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Institutionalising mediation? An evaluation of the Exeter Court small claims mediation pilot

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Summary

The DCA are currently institutionalising the use of mediation as a method of alternative dispute resolution in the courts in England and Wales. This paper analyses a small claims mediation pilot service which is in operation at Exeter County Court for disputes on the small claims track. The scheme has a 65 per cent settlement rate and litigants who have taken part in mediation have, on the whole, expressed satisfaction with the scheme. Yet of more concern is the possibility that institutionalising informal methods of dispute resolution into more formal court processes may raise substantial issues in relation to quality of standards, the training of court-appointed mediators and litigants-in-person understanding of how mediation works. It is argued that these issues need to be considered before mediation can be successfully integrated into the civil legal system.

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Introduction

As part of its commitment to providing greater access to justice, the Ministry of Justice (MOJ), formerly the Department of Constitutional Affairs (DCA), is keen to promote the use of alternative dispute resolution (ADR). This would usually take the form of mediation for defended civil cases, prior to, or ideally instead of, the case going to a court hearing. The government's stated aim is to encourage parties to resolve their disputes effectively and proportionately (PSA 5, 2002). Thus, the Civil Procedure Rules 1998 (CPR) explicitly require the courts to consider and to encourage litigants to use ADR if the judge considers it to be appropriate (Rule 1.4). In the higher courts, the judiciary has stated that an unreasonable refusal to mediate may be penalised by an adverse order as to costs (see *Halsey v Milton Keynes General NHS Trust* [2004] 1 W.L.R. 3002, and *Dunnett v Railtrack* [2002] 2 All ER 850).

Mediation has now become such an important aspect of civil court procedure that it must be considered by all parties to litigation (41st Update of the Civil Procedure Rules, Practice Direction Protocols, Section II, Paragraph 4.7). (See also guidance as what constitutes an unreasonable refusal to mediate in *Halsey* (*Halsey*, at 3009).) The assumption is that there are benefits in institutionalising and integrating such 'alternative' methods of dispute resolution into the contemporary legal system.

The MOJ has a commitment to institutionalise 'proportionate dispute resolution' as part of the existing structure of the court system in England and Wales (DCA, Dec 2004). A traditional court hearing will provide a recognised and acceptable solution to a problem. However, the more formal, evidential process required by civil hearings forces the dispute narrowly to fit into the requirements of the law. This may not allow for any analysis of the underlying issues which caused the dispute itself.

Particularly in small claims hearings parties may find themselves in the courtroom arguing in front of the judge without the benefit of any clear evidence because of the lack of legal formality, such as a written contract or documents, to substantiate the original subject-

matter of the dispute. Small claims are an important feature in the drive to promote ADR, as such hearings account for 75 per cent of all civil court litigation (DCA figures, unpublished, 2006). The costs of these hearings for the court and perhaps also for litigants can be disproportionate to the amount of the claim. Mediation offers the possibility of a cheaper, quicker and less stressful means to resolve disputes at potentially no additional cost to the user where the costs form part of the usual court processes.

In the summer of 2005, the, then, DCA commissioned a number of pilot research studies on the use of mediation and the provision of legal advice for parties involved in litigation on the small claims track. The aim of these pilots was to evaluate whether court-connected ADR methods are effective, in particular for small claims. Mediation has the potential to offer a service to a greater number of litigants in person than do other higher value civil court processes. Research commissioned by the Legal Services Commission on social justice (LSC, 2004) reported that 37 per cent of those questioned stated that they had had some form of justiciable problem over the period of the survey.

Integrating Mediation into the Small Claims Track Procedure

The DCA identified mediation as a positive addition to the small claims procedure because it is 'quicker, cheaper, less adversarial and provides a better outcome for the court user' (Source: Community Legal Service Direct leaflet (Nov 2005) See: <http://www.communitylegaladvice.org.uk/media/808/FD/leaflet23e.pdf>). The MOJ is also obliged, under Treasury imposed targets, to remove cases from the court list so as not to over-burden district judges and their deputies. Saving of judicial time is of fundamental importance as there is a national target for the disposal of small claims cases which is set at 15 weeks from the date that the claim is filed until the date of the hearing (DCA, 2004). This target can therefore be used as a rough guiding measure as to the effectiveness of the service provided by a particular court.

The aim of mediation is to offer parties to a dispute a collaborative rather than an adversarial route to justice. Instead of going before a judge for an official legal determination which imposes a solution upon the parties, the litigants have the opportunity to discuss the issues in the case and consider, with the help of an experienced third-party, possibilities for an agreed settlement. This is especially appealing in the small claims jurisdiction because the process is characterised by informality (CPR, Part 27.8 (2)). Strict rules of evidence do not apply in the hearing (CPR, Part 27.8 (3)). The parties and their witnesses are not required to take the oath or to affirm (CPR, Part 27.8). Small claims hearings themselves are unlikely to take much longer than an hour (DCA figures, provided

2006).

