

NOT SO SIMPLE? COURT CONNECTED MEDIATION IN SCOTLAND¹

Abstract

This article is concerned with the recent development of court-connected mediation in the context of 'simple procedure' in the Scottish sheriff courts. The article examines the policy drivers behind the recent moves to introduce mediation in Scottish civil courts and provides a detailed discussion of the rules providing for mediation in the new simple procedure in the sheriff courts. The piece then critically analyses the practical roll out of mediation in simple procedure and argues that current practice does not safeguard the crucial aspect of litigants' informed consent to both participation in mediation and in respect of outcomes brokered within the process. The piece hence argues that a uniform, funded system of referral to mediation needs introduced across Scotland. It further suggests that in the quest for ensuring that litigants without lawyers (LiPs) are in a proportionate sense able to make informed decisions about the outcomes they sign up to mediation, lay advisors be marshalled to aid those who find themselves mediating in the shadow of the court.

Introduction

Mediation has been present in Scotland since the 1980's first taking root in the family sphere and branching out to other fields including disputes relating to community, employment, additional support needs in education and general civil, commercial and construction

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matters.² Despite decades of promotion, however, and no small measure of over-optimism, mediation has been stubbornly slow to develop beyond the fringes of disputing culture in Scotland.³ One stifling factor has been the lack of any systematic linking between the Scottish courts and mediation, recognised as a vital trigger for growth in many jurisdictions.⁴ The relationship between the courts, legal profession and mediation in Scotland, as is the case in many jurisdictions, has long been a complex, contradictory one. On the one side we can witness the reported, initial defensive marketing and resistance of the Law Society of Scotland⁵ and the somewhat luke-warm attitudes of Scottish sheriffs⁶ and judges towards mediation.⁷ On the other hand, Scottish mediation *aficionados* – many of whom are lawyers - have perhaps held a rose tinted view of mediation against a somewhat jaundiced perception of formal civil justice through the courts.⁸ While pro mediation forces in Scotland had hitherto failed to make the breakthroughs predicted⁹, some progress has nonetheless occurred over recent years. Indeed, empirical research has suggested growth in different areas and importantly, a real measure of success in terms of the mediation that has taken place.¹⁰

² For a potted history see B Clark *Lawyers and Mediation* (New York: Springer, 2012) paras 1.2.2.2; M Ross 'Mediation in Scotland: An Elusive Opportunity?' in N Alexander (ed) *Global Trends in Mediation* (London: Kluwer, 2006, 2nd edn)

³ Ross *ibid*

⁴ See B Clark, "Institutionalising Mediation in Scotland" (2008) 3 JR 193

⁵ R Mays and B Clark *Alternative Dispute Resolution in Scotland* (Scottish Office Central Research Unit, 1999) available at <http://www.gov.scot/Publications/1998/12/d7238062-1187-43ba-8186-1ebf47ecff37>

⁶ Lower court judges in Scotland

⁷ See for example, Lord Roger of Earlsferry "Civil justice: where next?" (2008) 53 JLSS Aug 14; see also the views of Sheriff Principal Bowen and others on mediation at http://www.scotcourts.gov.uk/sheriff/rules_council/consultation/docs/ADRDocs/Response_Sheriffs_Principals_Bowen_and_others.pdf

⁸ See eg. J Sturrock and D Semple *Mediating a cultural revolution* (2001) 46(8) JLSS 21; E Malcolm *Breakpoint: Advantage Mediation?* (2004) 49 (7) *Journal of the Law Society of Scotland* 14; S Clark *Learning from across the Atlantic* (2001) 46 *Journal of the Law Society of Scotland* 33

⁹ See Clark above n. 4

¹⁰ See for example, B Clark and C Dawson, "ADR and Scottish commercial litigators: a study of attitudes and experience" (2007) 26 CQJ 228; A Agapiou and B Clark, "Scottish construction lawyers and mediation: an investigation into attitudes and experiences" (2011) 3(2) IJLBE 159; A Agapiou and B Clark, "An empirical analysis of Scottish construction lawyers' interaction with mediation: a qualitative approach" (2012) 31(4) CQJ 494.

Measures found in the Court Reform (Scotland) Act 2014¹¹ and court rules implemented in pursuance of these provisions, may herald the beginning of a new era, however, in which mediation is established firmly as the bonds forged with formal civil justice systems become stronger. This is so because the Court Reform Act brought about significant new potential for the embedding of mediation within the civil court process. While, as discussed below, this has primarily taken place at the outset in the context of lower level civil disputes, these initiatives may be seen as a launch pad for more widespread development.¹² This growth can be predicted not simply because of the terms of the Act itself but also because of the pro-mediation stance of the current Scottish government leading to potential further development.¹³

It is against this backdrop of new opportunity that this article considers the development of court-based mediation in Scotland. The article begins by analysing some of the policy objectives behind mediation's promotion in Scotland followed by a discussion of the provisions relating to mediation in the Court Reform (Scotland) Act 2014 and in particular, the detailed rules enacted in respect of the new 'simple procedure'. The piece then turns to its main purpose: an analysis of some of the repercussions that widespread mediation development in sheriff courts through the simple procedure rules may herald for the administration of civil justice in Scotland. The concerns here focus on the interaction between the goals of formal civil justice, the assertion of individual legal rights and the compromise, interests-based focus of classic, facilitative mediation. One issue that is central

¹¹ An Act of the Scottish Parliament

¹² Evidence internationally suggests that court embedding of mediation can be a trigger for more general growth. See, for example, the discussion in N Welsh, "The Thinning Vision of Self-determination: The Inevitable Price of Institutionalization?" (2001) 6 *HNL* 1

¹³ Discussed below further at fn 23 and text above

to this analysis is the important role that informed consent should play in both the act of parties participating in mediation and also in respect of their agreeing to outcomes rendered through the process. It is argued that the situation in Scotland needs reform as informed outcome consent in particular cannot be guaranteed given the large numbers of litigants without lawyers (LiPs) currently participating in court-based mediation. The article then proceeds to making some practical suggestions as to potential delivery models of mediation that could be applied in the Scottish court connected context. It is contended that solutions can be found in introducing uniform referral practices to mediation in simple procedure and also in enlisting non-lawyer party advocates in mediation to assist litigants in person.

The backdrop to mediation in the Court Reform Act

It is fair to say that mediation growth in Scotland has lagged behind comparative developments in England and Wales. As noted above, in part this has been caused by the relatively limited historical linking of mediation with the Scottish courts.¹⁴ Scotland's fundamental review of civil justice took place much later than that of its southern neighbours. In this sense, the current reforms establishing simple procedure and its emphasis on mediation can be seen as one of the end-products of the 'Gill review' – the recent review of civil justice in Scotland¹⁵. While the Gill review presented a radical vision of a new and fundamentally reformed civil justice system in Scotland, some commentators were disappointed with the faint praise afforded by the review team to mediation¹⁶. In *Gill* there

¹⁴ For a discussion of the historical development of mediation across the two jurisdictions see B. Clark, *supra* n 4, chapter 1.

¹⁵ Lord Gill Report of the Scottish Civil Courts Review (Edinburgh: Scottish Civil Courts Review, 2009)

¹⁶ C Irvine The sound of one hand clapping: the Gill Review's faint praise for mediation (2010) 14(1) ELR 85

was none of the radicalism regarding mediation found in the Woolf reforms in England and Wales¹⁷ or abounds in civil justice reform processes across the globe¹⁸. Instead, a cautious, arguably unimaginative approach to mediation was outlined.¹⁹ The limited appreciation of mediation was in part at least the product of the review's evidence base – a rather select literature survey of Alternative Dispute Resolution processes with the somewhat stringent critique of Professor Dame Hazel Genn on the impact of the reforms promoting mediation within the courts in England and Wales to the fore²⁰.

Although the Scottish Government was generally fulsome in its praise of the Gill review, it took a more critical stance in respect of its limited scope relative to mediation and signalled that promotion within the civil justice system would require additional steps beyond those set forth by the review team. In its response it stated that

...mediation offers significant opportunities for parties to reach an acceptable settlement of disputes, potentially at less cost to the public purse, and often with less distress and inconvenience to the parties... [and] agrees that the... [r]eview recommendations concerning mediation are generally worthwhile, but is not

¹⁷ Woolf Report: *Access to Justice (Final Report)* 1996

¹⁸ Including Australia (Civil Dispute Resolution Act 2011), Hong Kong (Chief Justice's Working Party on Civil Justice Reform, Final Report 2004 available at http://www.civiljustice.gov.uk/fr/paperhtml/toc_fr.html) and Italy (D.Lgs. 4-3-2010 n. 28, "Attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali", *Italian Official Journal*, March 5, 2010, n.53)

¹⁹ While a small claims pilot scheme was mooted alongside more public information, options to embed mediation in the civil court system through compulsion, costs penalties for unreasonable refusals to mediate and party requirements to consider mediation before proceeding to court were all rejected - Gill Review above n 16 pp 307-308

²⁰ In chief, the experiences of the 'compulsory' mediation pilot in the London County Court outlined in H Genn et al *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure* (MOJ: 2007)

persuaded that, by themselves, they will support a major shift towards ADR. It will therefore consider what further options may be available and affordable.²¹

