferry, “Civil justice: where next?” (2008) 53(8) *JLSS* 14. See *Review*, 169.

but that we have too few”.<sup>33</sup> Whether the Review actually agrees with this, it would be difficult to ignore such an influential voice. He was trenchant: the court system is, he asserted, “the best vehicle for achieving justice” and without judicial determination “individuals and businesses will lack guidance on all kinds of everyday situations”.<sup>34</sup>

Roberts and Palmer, considering recent developments around the world, state that “[a]lternative dispute resolution, with its objective in ‘settlement’ and its principal institutional realisation in ‘mediation’, is now a virtually unremarkable feature of disputing cultures almost anywhere we look”.<sup>35</sup> It seems that Lord Rodger fired a warning shot across the Review’s bows and said, “Not here”.

Another commentator singled out for approval by the Review is Professor Dame Hazel Genn. Once favourable to mediation,<sup>36</sup> she seems to have turned against it of late.<sup>37</sup> In her 2008 Hamlyn Lecture in Edinburgh she drew on recent research into two London court-based mediation schemes, one voluntary, the other compulsory,<sup>38</sup> painting a sorry picture of court-linked mediation, with low settlement rates, high opt-out rates and declining user satisfaction. The Review specifically endorses her view that mediation should be a supplement rather than an alternative to the court system, and that without judges to back it up, mediation is “the sound of one hand clapping”.<sup>39</sup> Furthermore, the movement towards ADR in England and Wales, aided and abetted by the UK Government and senior judiciary, is a “threat to civil justice”.<sup>40</sup>

It is worth saying a few words about this alleged threat. Both Lord Rodger and Professor Genn infer that if an attempt at mediation is interposed between citizen and court fundamental rights are lost. But two points need to be made. First, an attempt at mediation is just that. No-one is compelled to settle, or even to complete mediation. If it is unsuccessful, no-one loses their right to a hearing. And the second implication of these assertions is this: the citizens of England, the USA, Germany, Canada, Australia and many others have already

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<sup>33</sup> Rodger (n 32) 16. Interestingly, the academic who coined the phrase “the vanishing trial” has recently acknowledged that the phenomenon seems to have little connection to ADR: M Galanter, “The vanishing trial: an examination of trials and related matters in federal and state courts” (2004) 1 *Journal of Empirical Legal Studies* 459 at 517.

<sup>34</sup> Rodger (n32) 16

<sup>35</sup> Roberts and Palmer (n 25) 359.

<sup>36</sup> H Genn, *Mediation in Action: Resolving Civil Disputes Without Trial* (1999).

<sup>37</sup> See C Irvine “Mediation and social norms: a response to Dame Hazel Genn” (2009) 32 *Family Law* 352.

<sup>38</sup> Genn and others (n 12).

<sup>39</sup> *Review*, 170.

<sup>40</sup> *Ibid.*

lost these rights, with the collusion of their judiciary. We are noted for ploughing our own furrow, but even the Scots may pause before reaching this conclusion.

Perhaps it is not just this writer who sees the stamp of law and lawyers on these assertions. For example, in Professor Genn's research, when seeking the reasons for objections to mediation, nine pages were devoted to solicitors' views, as against three to those of the parties themselves.<sup>41</sup> And this is one of the marks of the Review: while acknowledging that the legal profession has a more negative attitude towards mediation than those it serves, it seems to have been unable to set this aside in its recommendations. It speaks approvingly of those who least approve of mediation, while marginalising those who speak in its support.

### C. CONCLUSION: WHERE DOES THE REVIEW GET US?

One of the Review's four remits was to consider the role of mediation and ADR in court processes,<sup>42</sup> yet its overview devotes only one of eighty-two paragraphs to the subject. In contrast to other common law jurisdictions, the Review seems to have set its face against significant judicial encouragement for mediated alternatives to litigation (although the familiar alternative, negotiated settlement, receives robust support in the form of pre-action protocols backed by costs sanctions).<sup>43</sup> Two questions remain: what does this mean for the Scottish justice system, and what practical steps might policymakers take now?

The first consequence is straightforward: more of the same. Legal practitioners who already view mediation as useful and cost-effective will continue to recommend it to their clients. Those who view it with suspicion will take comfort from this Review, perhaps keeping their fingers crossed that another generation will pass before the matter is seriously considered again. The "astonishing reversal" across the common law world which sees "adjudication relegated to an auxiliary, fallback position"<sup>44</sup> will not happen here. Scotland will continue to offer "the beautiful promise of an authoritative, third-party decision"<sup>45</sup> for the foreseeable future. Litigation, not mediation, will be the *lingua franca* in Scotland.

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<sup>41</sup> *Genn and others, 2007, 76-87.*

<sup>42</sup> *Review, 1.*

<sup>43</sup> *Review, 187.*

<sup>44</sup> *Roberts & Palmer (n 25) 4.*

<sup>45</sup> *Ibid, 1.*

This in turn must affect the Scottish Government's aspiration to develop a centre for dispute resolution. While arbitration will be underpinned by a new Act of Parliament,<sup>46</sup> it now looks unlikely that any other form of dispute resolution will gather the critical mass to present a significant attraction to business, or assist Scotland to become the "Switzerland of dispute resolution".<sup>47</sup> The BELF Report, attempting to explain why businesses choose English rather than Scots law, points out that mediation "receives only *ad hoc* judicial support".<sup>48</sup> The Review clearly intends this to continue. This is a worrying instance of the law and business going their separate ways.

So what might policymakers do? Mandatory mediation clearly has little support in this jurisdiction. Costs sanctions seem unlikely too. However, the idea that pleadings should set out what efforts have been made to resolve the dispute finds more favour. In the time available this writer could not examine all of the responses to the consultation, but it is striking that several of the larger law firms, as well as the Court of Session Rules Council, make such a recommendation. The Review rejects it but, as noted above, its selective use of evidence and clear discomfort with its remit in relation to mediation suggest that its conclusions should not necessarily be the last word.

Policymakers could also consider the fourth option suggested above to enhance the credibility of mediation. It may take legislation to fully clarify the issues concerning confidentiality and admissibility, but much could be achieved through the Rules of Court, in both the Sheriff Court and the Court of Session. Provisions affirming that mediation is a privileged forum for business negotiation would support the Government's goal of putting Scotland on the dispute resolution map. It would also place it at a considerable advantage over England and Wales, as well as complying with the EU Directive.<sup>49</sup> Finally, the Scottish Government could make an ADR "pledge" like that made by the UK Government in 2001, which produced cost savings of £26.3million in 2007/8.<sup>50</sup>

The Gill Review lacks neither courage nor ideas, and its structural and procedural reforms will significantly rationalise our rather antiquated civil court system. However, when it comes to thinking beyond the confines of the courts, its writers seem to have been unable to

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<sup>46</sup> The Arbitration (Scotland) Bill was introduced into the Scottish Parliament on 29 Jan 2009.

<sup>47</sup> BELF Report (n 7) 7.

<sup>48</sup> *Ibid*, 6.

<sup>49</sup> Council Directive (n 18). I am grateful to David Semple for his thoughts on this matter

<sup>50</sup> Ministry of Justice, *Annual Pledge Report 2007/8: Monitoring The Effectiveness of the Government's Commitment To Using Alternative Dispute Resolution* (2009) (available at <http://www.justice.gov.uk/publications/docs/alternative-dispute-resolution-07-08.pdf>).

transcend their professional background and instincts. If they have their way, we will continue for the foreseeable future to be the “Scotland of Dispute Resolution”, where litigation trumps all.

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*14 Edinburgh Law Review 85-92*