A mediation scheme, still running, at Exeter County Court, was originally established in the summer of 2002 through an agreement between the district judges at the Court and the local Law Society. The Court was keen to reduce the prospect of delay between the time of allocation to the small claims track and the hearing. Additionally, once the parties got to the hearing, many were so poorly or inadequately prepared that the judge had either to adjourn the proceedings or to guide litigants through the dispute. This was unsatisfactory for the parties but also was a poor use of judicial time in an already over-stretched court system.

The Exeter mediation service began in June 2002, free to court users, initially for a 6 month period. The aim was to identify whether a satisfactory dispute resolution could be reached for parties whilst also saving court time. Another potential benefit, even if parties did not resolve their case at the mediation, would be that spending focused time discussing the issues would help litigants to be better prepared for their court hearing. In the initial few months of the operation of the scheme, the mediators: local solicitors, who had been trained in mediation by Devon and Exeter Law Society, provided their services gratis to ensure that the costs of a mediation was not disproportionate to the value of the claim. (More recently, the cost to users of fast and multi track mediations referred by courts has been set nationally by the National Mediation Helpline. (See <https://www.nationalmediationhelpline.com>).

Although the Exeter small claims mediators therefore originally worked on a pro bono basis, the DCA agreed in August 2003 to support the scheme financially for a limited period, and so provided funding to pay for the solicitors' time spent in mediating. This not only helped to increase the pool of willing mediators but also endorsed the scheme with a measure of official legitimacy (Prince, 2004, at 26). The pilot project set up by the DCA in June 2005 purportedly marked the limits of funding for the Exeter scheme.

When other courts around the country heard of the effectiveness of the mediation process and requested their own small claims mediation service, it became apparent that the most effective generic scheme, which could be offered to court users on the small claims track throughout England and Wales, needed to be identified. As the first scheme of its kind in England and Wales, Exeter had already been the subject of research studies (Prince, 2004 and Enterkin and Sefton, 2006). The DCA decided therefore to compare it to a number of other different small claims mediation and advice pilot schemes. Those that took place at Manchester and Reading County Courts were different in kind from Exeter's. In

Manchester, court users were offered the services of an in-house mediator employed by the DCA as a member of the Civil Service, who would contact parties directly once the district judge referred the case to mediation. He would discuss with them over the telephone the benefits of mediation and where necessary, arrange personally to mediate between them (Doyle, 2006). In Reading, the pilot focused on providing advice about the small claims track; a permanent Small Claims Support Officer was employed at the court to offer court users an informal discussion about the process and how to best prepare for a hearing (Craigforth, 2006).

The differing mediation structures were to be compared in terms of the following goals: to reduce costs incurred by parties and the court and to achieve faster settlements. Achievement of these goals would contribute to an improved performance against government targets and would also make a broader use of the court facilities as well as offering an improved customer service to litigants (Sander, 1976).

This article considers the development of the scheme and the results of the research study conducted during the most recent pilot and since the last DCA study (Enterkin and Sefton, 2006). It analyses the appropriateness of institutionalising the use of mediation as an integral element of small claims track processes (Prince and Belcher, 2006), and so incorporating it within existing courtroom procedures across England and Wales.

Evaluating the Exeter Small Claims Mediation Service

Exeter County Court is the major centre for civil cases for a large, mainly rural, area in Devon. The research conducted for the DCA pilot covered the period from June 2005 until the end of May 2006. During this year district judges allocated 756 civil cases to the small claims track. Small claims cases are those with a value of less than £5,000 which are considered to be less complex by the judge (CPR, Part 27.1). The maximum value for personal injuries and landlord and tenant claims is £1,000 (CPR, Part 26.6). The judges referred 255 of these cases to their in-court mediation scheme; this represents approximately 34 per cent of the total number of cases on the small claims track at Exeter. This percentage compares extremely favourably with the low 5 per cent demand for mediation observed by Professor Dame Hazel Genn during her research into civil mediation at Central London County Court in 1996/97. (Genn, 1998). Of the 255 cases originally referred by the judiciary at Exeter, 136 cases went forward to a mediation session.

The current research analysed comprehensive quantitative data collated on a detailed spreadsheet from all of the 255 cases that were referred to mediation by the district judges. Data was taken

from court files, enabling comparison of those cases that mediated and those that did not. In addition, 89 of the 136 mediations that took place were observed, representing 65 per cent of the total number conducted over the period of the research, and structured interviews with parties were carried out immediately following the mediation. There were 151 interviews with equal numbers of claimants and defendants, amounting to 56 per cent of mediated cases. Each interview lasted about ten minutes. Parties were asked about their expectations of and reactions to mediation. Approximately 65 per cent of both claimants and defendants interviewed had settled their claim at the mediation.

It had proved impossible to interview in person all parties, so postal questionnaires were sent to parties. The questions here were slightly different, being more directly focused on the reasons for deciding to mediate as well as the process itself and the outcome. 198 questionnaires were sent and 32 per cent (63) were returned. This total represents 34 claimants and 29 defendants. 65 per cent of those who responded to this questionnaire had settled their case at mediation. In order to discover why some litigants declined mediation 214 postal questionnaires were also sent to all parties who were referred to mediation but refused it. Some of the reasons for refusal were also contained in a spreadsheet kept at the court. 37 claimants and 25 defendants in this group returned questionnaires. The low take-up is partly attributable to inaccuracies in the recording of addresses and contact details of parties who had not had contact with the mediation service. 24 of these respondents went on to have their case settled at a court hearing whilst 12 settled their case directly with the other party.