This pro-mediation government rhetoric has been transformed into reality in a range of different ways. For example, moves are currently afoot to further develop use of the process in the planning context,²² in land disputes²³, and legal aid has been extended in recent years to cover mediation in some circumstances.²⁴ More recently, the Scottish Government and Scottish Legal Aid Board have in principle supported a pilot “Family Dispute Resolution Information Meeting” scheme in which parties to child contact actions in some sheriff courts will be required to attend meetings with mediators to explore the possibility of using mediation to resolve their disputes.²⁵ Mediation is also encouraged by way of a recent Practice Direction applying to the new procedure for commercial actions in the Court of Session.²⁶ Finally, a recent report of Scottish Parliament’s Justice Committee has produced proposals setting out ways to help further expedite growth in Alternative Dispute Resolution.²⁷

²¹ Scottish Government Response to the Report and Recommendations of the Scottish Civil Justice Review, para 217 available at <http://www.scotland.gov.uk>

²² See for example, the Scottish government sponsored event into mediation in planning held jointly by Scottish Mediation and Planning Aid for Scotland, “A more collaborative planning system: what can mediation offer?” (21st Feb 2017) details available at <http://www.scottisharbitrationcentre.org/?p=2579>

²³ See proposal to use mediation in land disputes in Scottish Government, “Getting the Best from our Land: A Land Use Strategy for Scotland 2016-2021”, pg 4 available at <http://www.gov.scot/Publications/2016/03/5773/4>

²⁴ For a discussion see B Clark Stair Memorial Encyclopaedia (Mediation) Reissue (Edinburgh: LexisNexis Butterworths, 2014) paras 58-63.

²⁵ For a discussion of the pilot see <http://www.relationships-scotland.org.uk/blog/family-dispute-resolution-pilot-proposal>

²⁶ Court of Session Practice Note 107 of 2017, paras 7 & 20.3 available at [https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/court-of-session/court-of-session---practice-note---number-1-of-2017-\(commercial-actions\).pdf?sfvrsn=4](https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/court-of-session/court-of-session---practice-note---number-1-of-2017-(commercial-actions).pdf?sfvrsn=4)

²⁷ Including proposals for a new Scottish Mediation Act, see Scottish Parliament Justice Committee, “I won’t see you in court: alternative dispute resolution in Scotland” SP Paper 381, 9th Report 2018, available at <https://digitalpublications.parliament.scot/Committees/Report/J/2018/10/1/I-won-t-see-you-in-court--alternative-dispute-resolution-in-Scotland#Introduction>

The policy context to mediation's development

The state sponsored promotion of mediation in Scotland has not taken place in a vacuum. It occurs in a time when civil justice delivery is under pressure. Lacking the political clout of its criminal counterpart, as has been noted in the context of England and Wales, in times of austerity civil justice is a soft target for public funding cuts and further barriers to user access.²⁸ It was clear from the outset in the Gill review process that there would be no 'new money' for civil justice system reform. Indeed, chiming with civil justice reform in England and Wales part of the remit of the Gill review was to render the courts more efficient not only for system users but also for the State.²⁹ In its response to Gill the Scottish Government noted that

In taking forward the reforms, we will need to take full account of the pressure on public finances. This will significantly constrain investment in system improvements or transitional costs... We cannot accept that the waste and inefficiency identified by Lord Gill should be a permanent feature of the civil justice system, and must be prepared to take radical steps where necessary to address them.³⁰

The response continued,

Lord Gill's recommendations ... need to be considered against the scale of the tasks performed by... courts, and implemented at a time of almost unprecedented pressure on public expenditure. A reasonable estimate of total public expenditure on civil justice in Scotland is £150m, of which £25m is recovered in fees charged. The

²⁸ See generally, E Thornberg Reaping what we sow: antilitigation rhetoric, limited budgets, and declining support for civil courts (2010) 30(1) CQJ 74

²⁹ Gill above n. 16 p 1

³⁰ Scottish Government response to Gill above n.20, Ministerial Foreward

pressures on public spending are such that substantial savings will require to be found over the next few years in all of the budgets which make up this total.³¹

That civil justice requires rationing is not disputable and systems throughout the Globe have grappled with tightening budgets and the need to limit state expenditure in areas such as legal aid.³² England and Wales has seen significant civil justice reforms of late to encourage settlement and slim down the costs of civil justice delivery, including most notably perhaps the proposed new on-line court³³. Such radical steps have not yet been promoted in Scotland. Nonetheless, there is significant evidence of the further rationing of Scottish civil justice inherent in the Gill reforms including the creation of a new, lower-tier and less-well remunerated judiciary³⁴ as well as a hike in the jurisdictional limits of the Court of Session to £100,000 thus channelling more business to the lower courts³⁵. Shifts to full cost recovery through rising court and tribunal fees are also a feature of modern Scottish civil justice.³⁶ A fundamental review of legal aid provision in Scotland is also underway and ensuring further efficiency in the system is certainly on the agenda.³⁷

³¹ Scottish Government response to Gill above n.22 para 50-51

³² Witness for example the cuts to legal aid in England and Wales through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

³³ See Lord Briggs, Civil Courts Structure Review: Final Report, 2016, chapter 6 available at <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>. See also M. Ahmed A critical view of stage 1 of the online court (2017) 36(1) CJK 36 12

³⁴ The new 'summary sheriffs'. Schedule 1 of the Courts Reform (Scotland) Act 2014 details the civil proceedings which a summary sheriff will have competence to deal with

³⁵ See Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 3) (Courts Reform (Scotland) Act 2014) 2015 available at http://www.legislation.gov.uk/ssi/2015/228/pdfs/ssi_20150228_en.pdf

³⁶ The fees payable to the Scottish Court and Tribunal Service changed from 1 April 2016 following the issue of fee orders by the Scottish government. The amended fees can be accessed online at <http://www.scotcourts.gov.uk/taking-action/court-fees>

³⁷ The review was announced to Parliament by the Minister of Community Safety and Legal Affairs, Annabelle Ewing on 2 February 2017.

Against this policy backdrop, there is no doubt that the Scottish government perceives mediation as a potential way to make savings from the public purse. In terms of historical comparatives, this view is redolent of the 'efficiency proponents'³⁸ who sought to drive court connected mediation to cut expenditure in the administration of civil justice in the aftermath of the 1976 'Pound Conference' in Minnesota, USA.³⁹ Critics may thus argue that mediation is promoted by governments primarily as a cost saving measure especially in respect of lower value disputes which, in the name of freeing up judicial time, can be syphoned out of the formal court system without paying due regard to the rights of those channelled into the new programmes.⁴⁰

Nonetheless, beyond the pull of efficiency, the Scottish government also seems motivated by the promise that mediation may deliver superior outcomes for those who use it. As noted above, in its response to Gill, the Scottish Government pointed to the possibility of mediation resolving matters with less "inconvenience and stress" for the parties.⁴¹ At the Scottish Mediation Network annual conference in 2016, the Communities Minister Marco Biago MSP pointed to the wider benefits of the process when he noted that '[m]ediation and the values of mediation are at the heart of what we want to see in society and government in Scotland.'⁴² This view is redolent of those held by the pioneering 'quality proponents'⁴³ of mediation in the USA focusing on the transformative power of the process to cement relationships, provide

³⁸ A term coined in S Silbey and A Sarat "Dispute Processing in Law and Legal Scholarship" (1989) 66(3) *Denver Law Review* 437

³⁹ The National Conference on the Causes of Popular Dissatisfaction with Administration of Justice – see generally, A L Levin and R.R Wheeler (eds) *The Pound Conference: Perspectives on justice in the future* (Massachusetts: West, 1979)

⁴⁰ See for example, J Auerbach *Justice without Law: resolving disputes without lawyers* (New York: OUP, 1983)

⁴¹ Scottish Government response to Gill above n 20, para 217

⁴² Cited in G Boyack, "Teach mediation to all and reap the benefits" (2017) *Scotsman online* available at <http://www.scotsman.com/news/opinion/teach-mediation-to-all-and-reap-the-benefits-1-4082391>

⁴³ A term coined in Silbey and Sarat above n. 39

more meaningful outcomes for parties in dispute and lead to more harmonised communities. These twin agendas of 'efficiency' and 'quality' are not necessarily easy to reconcile, however – an issue returned to below in respect of mediation's place in simple procedure.

Legal provisions relating to mediation in simple procedure

In terms of general powers, sections 103(2)(b)(i) & 104(2)(b)(i) of the Court Reform Act 2014 enable the Court of Session⁴⁴ by Act of Sederunt to make provision for rules 'encouraging settlement of disputes and the use of alternative dispute resolution procedures' in the Court of Session and Sheriff courts. Furthermore, by dint of section 75, 'the power to make provision relating to simple procedure...under section 104(1) is to be exercised so far as possible with a view to ensuring that the sheriff...—

- (a) is able to identify the issues in dispute,
- (b) may facilitate negotiation between...parties with a view to securing a settlement,
- (c) may otherwise assist the parties in reaching a settlement,
- (d) can adopt a procedure that is appropriate to and takes account of the particular circumstances of the case'

The new 'simple procedure' was introduced on 28th November 2016 and replaced the pre-existing 'small claims' and 'summary cause procedures' in Scotland's sheriff courts. Simple procedure is designed to be flexible, informal and relatively quick and is used to settle cases below a value of £5,000. In pursuance of the powers set out in the Court Reform Act, the

⁴⁴ Scotland's highest civil court

Scottish Civil Justice Council⁴⁵ has since produced rules for Simple Procedure since adopted as rules of court as found in the Act of Sederunt (Simple Procedure) 2016, Schedule 1.