In order to discover whether there had been any enforcement issues since the mediation took place, and to explore in more depth some of the answers given to the questions in the postal questionnaire, a number of telephone interviews were also carried out with parties who had mediated. The 45 parties who took part were self-selecting, as those interviewed were those who had provided their contact details either at the original post-mediation interview or on the postal questionnaire. 21 claimants and 24 defendants were interviewed by telephone. All had been through a mediation process, and 69 per cent had settled at that stage.

Questionnaires were also given to all of the mediators who took part in the scheme. There were 16 responses received from 29 mediator sessions which took place during the period of the research, some being provided by individual mediators who had conducted more than one session. Devon and Exeter Law Society, who supply the mediators, have 29 trained mediators who work on a rota basis to deliver sessions at the Court. This questionnaire was designed to collect general data about individual qualifications,

mediators' views of the scheme itself and any additional thoughts they might have on the actual mediations which had taken place during the particular session. The views of other stakeholders who had an interest in the scheme, such as the district judges and the court manager, were collected in a special focus meeting. It was felt that these individuals would be able to discuss relevant issues in more depth when they spoke about them together than when we interviewed them separately as had been done in previous research on the fast track mediation scheme (Prince & Belcher, Exeter and Guildford, 2006).

Nature of Mediation in the Context of Small Claims

Mediation is an indeterminate concept because it can have different meanings depending upon the particular context in which it is used. There is no claim to a universal definition of mediation and no set method of conducting it. The DCA remarks merely:

“In mediation, each side to a dispute has a chance to put its case and to hear what the other side has to say. A mediator helps both sides reach agreement about how a dispute should be settled.” (DCA leaflet, 2005)

The universal quality of the mediation process is the emphasis on the parties themselves coming to an agreement. The mediator merely serves as a neutral to help achieve that agreement. Mediations are now used in a variety of civil and commercial legal disputes. The Exeter small claims track mediation, however, is very different from a traditional, commercial mediation. It is strictly time-limited. When the service began, mediations were restricted to 20 minutes in length but were later extended to half an hour. At the beginning of the pilot scheme itself, the maximum period was raised to an hour following recommendations from the DCA. One function of a tough time constraint might be to focus the mediation entirely upon its pragmatic goal, which is settlement.

Once a claim has been contested and the defence has been filed, the case is allocated to track by a district judge. At Exeter, where a case is allocated to the small claims track the judge also, on the basis of the paperwork supplied by the parties, decides whether the case might be suitable for mediation. Parties are specifically asked on the allocation questionnaire whether they might wish to try to settle the case through alternative dispute resolution prior to a hearing. They also received a specially designed leaflet, with a detachable returnable slip, which asked whether they would like to try to mediate the dispute free-of-charge. Very few of these slips were returned to the court. This is to be expected, however, as voluntary take-up of mediation is known to be extremely low even in those overseas jurisdictions where it has become well-established (Wissler, 1997). In reality it is the judge who decides

whether or not to refer the case to mediation. The process remains voluntary in the sense that parties who are referred to mediation and then choose not to take part are able to telephone the court and withdraw up to seven days prior to the date of the appointment. At Exeter County Court the majority of those who took part in a small claims mediation did so because the court had given them a prescribed date for a mediation appointment, rather than because they had positively volunteered to take part in the process. In fact there were so few mediations that took place because both sides had actually volunteered, it was impossible to record the numbers specifically in the research. The mediation service at Exeter was operated in the main along the lines of an 'opt-out' scheme as the emphasis in the documentation sent from the court was upon parties being allowed to cancel their appointment up to a week before the mediation date. If the parties were within easy travelling distance of the court and the case did not concern a road traffic issue then, once referred to the small claims track, it tended to be considered by a district judge as 'mediatable' unless there was something in the file that led to an instinctive doubt. The initial letter sent by the court to the parties when the scheme was originally established had actually ordered the parties to attend a mediation following the guidance of the overriding objective of the CPR (CPR, Rule 1.1).

Mediation 'days' are scheduled into the court diary and there are approximately two per month. These run from 10 am until 1pm. Two mediators operate from designated rooms in the court building. Mediations are scheduled in half hour appointments although, because the mediators are working in tandem with the case list, there is flexibility in the timing of the individual mediations. Where one or more litigant does not turn up for the mediation, the case is referred straight away to the district judge for directions.

At the outset, the mediators have only basic knowledge of the issues involved in the cases on the list for that morning. The first step is usually to take the parties into a room together and sit them around a small table. Most parties were not represented at the mediation itself even if they were represented at another point in the case (27 per cent). The mediator will stress that the proceedings are confidential and that their own role is to be impartial. Their purpose is not to judge the case, but instead to see if there is any common ground through which a settlement could be reached, enabling the parties to avoid having to go before a judge. Most mediators then ask the parties in turn to outline their own case, concentrating on the main issues. Once this has been done, each party is taken into a separate room to discuss with them independently what they wish to gain from the mediation process. Separating the parties also enables the mediator to manage each litigant's interaction with the other side, preventing potential further conflict and the making of damaging comments that will

preclude settlement. Consequently, the mediation is a 'forward-looking' process where the mediator encourages the parties to think about what they want to achieve rather than spending too much time dwelling on the events that led them to being at the court in the first place. This focus on finding a solution is a positive development in civil procedure; very few lay litigants in small claims cases can supply adequate legal evidence or apply the law to help them prove the points they wish to make. Such a point was made by John Baldwin, in his research on the small claims court. He said that "...lay litigants [in small claims cases] frequently fail to appreciate the meaning of 'proving' a legal case." (Baldwin, 1997, p 10). Individual mediators employ their own style, but the emphasis on settlement is a common feature. Parties are generally encouraged to settle by concentrating upon the benefits that will accrue to them through bargaining and ultimately resolving their case.

Where a mediation results in a settlement, the parties' written and signed agreement is enforced with a consent order made by a district judge. In the absence of settlement, the parties are asked to go back to the district judge that same morning, for directions for the small claims hearing. The hearing date has already been scheduled by the court so that an unsuccessful mediation will not cause any additional delay to the litigants.

Mediation and Litigants Expectations

In this study, of the total of 136 cases which actually mediated, 65 per cent settled their dispute at the mediation stage. Similar settlement rates were recorded by the two previous research projects conducted on the small claims service at Exeter (Prince (2004) cited 70 per cent and Sefton and Enterkin (2006) cited 69 per cent). The figure also compares favourably with the settlement rate of 62 per cent for fast and multi-track cases at the earlier Central London County Court project (Genn, 1998, p 45).

The combination of adversarial legal process and co-operative mediation is unfamiliar both to the legal profession and the population at large. Professor Genn has recommended a programme of 're-education' to help establish the benefits of mediation (Genn, 1998, p 154). The adversarial culture of England and Wales still envisages the resolution of conflict in terms of determination by a judge (Black 1973, p 134). The use of mediation as an institutionalised, intermediate stage in dispute resolution is outside the experience of most people. Claimants generally desire a judicial authority to endorse their own opinion that they are right, and to rule them the 'winner' and the other side the 'loser'. Without the benefit of a prior consultation with a lawyer, both parties to a dispute often arrive at the court convinced of the rightfulness of their claim and

with no doubt that their own infallibility will lead to judgment being made against the other side. It was apparent from observations that, essentially because of limitations of time, many mediators had to use the mediation to focus the parties as much as possible on the goal of settlement. There was not much time left for general exploratory discussions or ventilation of general issues relating to the dispute or disagreement. Most of the mediators introduced the mediation by saying something similar to, "My job is to help you to find an opportunity for settlement". Although 86 per cent of parties who responded to the questionnaire said that they knew before coming to court that they would be attending a mediation, there was little evidence that they knew either what mediation was or the nature of the mediation process. One litigant commented that she thought it was about sitting and listening to people but, "[in fact] it was the other way round". It was described afterwards by litigants as "negotiating a deal", "brokering", "people sitting around a table and 'eyeballing each other'", and "horse trading". Despite the acknowledgement that the use and promotion of mediation represents a sea-change in approach to dispute resolution in the civil courts, the initial information leaflets sent to the litigants to describe the mediation process contained little illumination on the approach actually required of the parties. The 'cultural shift' required by litigants to view the mediation as an opportunity to explore different solutions and discuss methods of compromise was not overtly reflected in any of the documentation sent to them. A significant number of parties still arrived at the mediation expecting an adversarial process, and in many cases, some form of determination by an external person. For example, several brought with them files of evidence, and one, a witness to the events in question. These were to be used to help prove their case, and there was some frustration when the mediator explained that these carefully prepared aids were not going to be necessary. More than one litigant complained after the mediation that they were frustrated about this. One commented, "I prepared background information but didn't get a chance to use it". Only two people who replied to the questionnaire said that they knew a lot about mediation prior to taking part. 77 per cent said that they had either never heard of mediation or had heard of it but knew nothing or only a little about it. There was further evidence that the information sent out in advance of the mediation was not clear or just not read. This often meant that the mediator had to spend much of the time scheduled for the mediation in explaining the nature of the process to the parties.

The aim of the mediation process is to actually move the parties away from their polarised positions and to realise that there may be benefits in compromise. Some litigants, however sought not merely a resolution, but wanted some form of punishment for their opponent. They found mediation less satisfying than going before a

judge. One litigant recalled an "...obvious frustration in not getting to put the other side on the ropes". Another said, "We would rather have our day in court than [voluntarily] pay any money to him". Thus, for some of those interviewed, a compromise at mediation is considered a capitulation: "a pyrrhic victory". It is particularly true in those disputes of minimum value that there is a wide variety of differing motivations. Baldwin identified in his research that litigants do not represent "a single homogenous group" and that people had a passionate and obsessional concern for what might appear to be even the most financially trivial disputes (Baldwin, 1997, p 2). The loss of the 'day in court' however, may nevertheless be beneficial if it allows the parties to explore together what they think they want or expect to achieve from the legal process. Three-quarters of litigants interviewed did however see that mediation was a useful process.