The prominence given to mediation⁴⁶ throughout the new rules is stark with the agenda of ‘efficiency proponents’ firmly in the foreground. First, rule 1.1(1) states that ‘the simple procedure is a court process designed to provide a speedy, inexpensive and informal way to resolve disputes’. This idea is expanded upon in Rule 1.2(1) where it is stated that ‘[c]ases are to be resolved as quickly as possible, *at the least expense to parties and the courts*’.⁴⁷ Rule 1.2 (2) further notes that ‘[t]he approach of the court to a case is to be as informal as is appropriate, taking into account the nature and complexity of the dispute’. So the three main driving elements of the procedure seem to be speed, informality and low cost and clearly linked to the efficiency aims at the heart of *Gill*, designed to reign in public costs and free up judicial time. While the notion of ‘informality’ could pertain to efficiency through dispensing with costly and time consuming legal formalities it may also point to a greater accessibility for users and perhaps flexibility in resolution - matters that are consonant with the goals of quality proponents to achieve superior outcomes and more humane processes.

In pursuance of these broad objectives, the new rules place an obligation on parties to seek out the possibility of using mediation or negotiating their own settlement and furthermore caution the parties only to make use of adjudication when it is absolutely necessary. So the

⁴⁵ The Scottish Civil Justice Council was established on 28 May 2013 under the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. It prepares draft rules of procedure for the civil courts and advises the Lord President on the development of the civil justice system in Scotland – see <http://www.scottishciviljusticecouncil.gov.uk/council>

⁴⁶ Although the terminology perhaps unhelpfully refers to “Alternative Dispute Resolution” as noted below in practice the process this relates to is mediation.

⁴⁷ My emphasis

notion of ‘justice as last resort’ – broadly rejected by Gill⁴⁸ - is alive and well in the rules. According to Rule 1.2(4), ‘[p]arties are to be encouraged to settle their disputes by negotiation or alternative dispute resolution, and should be able to do so throughout the progress of a case’. Rule 1.2(5) states that ‘[p]arties should only have to come to court when it is necessary to do so to progress or resolve their dispute’. These litigant-centred obligations are bolstered by duties imposed on the sheriff⁴⁹ to encourage out of court settlement. Rule 1.4(3) stipulates that ‘[t]he sheriff must encourage cases to be resolved by negotiation or alternative dispute resolution, where possible’ and under 1.4(4) ‘If a case cannot be resolved by negotiation or alternative dispute resolution, the sheriff must decide the case’.

Furthermore, under Rule 1.5(5) ‘[p]arties must consider throughout the progress of a case whether their dispute could be resolved by negotiation or alternative dispute resolution’. Underpinning the role of the sheriff in promotion of mediation, rule 1.8 empowers the sheriff to ‘do anything or give any order considered necessary to encourage negotiation or alternative dispute resolution between the parties.’ Finally, by dint of rule 1.5(6) a further obligation holds that ‘[p]arties must approach any negotiation or alternative dispute resolution with an open and constructive attitude’.⁵⁰

There can be no doubt from reading the rules that diversion away from formal adjudication is a key driver of the rules promoting mediation (as well as party negotiation). There has been significant evidence of the negative experiences of parties in small claims courts⁵¹ and the documented frustrations of sheriffs in guiding hapless party litigants through the procedural

⁴⁸ See Gill above n. 16 chap 6 para 21

⁴⁹ The sheriff court judge

⁵⁰ This raising issues around confidentiality and good faith participation in mediation. These are matters beyond the scope of this article but for a commentary on confidentiality and evidential privilege in Scotland see B Clark Stair Memorial Encyclopaedia Mediation (Reissue) 2014 at paras 40-48

⁵¹ The predecessor to simple procedure

maze of court procedure⁵². Research has suggested that sheriffs value the work that mediation and other in-court settlement services can offer and that hence they may keen to jettison cases in favour of these alternative routes.⁵³

In terms of how references to mediation may take place, in theory these can occur at various different stages of the proceedings. When a respondent disputes the claim, the sheriff must first consider the matter in private and issue 'first written orders' to the parties.⁵⁴ One such order permissible at this stage is to refer the parties to alternative dispute resolution.⁵⁵ If the sheriff at first written order has arranged a 'case management discussion',⁵⁶ then at that juncture again the sheriff may 'discuss negotiation and alternative dispute resolution with the parties'⁵⁷ or 'refer parties to alternative dispute resolution'.⁵⁸ Furthermore, if the case has been taken to full hearing the sheriff is empowered at this stage to refer parties to alternative dispute resolution.⁵⁹ The new provisions hence adopt a 'belt and braces' approach with a spate of rules imposed both upon parties and the sheriff encouraging use and three different procedural stages in which mediation may be referred to.

At the time of writing, it is not clear absolutely how the rules are being brought into practice throughout the country. Anecdotally, however, reports suggest that a variety of approaches can be found. In Glasgow, parties are referred to the free local Strathclyde University mediation scheme at first written orders.⁶⁰ In some geographical areas parties have at 'first

⁵² Blake Stephenson Ltd *Research into Participant Perspectives of Dispute Resolution in the Scottish Courts* (Scottish Legal Aid Board 2016), paras 5.12-5.17

⁵³ Blake Stephenson Ltd *ibid.* paras 3.35-3.37

⁵⁴ Rule 7.5(1)(a)

⁵⁵ Rule 7.6(1)(a)

⁵⁶ Rule 7.6.(1)(b)

⁵⁷ Rule 7.7(2)(b)

⁵⁸ Rule 7.7(3)

⁵⁹ Rule 12.3(1)

⁶⁰ The Strathclyde provision has recently been expanded to other areas including Hamilton, Airdrie and Falkirk - conversation with Charlie Irvine, Director of Strathclyde University Mediation Clinic.

orders' been referred to the Scottish Mediation 'National Mediation Helpline'⁶¹ where mediation is available for a cost of £100. Elsewhere, including Edinburgh, Paisley, Glasgow and Falkirk, case management conferences are used to refer to on the spot mediation services in court.⁶² Reports also suggest that at times sheriffs have 'ordered' parties to mediate raising the spectre of compulsory mediation.⁶³

The potential impact of court connected mediation in simple procedure

Existing evidence of court connected mediation in Scotland

Prior to analysing the potential impact of the simple procedure provisions on mediation, it is worth briefly examining what is already known about court connected mediation in Scotland at the present time. There is some limited data available. The most prominent research pertains to the pilot mediation programmes that operated out of Glasgow and Aberdeen sheriff courts between 2006 and 2008.⁶⁴ Added to this is the evaluation undertaken in respect of the Edinburgh sheriff court pilot mediation programme in 2002.⁶⁵ Furthermore, there exists data collected by the Strathclyde University Mediation Clinic⁶⁶ as well as recent research commissioned by the Scottish Legal Aid Board into in-court mediation (and in-court

⁶¹ Run by Scottish Mediation – for details see <https://www.scottishmediation.org.uk/>

⁶² G Boyack Simple procedure: it's complicated (Jan 2017) Journal of the Law Society of Scotland online edition availab <http://www.journalonline.co.uk/Magazine/62-1/1022715.aspx>

⁶³ Boyack ibid

⁶⁴ M Ross and D Bain In court mediation pilots: report on the evaluation of in court mediation schemes in Glasgow and Aberdeen Sheriff Courts (2010: Scottish Government, Courts and Constitution Analytical Team)

⁶⁵ E Samuel Supporting court users: the in-court advice and mediation projects at Edinburgh Sheriff court phase 2 (2002: Scottish Executive Central Research Unit)

⁶⁶ The vast majority of cases arising from the Small Claims party litigants court at Glasgow Sheriff Court. Unpublished data on file with the author.

advice schemes).⁶⁷ In the main, the available research relates to mediation in the context of the old 'small claims' procedure.⁶⁸

Taking the current evidence base as a whole it is possible to make the following general observations: mediation can be considered broadly a success at least in terms of its ability to broker settlements.⁶⁹ Settlements produced seem to be frequently honoured and importantly adhered to more often than comparable court outcomes.⁷⁰ Satisfaction rates of parties who have engaged in mediation again tend to be high and where the data exists, outstrips that of those parties whose cases were resolved through traditional civil court proceedings.⁷¹ That this is so is no real surprise. Surveys of claimants in the Scottish courts have suggested that aside from monetary compensation, they seek a number of other outcomes beyond the gift of the judiciary including apologies, explanations and assurances that the conduct they are complaining of will not happen to others.⁷² Mediation has the potential to yield up a wide array of potential outcomes thus meeting the personal desires or, one might say, the 'personal' justice needs of participants.⁷³ Evidence from the Glasgow and

⁶⁷ Blake Stephenson above n. 53

⁶⁸ Cases up to £1500 in value.

⁶⁹ The Edinburgh research found a 91% settlement rate from 22 cases in the research period – see Samuel n. 56 above. The Glasgow and Aberdeen evaluation found a 78% settlement rate from 138 cases in the research period – see Ross and Bain, above n 65 , para 4.11

⁷⁰ Ross and Bain found that 90% of mediated agreements were adhered to without further court action as opposed to 67% of comparable court orders, above n 65, para 5.17

⁷¹ Ross and Bain found for the Aberdeen and Glasgow sheriff court pilot that the overall satisfaction levels were higher for mediation service users than those who continued their dispute by normal adjudicative means. Satisfaction levels were highest for the time spent on mediation and the overall experience of mediation, above n. 655, Figures 5.4, 5.5. The qualitative study undertaken by Blake Stephenson Ltd broadly found that users who participated in mediation generally found users reporting positive experiences – Blake Stephenson Ltd above n 53, chapter 6.