The lack of knowledge about the process and how it operates in practice does make it difficult to draw particularly firm conclusions about the nature of this particular service at Exeter compared with users' expectations of a traditional 'day in court'.

Voluntariness of Mediation

In *Halsey v Milton Keynes General NHS Trust*, [2004] 1 W.L.R. 3002, Dyson LJ (at 3008), although acknowledging the "value and importance of ADR", stated emphatically that parties should not be ordered to mediate against their will. To ensure that the pilot project acceded to the requirements of the *Halsey* decision, the DCA requested that court documentation be rewritten to make it more apparent that the mediation service is voluntary. The difficulty was that this emphasis led to problems which impacted directly on the take-up of the mediation scheme. Previously it had been an independent decision of the judge at allocation as to whether the case was suitable for mediation, at which time an order was sent to the parties requiring them to attend a mediation session. With a more voluntary approach parties were invited, rather than ordered, to attend a mediation. The nature of the invitation led to a high rate for parties who had been referred not turning up to the mediation and not telling the court beforehand that they were not going to attend. This was particularly frustrating for those parties who were present at the court as the ambiguity of the request contained in the letter of 'invitation' could not be used by the judges to strike out the claim or find in favour of the party who had turned up. 20 per cent (39) of the total number of cases listed for mediation did not go ahead as one or more of the parties did not attend at the scheduled time. The difficulty for the court was distinguishing between those parties who did not appear at their mediation appointment because they were not going to appear in any event at any future small claims hearing, and those who merely did not want to mediate. It is not uncommon for parties not to attend a small claims hearing. In Baldwin's research over

half of the parties failed to turn up (Baldwin, 1997, pp 34-35). This non-attendance often resulted in uncertainty and poor use of time not only for the judge but also for the litigant who had attended court. This person had the stress of having to appear before the judge purely to make another appointment to attend court for a further small claims hearing, with no possible claim for expenses against the other side for their lost time. The invitation to mediate was therefore rewritten by the judges at Exeter during the period of the pilot to make it clear that parties were welcome to telephone the court to cancel the mediation up to seven days in advance but if they did not choose to do so, and did not attend the court at the appropriate time, the judge was empowered to make an order to either dismiss or to strike out the claim. The intention was to maintain some level of voluntariness for the parties as to whether or not they wanted to mediate, but to ensure at the same time that this did not impinge on the efficient working of the court. In fact, over the period of the pilot the number of parties who did not attend on the day of the mediation dropped for some sessions from six cases not mediated to one or two, once the invitation to mediate had been modified.

Time and Money Saved by Mediation

One of the primary aims of interposing mediation into the small claims process is to reduce the length of time the processing of the case takes and correlatively, the amount of stress involved for litigants as well as saving the time and consequently the cost, of judges. Cases which settle in advance and so do not result in hearings save a substantial amount of judicial time. It was crudely estimated, by counting time estimates for each case that settled at mediation, that 121 hours, approximately 20 working days, was saved over the course of the pilot by successful mediations.

A successful mediation can also have a marked effect on reducing waiting times as, during the course of the pilot, the mean time measured from case referral to track until the mediation was 34 days. For those parties who settle their case at that mediation, this represents a third less time waiting time than going straight to a court hearing. This was acknowledged by parties, as 25 per cent of those who settled after the mediation identified time saved as a specific advantage. Even where the case does not settle at mediation there is a reduction in delay, as the mean time for the case to come before a judge for a hearing is 93 days, which is two weeks less than the national target. This is achievable because the date of the hearing is set at the time that the case is referred to the small claims track so the mediation, even with a negative result, does not mean delay to the entire legal process. Since the court-based mediators operate during the court day, parties who do not settle at mediation can go before a judge for directions hearings

immediately. This results in a marked saving of judicial time on the day, as the judge is able to continue with other work subject to interruption only when a case does not settle at mediation. The parties themselves will still attend their scheduled hearing on the date set at allocation stage. This is achievable as there are more vacant hearing times available at listing due to previously successful settlements at mediation. Further to this, there are also longer assigned hearing times left available for more difficult or complex matters due to the number of cases which have settled at mediation. Time saved represents a significant argument in favour of using mediation. At Exeter, it reduced by a third the number of small claims that resulted in a hearing.

Characteristics of Cases Successfully Mediated at Exeter

It would undeniably be helpful to establish whether the characteristics of litigants or of their disputes are likely to affect the likelihood of settlement at mediation. Identifying at an early stage cases which are more likely to settle might increase the settlement rate and aid judicial referral to mediation. Yet there is such a wide range of characteristics amongst the facts of individual cases and in the nature of individual litigants that any such conclusions have to be treated with great caution. Overwhelmingly, the type of cases that were originally referred to mediation by the district judges fell into the broad category of general debt and contracts for goods and services; this staple diet of the small claims track made up 78 per cent of the cases referred to mediation. However, many disputes contain a number of issues. They may involve, for example, elements of both contract and the tort of negligence. They may include a counterclaim founded upon legal issues, different in kind from the original claim. This makes it difficult on the whole to classify disputes except into categories too broad to be helpful.

The research did, however, find that cases with the lowest claim values are more likely to settle at mediation than higher value claims. 65 per cent of the cases that were initially referred to mediation by the district judge had a claim value of less than £2000 but 73 per cent of cases which settled at mediation occupied this category. Claims having a value of less than £500 were even more likely to settle at mediation. Such claims accounted for 22 per cent of cases referred to mediation and for 32 per cent of those cases which settled at that stage.

Some variation in settlement rates as between different classes of litigants was found. The largest category of case involved litigants in person on both sides; here the settlement rate was 63 per cent. Where a litigant in person acted against a company in person the settlement rate increased to 76 per cent. These companies were

frequently run by builders or plumbers and it was in their own commercial interests to avoid losing another day's work coming to court to attend a hearing. The settlement rate was lower where the company was bringing the claim against an individual, however; here the overall settlement rate reduced to 42 per cent. It is likely that at the time of issuing the claim the company had already decided that going to court for a full hearing would be in their best interests.

General benefits of mediation

One of the much-vaunted benefits of mediation is said to be the possibility of achieving a creative settlement of the type that could not be ordered by a judge in traditional court hearings. It has been stated that,

“... Parties may agree on outcomes which could never be available as a court remedy. Thus they may agree upon one party performing a personal service for another, on a dismissed employee being re-employed in another branch of the firm, or on one party giving the other an employment reference.” (Boulle, Nestic, 2001, p 40).

When mediation is integrated into legislative proceedings there are often few reported instances of anything other than the usual financial settlements (See, for example, Brooker and Lavers experience with construction lawyers, Brooker and Lavers, 2005, p 32). In the research conducted at Exeter it was found that the action of filing the claim at court, and so having to specify the value of the claim, may cause claimants to see their dispute in monetary terms, making it difficult when the case has come to court to consider an apology, for example, as an adequate outcome. In many observed mediations, the mediator would suggest an apology or alternative non-financial solution but, although the parties might spend a little time thinking about it, few of them considered it a viable alternative to a final monetary settlement. There were merely two instances from the 136 settled mediations where an alternative to a payment of damages was considered to be acceptable. One involved a claimant suing for alleged damage to a watch, who was prepared to accept its repair as settlement of the claim.

In fact, the mediators were not demonstrably regularly engaged in 'transformative' or even 'problem-solving' mediation, where the goal is to empower the parties to resolve their own problems (See Bush and Folger, 1994). They tended to concentrate on the stated claim rather than the on-going needs of the parties. This may be a function of the focus on settlement and their own background as legal professionals. Also, their creative abilities were severely

constrained by the time-limited nature of the mediation. However, what was noticeable was that, overall, claimants were often prepared to accept less than the original value of the claim, usually because the mediator explained the reality of the court system and, for example, that it was very difficult to obtain punitive damages in small claims case. The result of the mediation was liable to be a reduction in the amount that the claimant originally sought from the defendant when filing the initial claim. Statistically the amount that the claimant was likely to settle for was substantially less than the amount claimed. The average stated claim for those cases that settled was £1680, but the average amount settled for was £870. Litigants, it seems, were, on average, prepared to accept about half as much as they had originally claimed where mediation was successful. In the DCA research study conducted during 2004 at Exeter which compared the mediation experience to that of those who had attended a hearing the average value of the settlement was significantly lower, 63 per cent less than the original claim, (See Enterkin and Sefton, 2006, p 42).

Perhaps the most problematic area identified for small claims is the enforcement of judgements. Professor Baldwin found that on the small claims track around a third of claimants who had been successful in the courtroom had still not received any payment six months after the date of the court hearing (Baldwin, 2003, p 3). Initial research seems to show that at Exeter enforcement was not an issue in those cases that mediated. Only one of the 88 cases that settled at mediation had any difficulties with enforcement, and this case was rather an anomaly because the defendant ended up in prison possibly affecting his ability to pay. However, in comparison eight per cent of those cases that did not mediate were having difficulties obtaining payment even a few months after the court hearing. Preliminary data appears to suggest that, because the parties are involved in, and agree to, the settlement terms they are more prepared to pay than when an independent, judicial decision has been made.

Participants' Perceptions of the Mediation Experience

At Exeter, mediation has been integrated into existing court procedures. It does not stand apart as a separate element of the civil justice process. Consequently, dissatisfaction with the mediation process may be to some extent a manifestation of dissatisfaction with another aspect of the small claims process. Thus when asked about their experience of mediation parties complained of issues that related generally to small claims in general or the practicalities of coming to court such as 'confusing forms', 'lack of parking facilities at the court', and 'difficult court papers'.