⁷² Parties sue for a wide range of extra-legal factors. One Scottish survey found that while around half of pursuers surveyed wanted financial compensation, others sought apologies, explanations and assurances that the conduct complained of would not reoccur – see Scottish Consumer Council Civil Disputes in Scotland: A Report of Experiences (Edinburgh: SCC, 1997) p 23

⁷³ Ross and Bain note the variety of outcomes yielded in mediation including those that could not be delivered by the court – Ross and Bain n. 65 above, para 5.21. 'Justice' in mediation is explored below infra at n. 77 and accompanying text

Aberdeen scheme also point to costs as well as time savings to be made with regard to mediation use for both parties and the State⁷⁴.

Data from some of those providing mediation in simple procedure echoes the generally positive noises made in previous studies⁷⁵. From May 2017 to January 2018, the Edinburgh sheriff court programme reported 46 mediations taking place with a settlement rate of 70%. For the same period, across a range of sheriff courts the Strathclyde Mediation programme reported 76 cases occurring with a 61% settlement rate.⁷⁶ Importantly, in common with previous Scottish studies, a high percentage of mediated outcomes are reportedly honoured by the parties without any further enforcement proceedings⁷⁷.

The Scottish research as a whole indicates, however, that the numbers of cases mediated were relatively low and there to appear to subsist a range of barriers to mediation's acceptance, not least from the legal profession.⁷⁸ Against the somewhat positive evidence gleaned thus far in Scotland, allied to the suspicion of resistance from users and legal advisors,

⁷⁴ In terms of personal savings, the Glasgow and Aberdeen research estimated that, on average, the costs for mediation service users were lower (£267 on average) than the alternative court service (£328 on average). (Ross and Bain above n. 65, para 6.23) Ross and Bain tentatively suggest that savings from the public purse are to be made through recourse to mediation. The authors conclude that "the average actual cost per case in Aberdeen was £1,142 for the whole pilot period; recurrent costs were around £953. The average actual cost per case in Glasgow was £1,135 for the whole pilot period; recurrent costs were around £981. This compares well with the comparative costs for civil litigation cases brought through the sheriff courts at £2,044 per case" Furthermore in terms of potential time savings, "the average time spent on [mediation] in Aberdeen was 29 days for summary causes and 20 days for small claims. In Glasgow, average times were slightly longer at 44 days for summary causes and 37 for small claims. Estimates of comparable time spent per case for civil litigation cases going to the sheriff was around 50 days (Ross and Bain above n. 65 para 6.3)

⁷⁵ Scottish Mediation and University of Strathclyde, "Mediation Under Simple Procedure: one year on" available at

https://www.strath.ac.uk/media/faculties/hass/law/mediationclinic/Simple_Procedure_Report_Feb_2018.pdf

⁷⁶ *Ibid* at 10-14

⁷⁷ See Scottish Mediation and University of Strathclyde, *supra* n 76

⁷⁸. For example, the Glasgow and Aberdeen research speaks of some initial resistance to the scheme from solicitors as well as sheriffs – Ross and Bain above n 65 paras 3.32-3.39.

governmental initiatives to encourage further use – such as those in simple procedure rules - may be considered compelling.

Critiques of court connected mediation

Despite the rather rosy picture painted above, existing Scottish studies do not tell us how the outcomes brokered in mediation comport with formal justice outcomes. Critics suggest that participants in mediation run the risk of being short-changed in justice terms – even when they express subjective satisfaction with the process. In short, the argument runs that settlement rates and party satisfaction are no proxies for justice where legitimate legal entitlements are compromised and recrafted as mere disagreements⁷⁹. As Genn has suggested, ‘mediation is not about *just* settlement, it is *just about* settlement’⁸⁰. Amplifying this view, more explicitly she posed the question, ‘[a]re mediators concerned about substantive justice? Absolutely not... There is no reference to the hypothesised outcome at trial. The mediator does not make a judgement about the quality of the settlement.’⁸¹ The fact that many litigants in simple procedure are likely to be LiPs is important here. The power imbalances inherent in many cases –for example when one party is legally represented and the other is not, or where one LiP is more knowledgeable, forceful or confident than the other – may not be alleviated in facilitative mediation where mediators cannot take sides and the norms upon which outcomes are crafted emanate from the parties themselves.⁸² Although

⁷⁹ What Laura Nadar termed ‘harmony culture’ – see L Nadar Controlling Processes in the practice of law: hierarchy and pacification in the movement to reform dispute ideology (1993) 9 OSJDR 1

⁸⁰ H Genn Judging civil justice: 2008 Hamlyn Lectures (Cambridge: CUP, 2010) p 117

⁸¹ Ibid p 116-117

⁸² For a discussion of the issue of power imbalances in mediation see, for example, T Grillo The mediation alternative: process dangers for women (1991) 100 Yale Law J 1545; R Rueben Constitutional gravity: a unitary theory of alternative dispute resolution and public civil justice (2000) 47 UCLA Law Rev 949

there is no evidence of this in Scotland at present, the argument follows that the potential thus exists for settlements to be deficient in formal justice terms.

These problems may be compounded if mediators work in broadly unregulated ways and in particular if they operate under efficiency targets or need to prove their worth in public expenditure terms. As discussed above, the efficiency drive for mediation in Scotland exists in government rhetoric as well as in the simple procedure rules themselves. Brazil has noted in the US context that when courts emphasise the efficiency elements of diversion to Alternative Dispute Resolution they may 'elevate ends over means; that is, to care more, perhaps appreciably more, about 'getting a deal' than about how they conduct themselves'.⁸³

On the issue of the justice gap in court based mediation of course legal norms are only one of a wide range of factors that parties may see as relevant in terms of influencing a certain desired outcome to a dispute. A pluralistic approach posits that justice is not the monopoly of the law but rather can also be found in a wider array of values and norms of importance to parties in dispute⁸⁴. Court adjudication may in fact fall down by the way the discourse of the dispute is shaped and compromised by the law⁸⁵ by the fact that parties' participation in the process may be limited or undignified⁸⁶ or by the way available legal remedies may not in fact meet either party's underlying interests.⁸⁷ It has been argued that there may be a form of

⁸³ Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, (2006) 21 *Ohio St J On Disp Resol.* 241, p 266

⁸⁴ See for example, S. Elnegahy, *Can mediation deliver justice* (2017) 18 *Cardozo J On Disp Resol* 759

⁸⁵ C Menkel-Meadow *Whose dispute is it anyway? A philosophical and democratic defense of settlement (in some cases)* (1995) 83 *Georgetown Law J* 2663, p 2674

⁸⁶ Thus contrary to notions of procedural justice - see AE Lind and T Tyler *The social psychology of procedural justice* (New York: Plenum Press, 1988); N Welsh *Making deals in court connected mediation: what's justice got to do with it?* (2001) 79 *Washington Univ Law Q* 788

⁸⁷ Ross and Bain above fn 65, paras 5.12-5.13; T Relis *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (New York: Cambridge University Press, 2009), p 9-10, 15

personal justice thus found in mediation which is better reflective of parties' needs⁸⁸ – even if it not necessarily consonant with formal justice outcomes.

Underpinning legal norms may indeed be one of a range of issues discussed in mediation and may in practice influence outcomes agreed. It is clear, however, that parties in mediation in pursuit of their own desired outcomes, may be willing to sacrifice a particular legal entitlement to attain an agreement that better reflects their underlying interests and needs or entails a more humane process. So even if an analysis of court based mediation practice in Scotland were to suggest that mediated agreements looked sub-par in legal terms, it would not necessarily provide an indication of whether or not those outcomes were deficient in terms of fairness. Knowledge of potential outcomes and legal entitlements is king here, however. A compelling argument is that parties may indeed be willing to sacrifice potential legal rights at the altar of wider interest maximisation but to do so they must have some cognisance of what they are giving up. To reframe this we might say that to ensure that mediation schemes comport with the justice missions of the civil courts within which they are located, parties must provide informed consent both to participate in mediation – a process not fundamentally concerned with the assertion of legal rights - as well as to any outcomes that they agree to in mediation. It is to such issues that we now turn.

Informed consent

Informed consent is a well-established concept in a number of fields, including with regard to decisions taken in respect of potential courses of action in the context of the doctor/patient

⁸⁸ JM Hyman and LP Love, If Portia were a mediator: an inquiry into justice in mediation (2002) 9 Clinical Law Review 157

field as well as the lawyer/client relationship⁸⁹. There are two aspects to informed consent – one is the explanation to the client of the consequences of participation in a particular process, decision or step. The second is to ensure that the client is able to comprehend the information tendered and consents to the course of action described.⁹⁰ Academic study has analysed the import of informed consent in the field of mediation in respect of two main aspects⁹¹. The first is what is termed as ‘participatory consent’ – where a party consents to initial engagement in mediation (as well as continuous involvement) and the other is ‘outcome consent’ where the party consents to an outcome brokered in mediation. While arguably participatory consent is uncontroversial and indeed an essential feature of court connected mediation,⁹² outcome consent is beset with theoretical and practical difficulties. Both issues are examined below in the context of mediation in Scottish simple procedure.