It was clear, though, that the informality of mediation was greatly appreciated by many of those interviewed afterwards, especially as the perception most people have of court is that it is quite daunting. 21 per cent of those interviewed after the mediation mentioned the informality of the process and the fact that it avoided having to attend a hearing at court. As an example, one litigant said, "A mediator is more informal, if [the case] goes to court only one [party] will benefit; in mediation it is both". Another, a defendant, praised the use of informality in the mediation to help him engage the claimant in discussion. He said,

"[Mediation] allows both parties to settle informally. The claimant was rigid in his thoughts and ideas and mediation swayed him to listen to offers."

A majority of litigants cited the benefits of what they saw as a more co-operative process that perhaps provided more all-round benefits than they thought they would find in the courtroom. 29 per cent said that they were relieved that their case was over. In addition, a further 23 per cent greatly appreciated the informal approach of the mediator.

A number of respondents commented on the difference between the role of the mediator and that of the judge. One defendant said, "[a] judge considers the law. When you mediate you can look at it from each side's personal view: that seems fair". This idea that the mediator could use common sense, whereas the judge was confined to relying upon the law, was echoed by other parties who had been through the mediation process. Yet, the 'precarious' nature of the mediation was reflected by participants who commented upon the use of pressure to settle their case. It is vital that the mediator must take into account the unequal power resources of the parties and this can be quite a 'precarious' process (Roberts, 2000, p 742). 33 per cent of parties responding to the questionnaire said they had felt under some pressure to settle. It is difficult to know whether the pressure that they felt was different from the stresses and strains felt by anyone bringing a small claim, but certainly the parties' knowledge that the mediation was only scheduled for a short and limited time and that the aim of the mediator was to obtain a settlement was influential. 30 per cent of those who felt pressure specifically identified the mediator as its sole source. A further 52 per cent mentioned that the time allowed for the mediation, either on its own or combined with other factors, exerted pressure to settle. This raises critical questions about fairness in the mediation and about the training of mediators to deal with any imbalance of power between parties. Pressure itself is not always wrong since tensions are normally high during legal proceedings. Litigants often feel under pressure from the other party or from the demands of the system itself. However, if mediation is to become institutionalised within the legal system, the exact nature of

pressure to settle requires investigation. It may be possible to ensure that it contributes positively to a process designed to be humanistic, empowering and conciliatory.

Parties Who Did Not Settle at Mediation

Those parties who did not settle at mediation were not always disappointed with the process, and acknowledged that it has advantages. 25 per cent of claimants and 30 per cent of defendants who stated that the mediation had been useful did not settle their case at the mediation appointment. These litigants found that the process has a value apart from the objective of achieving a settlement. Some saw the process as good in principle whilst not necessarily suitable for all cases, especially where one party is intransigent. One said,

“...We are both of the opinion that in theory mediation is good, but if you have someone stubborn on the other side, who is not willing to talk, negotiate or compromise then it is a total waste of time, and I would not [then do it again].”

14 per cent of those who responded to the questionnaire said that even though their mediation had failed they had gained additional insight into their own case. They recognised that even if the case did not settle at the mediation there were other benefits to using the process, for example, the indication that the other side “weren't going to give in”. One defendant said, “It opens the case up, I realise I need more evidence”.

Objections to Mediation

There were a number of parties who, despite being referred to mediation did not take advantage of the process. Thirteen claims were settled before the case even came to mediation. In a further 60 cases, one or more of the parties involved objected to the mediation and chose to opt out of the process. In 39 cases one or more of the parties did not turn up to the mediation appointment on the scheduled day.

Of legally defended litigants, more defendants than claimants chose not to mediate. Of all the cases originally referred to mediation, 27 per cent of defendants were legally represented; this figure dropped to 11 per cent of all the cases that mediated and of these only 8 per cent settled at mediation. A number of objections were received from solicitors who did not think that mediation was suitable for their client's dispute. It was clear from some of the comments received that the solicitors had little idea as to the nature and purpose of mediation. One solicitor wrote refusing mediation:

“There is a substantial dispute as to fact in this matter with each party giving different versions of events. There are no independent witnesses.... mediation is unlikely to assist ...”

Actually, the reference to lack of witnesses and the dispute over facts potentially made the claim ideally suited to further communication between the parties and so, also perhaps, to mediation.

Where one party wanted to mediate but the other side did not, the mediation appointment was cancelled and the case proceeded straight to trial. The majority of those who chose not to mediate had little or no experience of the mediation process. A district judge said that it was a major problem with small claims cases is that there is a mindset amongst litigants that if they can just get into court their problems will be resolved. This attitude was displayed by the defendant who said, “At court even if I lose I will still keep my self-respect because I have done the best I can”. Such views reflect a culture very different from the spirit of the CPR aspiration, namely, to get the parties thinking about resolving disputes before going, as a final resort, to a hearing.

Those litigants who did object to mediation and who responded to the questionnaire generally tended to see the merits of the mediation process but the specificities of their case, for example, the personal characteristics of the other party, led them to decide mediation was not appropriate for them in this instance. However, they may have been mistaken on one particular point. Of parties who chose not to mediate, 38 per cent were either dissatisfied or very dissatisfied with the time they had spent on preparing their case and attending court, compared with 25 per cent of those who had mediated.

Conclusion

This research provides evidence that mediation offers distinct benefits to parties engaged in small claims litigation. It is a useful means of complying with CPR requirements to encourage out-of-court resolution of disputes. In the small claims context, particularly, it provides litigants-in-person with the possibility of a supportive environment in which to discuss their grievances. It comprises a positive, rather than a negative process whereby parties are encouraged to consider broader options for settlement than legal tradition provides, and to focus on their future needs and requirements rather than to dwell on arguments and events from the past. Whilst mediation has been positively received by litigants at Exeter, it is not clear, however, from this research that the methods currently used by mediators, and the length of time

allocated to mediation, always achieve these ends. The role of the mediator is not clearly defined; for example, the boundary between providing the parties with information and giving advice, which is often requested, is blurred and indistinct. Criticism is also made of the limited training offered to potential mediators. There is a great reliance on the mediator's existing legal skills and an assumption that these will be sufficient when applied to the small claims track. Observation of the training showed that there was a concentration on the application of particular mediation skills which involved lawyers and their clients. More of the training needs to focus on the distinct needs of litigants in person who are unlikely to have referred their dispute to a lawyer or even the Citizens Advice Bureau prior to attending at court. This training might involve role plays and evaluation of different approaches to mediation and imbalances of power between litigants to encourage mediators to take a reflective approach to their role. There are currently no official national standards for individual mediators to provide a benchmark for such an operation although the Civil Mediation Council, which represents the interests of mediators, is working towards establishing a quality benchmark for civil mediators. Mediation, even when integrated into highly regulated court processes is itself highly unregulated since there is a strict convention in operation that what goes on in any form of mediation is confidential (Canadian authority on this point is provided by *Rudd v. Trossacs Investments Inc.*, 2006 CanLII 7034 (ON S.C.D.C.)). In addition, there are no safeguards in terms of principles of openness or accountability to resolve any perceived ambiguities in the process.

The MOJ have recommended to HMCS that litigants on the small claims track should be able to utilise the services of a mediator (See further, (2006) LS Gaz, 12 Oct, 1 (2)). The savings in efficiency for both the court and the parties are appreciated by the government. Nevertheless, the Exeter model which relies upon external lawyer mediators, is considered too expensive. Instead, the MOJ prefer a more economical version whereby a civil servant, trained as a mediator, will be available to mediate cases, either by telephone or in-person. Such a system was modelled and much appreciated in the Manchester pilot (Doyle, 2006). In fact the use of telephone mediations became the predominant method of mediation by the end of the pilot. The in-house mediator would contact the parties individually and speak to them over an extended period of time, if necessary, to encourage settlement of the case. Whilst 121 cases were referred to either face-to-face mediation or telephone mediation at Manchester, representing almost 50 per cent less than at Exeter, the settlement rate at 86 per cent was proportionately higher than Exeter. This option arguably offers the greatest potential for cost savings for the MOJ as it requires employment and training of one civil servant for a whole HMCS area rather than a team of specialist mediators for an individual county court. In addition, managing the process can be done more efficiently with

employed mediators than with outsourced services which, in principle, need to be put out to tender for each small claims scheme.

Ten HMCS areas are to be involved in an initial roll-out of the in-house mediator model during 2007 and this will be extended nationally by the spring of 2008. There are concerns, though, that this approach may focus the mediator, employed by the MOJ overtly to obtain settlements, into 'knocking heads together' to meet targets rather than concentrating on achieving a fair outcome (Rustidge, 2007). In Exeter, the MOJ have agreed to extend the existing scheme until the autumn of 2007 so that there can be further comparison of results with the in-house, MOJ mediators.

The significance of the Exeter research is that it has shown that mediation can produce successful results in a court where a high number of cases are referred by the district judges. However, parties still arrive at the court expecting to take part in an adversarial process. There is a distinct lack of suitable information at the court, in the offices of the CAB, or from local solicitors or even on the internet. Mediation is a flexible and informal process, but the parties still come to court believing it to be some kind of formal legal determination. In order to affect a culture change there needs to be a distinct increase in the amount of information provided and made easily accessible to potential court users. Many litigants expect that, even if the mediator will not make a decision in their case, they will be able to give advice. Hence, the mediators' opening statement that they are impartial and neutral can be quite frustrating. Often parties have prepared a case but not thought realistically about settlement options or whether they are prepared to negotiate or even reach any form of understanding with the other side. The historical background of many disputes is that they have developed and evolved over a long period of time, generating such a depth of bitterness and resentment that it can be difficult for those involved to reconcile or even think rationally about the issues. Integrating mediation is a positive step as long as those who will be taking part understand the nature of the process. A general sea-change in approach is required, in fact, by everyone involved in the legal system.

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