Participatory consent in simple procedure mediation

Simple procedure rules repeatedly point to the ‘encouragement’ of parties to engage with mediation. As noted above, however, reports indicate that some sheriffs are ordering litigants to mediate. Whether compulsion is intended within the rules or not is unclear⁹³ but where shrieval encouragement is made robustly we might expect litigants to be susceptible to viewing such promptings as instructions to be followed without question.⁹⁴ Even in

⁸⁹ The origins of the concept can be traced back to US jurisprudence in the doctor/patient context - for a review of development see generally J M Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' [1999] 74 NOTRE DAME L Rev 778; M T Colatrella Jr. 'Informed Consent In Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honoring The Mediator's Ethical Duties' [2013-2014] 15Cardozo J Conflict Resol 706

⁹⁰ Nolan-Handley above n 90, p 778

⁹¹ The two main reference points in the field are Nolan-Handley above n. 90 and Colatrella Jr above n 90.

⁹² Although nonetheless not assured without due care and attention.

⁹³ The simple procedure rules – including that stipulating that adjudication should only take place where mediation is not applicable (rule 1.4(4)) - could be interpreted to allow for compulsion.

⁹⁴ One may question the knowledge levels of sheriffs as regards mediation too in their efforts to explain the process to parties.

mandatory mediation, however, informed consent to continue with the process once begun is still important. This is so because mediating parties are generally free to leave at any time and not bound to continue until a reaching settlement.⁹⁵

For informed participation consent to be achieved, either or both at the time of referral and within the mediation itself, parties need to be made aware of exactly what it is they are signing up to and then consent to their involvement in that process. This is not necessarily simple to achieve. Mediation is relatively unknown to those who have not used it.⁹⁶ In its classic facilitative guise, mediation involves an independent third party who does not take a decision, nor advises the parties what to do, nor provides views on the respective strengths of the parties cases or appropriateness of any offers made. Uninitiated parties may wonder exactly quite what the mediator will actually do. Explaining the mediation process and the roles of mediator and parties within it in a manner understandable to those new to the game is no easy task. This may be particularly so when one considers the context in which court-connected mediation takes place. Despite explanations to the contrary, uninitiated LiPs mired as they are in court proceedings, may expect the process to entail some manner of decision making on their behalf and an element of legal determination.⁹⁷

⁹⁵ An exception might arise where parties are subject to good faith participation requirements. As noted above simple procedure rule 1.5(6) requires parties to take a constructive attitude in respect of mediation participation. For a discussion of good faith requirements in mediation and the potential impact on confidence and impartiality of mediators see S Zimmerman *Judges gone wild: why breaking confidentiality privilege for acting in 'bad faith' should be re-evaluated in court-ordered mandatory mediation* (2009) 11 *Cardozo J Conflict Resol* 353

⁹⁶ The Ross and Bain research found high levels of unawareness of mediation from parties that mediated their disputes (as well as those who chose to go to final judicial hearing) – Ross and Bain above n.65 Table 5.3

⁹⁷ Other UK research here is instructive. An analysis of user perceptions in respect of the Exeter small claims mediation project found that legal skills and experience were highly valued in mediators suggesting a preference for evaluation from court mediators – J Enterkin and M Sefton *An evaluation of the Exeter small claims mediation scheme* (2006) Executive Summary available at http://www.dca.gov.uk/research/2006/10_2006excsumpdf; Research into judicial mediation in the contexts of employment tribunals in England and Wales found clients criticising judicial mediators for being too detached and not 'judge-like' enough – see Urwin et al *Evaluating the use of mediation in Employment Tribunals* (Ministry of Justice Research Series 7/10, 2010) pp 44-46. Ross and Bain reported that lawyer-

Such difficulties are compounded by the fact that different mediation styles abound where one form of mediation may be barely recognisable to another. It seems thus essential that in gaining participatory consent parties are painted an accurate picture of the process and the role of the mediator that will unfold. So, for instance, a mediator or mediators may operate in the classic, facilitative style and/or engage in evaluative techniques,⁹⁸ or adopt 'transformative' approaches.⁹⁹ Equally, in respect of the terms of agreements reached between the parties, a typical 'norm-generating' method may be deployed where the norms underpinning any outcome are agreed upon by the parties. By contrast, mediators may seek to influence the terms of agreement and adopt 'norm-educating' or even 'norm-advocating' approaches.¹⁰⁰ Mediators may prefer private meetings or operate to keep parties together at all times. Issues such as ground rules for party conduct, neutrality and confidentiality require adequate explanation too.

In terms of where parties may get information about mediation from, much hinges on the mode of referral. As noted above, parties may at 'first orders' be required or advised to contact mediation providers or may be referred on the spot to an in-court service at a case management conference or at full hearing. So information upon which to base a decision whether or not to participate in mediation may be provided in writing through information

mediators in the Aberdeen and Glasgow pilot scheme had to resist calls from parties to deliver legal advice – Ross and Bain above n. 61 para 4.3.6

⁹⁸ In an evaluative model, 'a mediator [may focus] ... on the legal claims, assesses [parties'] strengths and weaknesses... predicts the impact of not settling and pushes the parties to his/her evaluation of the appropriate settlement' - L Riskin *Understanding mediators' orientations, strategies and techniques: a guide for the perplexed* (1996) 1 *Harvard Negot Law Rev* 17, p 25

⁹⁹ Transformative mediation insists that the process should focus on the relationship between the parties. The mediator's role is to 'support' party interaction, restoring to those in conflict a degree of competence or 'empowerment' which in turn leads to a greater capacity to recognise the perspective of the other – see A B Bush and J P Folger *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 2nd edn, 2005)

¹⁰⁰ See E Waldman *Identifying the role of social norms in mediation: a multiple model approach* (1997) 48 *Hastings Law J* 703

on leaflets or websites, over the phone or in person from a range of different potential providers.

In relation to these 'intake' conversations – whether via phone or face to face discussion - one of the potential problems with gleaning participants' informed consent therefrom is that at least arguably the focus may be on conversion rather than laying out full information - warts and all - upon which parties may make an informed choice as to whether to mediate or not. This may be so because some mediators are known to have a deeply held, often evangelical belief in their process.¹⁰¹ It is also recognised that resistance to mediation is often strong in would-be users and their lawyers. Some of this intransigence is built on unsteady foundations, comprised of false and distorted perceptions about the process and thus needs to be strongly rebutted.¹⁰² Additionally, mediators may fall under pressure to prove that their service works and that they convert a sufficient number of leads to render their offering viable in economic terms. Thus, there seems at least a danger that mediation information sessions may become more of an exercise in persuasion rather than a neutral mapping out of the process designed to elicit the informed consent of potential users to participate.

To be fair, a survey of information available from different mediation providers in Scotland currently suggests that (at least in writing) they seek to provide information to would-be users in an accessible, comprehensive fashion.¹⁰³ There is no available evidence suggesting a sales-

¹⁰¹ In the Canadian context, Julie Macfarlane noted mediation converts as 'true believers' who became zealous preachers for mediation – J Macfarlane Culture Change? Commercial litigators and the Ontario mandatory mediation programme (2011) available at http://dsp-psd.pwgsc.gc.ca/collection_2008/lcc-cdc/JL2-70-2001E.pdf. Similarly Hensler noted the 'conversion' of some lawyers to mediation in the USA – D Hensler Our courts, ourselves: how the alternative dispute resolution movement is reshaping out legal system (2003) 108 Penn St L Rev 108, pp 190-192

¹⁰² See the discussion in B Clark above n. 24 chapter 2

¹⁰³ See for example the information pages at <https://www.mygov.scot/alternatives-to-court/> (Scottish government general information);

pitch mentality to mediation intake in Scotland. Nonetheless, such approaches can be detected elsewhere in the UK. In this sense, there has been significant interest from the UK mediation community in the work of Liz Stockhoe, and the lessons that can be learned from utilising the Conversation Analytic Role-Play Method ('CARM') approach¹⁰⁴ to aid conversion in mediation intake sessions. In general, the research suggests what to say and not say – those patterns of conversation most likely to lead to successful conversion of potential clients and those that are more prone to shutting down opportunities for mediation. So for example, the Brighton and Hove Mediator's Newsletter draws on this research in an article entitled, "How to sell mediation"¹⁰⁵. It contains advice about how to "convert clients". Some of the more eye-catching instructions include "Do not remain impartial at the expense of losing clients"; "Do not say that mediators have no power and do not take sides". It should be recognised that as mediation develops further in Scotland providers in Scotland may not be immune to the attractions of mimicking this approach.

Aside from intake conversations, there is additionally an opportunity to glean informed consent to continue with mediation in the session itself. The opening statement in mediation may typically reiterate key aspects of the process that already relayed to the parties in their intake transaction.¹⁰⁶ At this juncture, mediators may stress their neutrality, the confidentiality of the process, the fact that parties remain in control of the settlement, and also seek to explain the general procedure to be followed and any ground rules around party conduct in the mediation. It is possible, however, that parties may not digest information

¹⁰⁴ See, for example, E Stokhoe Overcoming barriers to mediation in intake calls to service: research-based strategies for mediators (2013) 29(3) Negotiation Journal 289

¹⁰⁵ Available at <https://bhimsdotorg.wordpress.com/category/dr-elizabeth-stokoe/>

¹⁰⁶ If indeed one has taken place – a direct referral to mediation by a sheriff in a case management conference may not allow for this.

proffered at this stage because of their emotional state at the beginning of a mediation. As Genn highlighted in respect of court connected mediation in the London County Court, 'the commencement of the mediation was often a tense time. Many parties had not communicated, let alone been face to face, since the dispute began. As a consequence, when parties first entered the meeting room for the opening session there was a sense of anxiety and awkwardness'.¹⁰⁷

Informed Outcome consent

Gaining parties' informed outcome consent is troublesome for mediators. Mediators deploying the classic, facilitative approach do not typically take on responsibility for the substantive fairness of outcomes, leaving the parties to determine what is fair and just for them, although they may ask 'reality testing' questions designed, for example, to help parties think about the legal strengths of their cases.¹⁰⁸

Jacqueline Nolan-Handley has suggested that in the context of court connected mediation, informed outcome consent is essential to comport with the justice missions of civil courts.¹⁰⁹ This is commensurate with the idea expressed above that parties may prefer to sacrifice potential legal rights in favour of interest maximisation, but that parties should exercise a conscious choice to do so in the full knowledge of those rights. The argument continues that if parties in mediation do not appreciate their legal position, including potential litigation

¹⁰⁷ H Genn *The Central London County Court Pilot Mediation Scheme: Evaluation Report* (The Research Unit, Department for Constitutional Affairs, 1998) at para 6.2.4 available at http://www.cnmd.ac.uk/laws/judicial-institute/files/Central_London_County_Court_Mediation_Scheme.pdf

¹⁰⁸ A Davis and R Salem *Dealing with power imbalances in mediation in interpersonal disputes* in J Lemmon (ed) *Procedures for guiding the divorce mediation process* (San Francisco: Jossey-Bass, 1984) p 20

¹⁰⁹ Nolan-Handley above n 90

outcomes, then they are unable to make informed decisions and negotiate a settlement that is objectively fair.¹¹⁰

It can be argued thus that it should fall to mediators, operating in the shadow of courts, to be responsible for ensuring the informed consent of the parties to outcomes brokered therein. Nolan Handley sets out a sliding scale of obligations ranging at the one end from a contractual approach where the extent of information to secure outcome consent to be provided by the mediator is set out in their agreement with the parties. This would apply in respect of legal assisted parties mediating on a voluntary basis outside of the court process. At the other end of her scale lie LiPs, pressured into court-connected mediation programmes, where a fuller level of information disclosure to allow informed outcome consent to take place is required.¹¹¹

Such an approach is perhaps redolent of a 'norm educating' model of mediation¹¹² in that it becomes incumbent upon mediators to provide information about the possible legal ramifications of the dispute before them against which parties can weigh potential outcomes.¹¹³ Whether a mediator can ensure such consent is questionable, however. Robert Baruch Bush was one of the first commentators to flag up the ethical complexities for mediators in handling the issue of informed outcome consent.¹¹⁴ He posed a number of theoretical questions around how mediators might respond in different situations in which informed outcome consent might be lacking. As he noted,

¹¹⁰ J Stulberg *Mediation and Justice: What Standards Govern?* (2005) 6 *Cardozo Journal of Conflict Resolution* 213, p 239; J Maute *Mediator Accountability: Responding the Fairness Concerns* (1990) 2(4) *Journal of Dispute Resolution* 347, p 362

¹¹¹ Nolan-Haley above n 90 pp 825 – 840

¹¹² Waldman above n 101

¹¹³ Or indeed a 'norm advocating model' in which mediators insist that certain norms – such as underpinning legal rights - are captured in the agreement, *ibid*.

¹¹⁴ Robert A. Baruch Bush *A Study of Ethical Dilemmas and Policy Implications*, (1994) 4 *J. Disp. Resol* 1

It happens with some frequency that one of the parties is ignorant of a legal rule that would operate in his favor, and which the mediator knows of. That is, the party is on the verge of making a settlement on certain terms, when if the legal rule were known to him, he would be able to get more favorable terms or might not settle at all. The question here is whether the mediator should provide the information to the part - or hint to him that he should do further research, or otherwise put him on notice - or do nothing. If the mediator does something to bring the information to the party's notice, he preserves the opportunity for meaningful consent, but he runs the risk of crossing the line that separates mediation from legal advice and advocacy.¹¹⁵

Equally, providing information about possible legal outcomes may clearly prejudice the negotiating position of one party over the other and damage perceptions of neutrality. Informing the parties of their legal rights may also increase the potential of liability for (mis)information provided by the mediator¹¹⁶ and also poses a question around the ability or qualification of the mediator to provide such information. Moreover, the mediation process should not be conflated with legal process; the way that the evidence is presented to a mediator may not in any case be conducive to taking a proper view on its legal merits. Hence, any information or advice tendered by a mediator in this regard can only be qualified at best.

Reflecting this dilemma it is notable that the Scottish Mediation code of practice for mediation makes no reference at all to informed outcome consent, stressing instead mediator impartiality and respecting the self determination of the parties.¹¹⁷ The same is true in other

¹¹⁵ Ibid at 21

¹¹⁶ Although there are no known legal claims against mediators in Scotland, it is possible that an action in negligence, breach of fiduciary duty or for breach of contract could arise in respect of any error or impropriety by a mediator which results in a loss to a mediating party

¹¹⁷ <https://www.scottishmediation.org.uk/wp-content/uploads/2016/03/Code-of-Practice-for-Mediation-in-Scotland.pdf>

jurisdictions. Standard 1.A.2 of the 2005 US Model Standards for Mediator Conduct,¹¹⁸ for example, states that '[a] mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices'. Other codes of conduct actively require a mediator to allow unrepresented litigants to have any agreement reached by them in mediation reviewed by lawyers. The New Mexico guidelines for mediators state that 'If the mediation parties are not represented by counsel at the mediation, the mediator should afford them the opportunity for review of any agreement by an independent attorney or other consultant before it is signed'.¹¹⁹

Building on this latter point, removing the responsibility of the mediator to ensure informed outcome consent does not necessarily mean that the process as a whole should not strive to achieve the same. Informed outcome consent can alternatively be tackled by the provision of legal advice and assistance either in or after the mediation. Mediation advocacy is a growing area for training for lawyers in the UK.¹²⁰ In many Scottish contexts lawyers are currently involved in assisting parties within mediation sessions¹²¹ and in others, lawyers provide advice outside of mediation prior to any draft agreements being signed up to.¹²² More generally it can be said that although evidence suggests that lawyers can sometimes

¹¹⁸ Developed in partnership by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution. Available at https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf

¹¹⁹ https://www.nmcourts.gov/uploads/FileLinks/533c1395ac89471d80d5a34b56091cf9/Guidelines_For_Court_Connected_Mediation_Services_September_30_2016_.pdf

¹²⁰ For example, in recent years Diploma in Professional Legal Practice students have been taught a module in Mediation and Mediation Advocacy at the Universities of Strathclyde and Edinburgh.

¹²¹ See Clark and Dawson above n 10 Agapiou and Clark above n 10

¹²² A common approach in family mediation – see the information on 'CALM' mediation in Scotland at <http://www.calmscotland.co.uk/the-mediation-process.html>

scupper negotiations in mediation and reduce client empowerment, the input of lawyers can help alleviate power imbalances that may otherwise exist, assist clients to resist the overtures of overly zealous mediators and also improve participants' perceptions of substantive justice in mediated outcomes.¹²³

The kind of mediation that may arise in the context of simple procedure, however, often entails LiPs on one or both sides. The research into the Glasgow and Aberdeen in-court pilots found relatively few legally represented litigants in mediation.¹²⁴ Equally, lawyers will often simply not be available to review agreements reached in mediation even if mediators were compelled to give provide litigants with the opportunity to seek legal advice on potential settlements prior to final agreement. Civil legal aid in Scotland is not currently available in simple procedure and thus this trend is likely to continue.

Charting a way ahead for mediation in Scottish simple procedure

Uniform referral to mediation

As a general issue, clearly the aims of civil justice as articulated in the Gill reforms to provide proportionate justice –balancing speed and efficiency with quality of outcomes and experience for users – is better met by a consistency of approach in recourse to mediation rather than the current patchwork of different systems in place at present. In this vein, despite concerns about the introduction of a mandatory element, compulsory referral to a

¹²³ See generally Clark above n. 4 para 4.2.3.2. The Ross and Bain research charted both the positive and negative impact of legal (and lay) advisors on mediation see Ross and Bain above n. 65 paras 4.33-4.34

¹²⁴ Ross and Bain above n. 65 para 4.13

mediation information session in all cases – perhaps at a case management conference¹²⁵ - may be the best vehicle for ensuring consistency of practice and the balancing of the overall aims of the system. Compulsion is attractive from a policy stance in particular if one believes – as the evidence would suggest - that resistance to mediation amongst disputing parties (and their advisors) is often strong (and perhaps misguided) and there are significant economic (and other) benefits to be gleaned from the process. Nonetheless, the debate over mandatory mediation continues to rage in the UK and the critique of compulsion remains strong. It may, for example, be argued that compulsion is antithetical to the ethos of mediation. Compulsion may be seen as fruitless if parties do not seek to negotiate their case and moreover, may amount to an abrogation of civil rights to access courts.¹²⁶

The proposal in this paper, however, is not for compulsory mediation but simply an obligation to seek information on the process. This can be seen as consonant with providing informed participatory consent in so far as the approach truly focuses on information sharing and that

¹²⁵ Or at first orders. While it may be more efficient for referral to come at first orders, there is some evidence to suggest that mediation stands more chance of success in the simple procedure environment if it supported in person by a sheriff in front of the parties – see Scottish Mediation and University of Strathclyde, *supra* n. ? above

¹²⁶ For a fuller discussion of the policy debates surrounding mandatory mediation in the UK (primarily in England and Wales) see D De Girolamo Rhetoric and Civil Justice: a commentary on the promotion of mediation without conviction in England and Wales (2016) 35(2) CJQ 162; M Ahmed, Implied compulsory mediation (2012) 31 C.J.Q. 151; S Shipman, Court approaches to ADR in the civil justice system (2006) 25 C.J.Q. 181; A.K.C. Koo, "Ten years after Halsey" (2015) 34 C.J.Q. 77 S Shipman, Compulsory mediation: the elephant in the room (2011) 30 C.J.Q. 163. The legal argument in the UK as it pertains to how commensurate compulsory mediation is with Article 6 of the European Convention of Human Rights was first raised in the English Court of Appeal case of *Halsey v Milton Keynes General Trust NHS* [2004] EWCA (Civ) 576 in which Dyson, LJ opined that compulsory referral by the court to mediation would amount to an infringement of Article 6 of the European Convention on Human Rights. This view has generally been discredited since the European Court of Justice ruled in the case of *Rosalba Alassini v Telecom Italia* (Joined Cases C-317/08, C-318/08, C-319/08 and C-320/0) that an Italian court's imposition of compulsory mediation was not a breach of Article 6(1) of the Convention of Human Rights at least in so far as that any such scheme does not result in decisions binding against the parties, or is subject to substantial costs or delays. This view is consonant with the terms of the recent EU directive on mediation - Mediation Directive (2008/52/EC), Article 5 states that: "[t]his directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system."

alternative pathways for dispute handling do exist. This approach is designed to bring about a consistency in mediation referral in simple procedure, allowing equal access to information on the process and a clearly defined route into mediation.

Compulsory reference to mediation information is not without precedent in the UK. In Scotland such a system mirrors the compulsory reference to discussions about ACAS conciliation that is required in the Employment Tribunal context¹²⁷ and the reference to Mediation Information and Assessment Meetings (MIAMS) in family actions in England and Wales¹²⁸. As noted above, the simple procedure rules can be interpreted in such a fashion as to entail compulsory reference to mediation and indeed, this appears to be occurring already as a sheriff-led initiative in some areas.¹²⁹ Compulsory referral to mediation information could, it is submitted, thus be developed without any need to reform the general law pertaining to mediation in Scotland although it may be desirable for the simple procedure rules to be amended to make express provision for this.

Even though evidence arising from the use of MIAMS in England and Wales in family actions is mixed, it does not mean that as a concept this approach is not without merit. Some of the criticism of MIAMS in the family context in England has emanated from the poorer than expected take up of full mediation, although on a more positive note the recent MOJ study suggests a conversion rate from MIAM to mediation between 66-76%.¹³⁰ Conversion itself

¹²⁷ Under Section 18A of the Employment Tribunals Act 1996

¹²⁸ Under the Family Procedure Rules Pt 3, as amended; Practice Direction 3A — Family Mediation Information And Assessment Meeting (MIAMS), https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a. See also the new Scottish family mediation referral pilot discussed at n 26 above

¹²⁹ See discussion *infra* at n. 64 above

¹³⁰ B Hamlyn et al Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Quantitative research findings (2015, Ministry of Justice Analytical Series), p 3

should not be the goal, however, but rather an opportunity for parties to make informed decisions as to whether to participate or not.

Tackling Informed participatory consent

Compulsory mediation information referral also holds the potential at least to allow the informed consent of parties' participation in the process. While there is divergent practice to drawing parties in to mediation at present, any new mechanism introduced needs consistency of messaging to ensure that information about mediation is given in a fair and balanced way and that proper vetting for inappropriate cases in the intake process¹³¹ is carried out. In terms of screening we should be aware of the perverse incentives that particular funding models may hold for an over-zealous approach to client conversion thus channelling inappropriate cases into the process¹³². The main professional body in the field, Scottish Mediation¹³³, could work with current and future providers to develop and establish best practice here. In particular, in dealing with LiPs involved as they are in a court process, emphasising the fact that mediation is not fundamentally concerned with ensuring that legal rights are given effect to is absolutely crucial.

In terms of those who should conduct mediations, lead mediators who take cases in the courts currently in the extant programmes in Edinburgh and through the Strathclyde University mediation clinic as well as those on the Scottish Mediation Helpline are all required to be

¹³¹ Where there are significant issues around capacity for example.

¹³² Funding models are discussed briefly below. Although in the context of MIAMs in the family law field the cautionary tales of Barlow et al regarding the inadequate screening and over optimism regarding mediation needs to be borne in mind, see Barlow A., Hunter R., Smithson J., Ewing J. (2017) Entering Family Dispute Resolution. In: Mapping Paths to Family Justice. Palgrave Socio-Legal Studies. Palgrave Macmillan, London, chap 4.

¹³³ See <https://www.scottishmediation.org.uk/>

members of the Scottish Mediation Register¹³⁴ and this should continue. The system, however, needs proper financing. Indeed, reports suggest that sheriffs are unhappy that the mediation rules under simple procedure are not underpinned with a fully funded scheme¹³⁵. The Director of the Strathclyde Mediation Clinic has also suggested that the current system is unsustainable.¹³⁶ The fact that mediation is currently largely provided *pro bono*, lends support to the argument that mediation represents second class justice. *Pro bono* delivery has largely been the norm in Scotland for court connected mediation thus far drawing on the good will of the mediation community. This has occurred not least because of the difficulty that mediators have had in gaining experience. So mediators may seek to expand their own future employment opportunities as well as the field more generally through *pro bono* work. Equally those currently training or taking academic mediation programmes are generally keen to gain experience through co-mediating, so the supply of mediators willing to operate gratis seems secure. The roll out of mediation throughout sheriff courts in Scotland, however, has the potential to lead to much greater demand for mediation services and the patchy availability of service in Scotland renders a comprehensive and consistent approach unlikely¹³⁷. The current situation with free mediation provision in some areas where court schemes already exist, but where the service is only available at cost elsewhere is not easily defended.

¹³⁴ Both projects make use of co-mediation often with a lead mediator (on the register) and student or trainee mediator. The Scottish Mediation Register is held by Scottish Mediation and comprises those mediators have completed minimum designated training, gained requisite practical experience, undertaken appropriate CPD activities and have in place adequate insurance and complaint procedures – the relevant professional standards are set out at <https://www.scottishmediation.org.uk/wp-content/uploads/2016/03/Practice-Standards-for-Mediators-26-05-16-V2.pdf>

¹³⁵ C Irvine Simple Procedure: What I Learned from the Sheriffs (2017) available at https://www.strath.ac.uk/media/faculties/hass/law/mediationclinic/Simple_Procedure_CI_March_2017.pdf

¹³⁶ *ibid*

¹³⁷ Questionnaire responses from mediators in the Aberdeen and Glasgow pilot mediation schemes suggested that *pro bono* offering was not sustainable in the long term – Ross and Bain above n 65 para 4.43

While it is accepted that there is no new money for post-Gill developments, as noted above in this paper, evidence suggests that mediation can be cost effective in the court environment in Scotland consonant with efficiency-based policy aims and that in particular up-front investment can lead to savings for the public purse down the line. In terms of the model for delivery, Scottish Mediation argue that a Social Enterprise model should be deployed which is ‘an appropriate vehicle for the mix of Scottish Government funding and income generation which will be required to run the service’.¹³⁸ The proposal anticipates charging a small administrative fee from users – perhaps a proportion of the parties’ filing fee in simple procedure - to complement Scottish government funding.¹³⁹ Fee charging for public goods such as civil justice is a controversial issue but is consonant with the fee regime that applies in Scotland for accessing civil courts with its recent shift towards a ‘user pays’ principle¹⁴⁰. Unless modest and tightly means-tested, any additional fee for mediation is, however, likely to act as a barrier for development.

Tackling informed outcome consent

As set out above, given the justice missions of courts and the potential for unfairness to permeate outcomes involving party litigants in particular, the argument for ensuring informed outcome consent in court based mediation is an attractive one, albeit one hard to implement in practice. In all of this it should be remembered that the simple procedure itself is a

¹³⁸ Scottish Mediation Network Discussion Paper: on the Integration of Mediation in the Scottish Civil Justice System (Feb 2014) available at [http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/access-to-justice-committee-files/10-march-2014-papers/6-1b-civil-justice-mediation-model---discussion-paper-\(incl-flowchart\)---scottish-mediation-network.pdf?sfvrsn=2](http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/access-to-justice-committee-files/10-march-2014-papers/6-1b-civil-justice-mediation-model---discussion-paper-(incl-flowchart)---scottish-mediation-network.pdf?sfvrsn=2) p 4

¹³⁹ Ibid p6

¹⁴⁰ The Scottish Government is currently consulting on increasing court fees across Scotland’s courts by 2.3% from April 2018 with further 2% hikes from April 2019 and April 2020 respectively – see Scottish Government *Consultation on Scottish Court Fees 2018-2021* available at <https://consult.gov.scot/courts/scottish-court-fees-2018-2021/>

truncated form of formal justice. The decisions produced by this mechanism presided over by summary sheriffs with its scaled down procedure and limited timeframes cannot be said to necessarily deliver justice in the pure sense. Rather the process represents an approximation of formal justice or a vehicle seeking to deliver just outcomes but in a proportionate manner. In this light, arguments for ensuring that formal justice is given effect to – at least in terms of allowing parties to determine whether to jettison legal rights in favour of other interests - are less compelling. Nonetheless, to guard against possible abuse of the process and potential manifestly unfair settlements, a measure of objectives fairness –in the sense of making parties aware of the potential legal norms underpinning an action - needs to be injected into court-based mediation.

Nolan-Handley is persuasive at least in theory regarding the need for *mediators* to ensure informed outcome consent but how it would operate in practice is not spelt out sufficiently. Unless it were determined that only qualified Scots lawyers¹⁴¹ could mediate in the court connected setting, and that they were obliged to set out the legal ramifications of each parties' case as part of their role, it is difficult to see how mediators would be capable of ensuring informed consent in the fullest sense. Excluding non-lawyers from mediating in the simple procedure context is unattractive for a range of reasons. Although lawyers can and do make excellent mediators, preclusion of lay mediators would remove huge swathes of experience and expertise from the pool of service providers. Moreover, it is not in the interest of the field as a whole to expedite further the current domination of lawyers in mediation in many areas.¹⁴² Aside from this matter, as discussed above in this article, bestowing a

¹⁴¹ There is no formal regulation of mediation in Scotland at present

¹⁴² On lawyer domination in mediation see Clark above n. 4 para 3.4

requirement upon mediators to ensure informed outcome consent is fraught with ethical and practical problems related to remaining impartial and potential liability for misinformation.

Nonetheless, in court connected mediation it may be useful for all mediators (including lay mediators) to be

well versed in appropriate knowledge regarding the legal backdrop to disputes that come before them... including an understanding of... the civil court system, remedies available and rules relating to the costs of such regimes...and a general understanding of basic underpinning law... such as contract and tort¹⁴³

Such a knowledge base might allow mediators to contribute to informed outcome consent (without rendering them responsible for it) by enhancing their abilities to reality test and get parties thinking about potential legal rights that might be pertinent in their case. Training programmes could be adapted for in-court mediators to ensure that the above issues are covered¹⁴⁴.

As this paper has highlighted, while external legal assistance may be instrumental in promoting the informed outcome consent of all mediating parties, it would be unrealistic, however to make lawyers available to all party litigants in the simple procedure mediation setting. Nonetheless, making greater use of lay advisors to assist LiPs in mediation may provide a more realistic remedy.

¹⁴³ B Clark above n. 4 para 5.3

¹⁴⁴ Standard mediation in non-family, civil mediation does not tend to focus on the underlying law within disputes commonly referred to mediation.

Although there is some controversy around the use of lay advisors in civil courts in the UK,¹⁴⁵ evidence suggests that non-lawyer representation aids the lot of LiPs significantly.¹⁴⁶ There is no reason why this should not be the case in terms of mediation advocacy. Indeed, lay advisors are common in some mediation contexts¹⁴⁷. While the more limited legal expertise of the lay advisor compared to qualified lawyers may represent a deficiency in formal justice terms, experienced and properly trained lay support in mediation can assist in aiding parties' comprehension of the meaning of agreements reached and thus ensuring informed outcome consent. More broadly, non-lawyer advocates may assist LiPs to more meaningfully engage in mediation. As Wolski notes, there is wide range of activities that advocates in mediation may undertake on behalf of their clients, many of which may be particularly well suited to lay advisors and lawyers alike¹⁴⁸. These include acting as "advisor and counsellor", "spokesperson", "negotiator", "strategic intervener" (to protect from unfair bargaining or from pressure from mediators), "evaluator, risk assessor and agent of reality" and "document drafter".¹⁴⁹

Lay advisors already operate in the Scottish civil court setting. For example, in certain Scottish geographical areas there exist in-court advice schemes.¹⁵⁰ Although such programmes do not provide legal advice *per se* they can provide advice and support. *Pro bono* assistance through

¹⁴⁵ See, for example, L. Smith, E Hitchings and M. Sefton, *A Study of Fee Charging McKenzie Friends and their work in private family cases* (2017)

¹⁴⁶ *ibid*

¹⁴⁷ Eg in the US postal system mediation programmes - Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 356, 364 (2002)

¹⁴⁸ See Wolski, B (2015) "On mediation, legal representation and advocates" available at http://epublications.bond.edu.au/law_pubs719

¹⁴⁹ *Ibid* at pp40-43. One other way in which informed outcome consent can be bolstered is by making better use of online legal information and advice systems which may allow LiPs to better understand and craft their legal claims as well as the cases of their opponents. See for example the triage and legal information phases of the proposed online court in England and Wales – see Lord Justice Briggs, *Civil Courts Structure Review: Final Report* July 2016, at chapter 6, available at <https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>

¹⁵⁰ Including in West Lothian, Dundee; Edinburgh; Aberdeen, North Lanarkshire

University law clinics, law centres and CABs is also available although provision is patchy throughout Scotland. If mediation is to become an established part of simple procedure in Scotland then awareness-raising of, and training in mediation representation could be developed for those who currently assist party litigants. For example, appropriately trained and supervised law students could be engaged to act as party advocates in mediation where those parties lack legal representation.¹⁵¹ Many law students including those who work in university law clinics in Scotland now receive instruction in mediation.¹⁵² Extending the in-court advisory service to other sheriff courts would also be another pertinent development,¹⁵³ coupled with a greater role for assistance in and around mediation as party advocates¹⁵⁴. While there may be those that see the use of lay advisors in mediation as a token gesture to rights assertion, their use can be defended as a proportionate response in the context of simple procedure and one designed to limit the extremities of injustice that could otherwise occur.

Conclusion

That mediation is here to stay in Scotland seems indisputable. In general, this should be seen as positive. Evidence suggests that mediation can make a useful contribution in assisting disputing parties realise their own sense of personal justice while also addressing the need to save public costs and judicial time in the administration of civil justice. It is hence correct that

¹⁵¹ As has already occurred in Glasgow with the Strathclyde University mediation clinic

¹⁵² Law Clinic students at Strathclyde University have already acted as party representatives in mediation for party litigants.

¹⁵³ The Ross and Bain research found that the in court advisor in Aberdeen played a key role in expediting development of the in-court mediation scheme albeit that she did not represent parties in the mediation – Ross and Bain above n 65 paras 3.46-3.48.

¹⁵⁴ The author understands that such advisors may currently assist parties in preparing for mediations but rarely attend mediations.

those involved in the administration of Scottish civil justice should take steps to help expedite the use of mediation and divert LiPs in particular from the civil courts. Nonetheless, the current scenario as it applies to mediation in simple procedure is far from perfect. The present hotchpotch system produces a fragmented, inconsistent approach across the country. This is unsustainable. The lack of a unified scheme for mediation and proper funding means both that Scotland will miss out on the true potential of the process and also fuels the anti-justice, 'cheap option for cheap cases' assault on the process. Equally, mediation should not be used to supplant access to formal justice. In light of the recent UK Supreme Court judgement declaring employment tribunal fees unlawful,¹⁵⁵ the need to ensure proportionate access to courts and legal remedies is clear. Efficiency aims should not be the sole drivers of mediation development.

For mediation, this means that parties who encounter the process in the context of civil court proceedings are made aware of what they have signed up to both in participating within mediation and also in forging any agreements therein. They also need to have some understanding at least of what legal remedies they may be giving up in the process.

The measures outlined above to promote informed participation and outcome consent reflect these concerns in a proportionate way. There is of course a need to live in the real world, countenancing the practical limitations that financial constraints necessarily place on civil justice systems. Especially in simple procedure –this summary court procedure for lower level disputes –there is a need to be realistic in what can be achieved in the name of ensuring that a measure of justice is available in every case. Nonetheless, a unified system of referral to mediation providing consistency in information provision to parties is arguably a

¹⁵⁵ *R (on the application of UNISON) v Lord Chancellor* [2015] EWCA Civ 935.

proportionate step in the quest for ensuring informed participatory consent for all user across the country.

Though laudable in theory, ensuring informed outcome consent is more challenging in practice. As argued above, informed outcome consent should not fall within the responsibilities of those mediating even if they may contribute to it. Nonetheless, assistance in and around the system is needed to promote informed outcome consent in a proportionate sense especially where participants are not legally represented. This paper has argued that marshalling lay advisors to assist in this would be a laudable development and one that is more realistic in the context of our financially hidebound civil justice system than providing legal representation. There will entail costs but this article has already outlined the potential financial savings that mediation can reap for users as well as the State. Moreover, lay advisors are already present and contributing to the civil court system in Scotland, so there is a kernel of expertise that can be grown. The Scottish government should work with existing in-court advisors, university law clinics, public law centres and citizens' advice bureaux to help fund, establish and develop appropriate training programmes and ensure the roll out of advisors to assist the lot of mediating LiPs across all of Scotland's sheriff courts. Such a development has the potential to offer a mediation service best fit for delivery within simple procedure in Scotland.