Embedding mediation in Scottish Civil Justice –

Riding the tide for a cultural shift?

Margaret L Ross, School of Law, University of Aberdeen[1]

Abstract: In this article, the author examines an accumulating tide of will to embed early dispute resolution in civil courts in Scotland and sets it in the context of research evidence, procedural reforms and philosophies of justice. The article considers whether championing mediation in the present environment can hope to engage those actors in civil justice whose support for it will be necessary.

Introduction

Reflection has abounded about the role, nature and impact of court-connected mediation globally[2] and yet commentators continue to identify gaps in knowledge[3] and agonise over measures of success.[4] In Scotland pilot schemes of in-court mediation have been evaluated, with positive outcomes, and the slowness to embed mediation in civil justice appears over-cautious[5] and not in keeping with legislative aims.[6] There can be many reasons for caution

[1] Professor of Law, Taylor Building, Aberdeen AB24 3UB, m.l.ross@abdn.ac.uk. The author is a member of the law school's research centres for Commercial Law https://www.abdn.ac.uk/law/research/centre-for-commercial-law-692.php and Scots Law https://www.abdn.ac.uk/law/research/centre-for-scots-law-685.php.
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[2] E.g. N Alexander (ed) *Global Trends in Mediation* , 2nd Ed (Kluwer, 2006) which includes M Ross, "Mediation in Scotland: An Elusive Opportunity" 305-332*;* S Stobbe (ed) *Conflict resolution in Asia: Mediation and other cultural models* (Maryland, 2018); C Esplugues & L Marquis (Eds) *New Developments in Civil and Commercial Mediation* (Springer, 2015)**.** Most consider developments country by country with an editorial template and overview. For brief thematic consideration see also D Druckman and J A Wall "A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation" (2017) 61(9) *Journal of Conflict Resolution* 1898, 1910 -1917, and Scottish Government *Making Justice Work: Enabling Access to Justice Project – International Literature Review of Alternative Dispute Resolution,* (November 2014) available via https://www.slab.org.uk/about-us/what-we-do/policyanddevelopmentoverview/AlternativeDisputeResolution/ (last accessed 21 August 2019).

[3] APS Group Scotland for the Scottish Government, *An International Evidence Review of Mediation in Civil Justice,* PPDAS598390 (06/19), (hereafter *International Evidence* Review) available at https://www.gov.scot/publications/international-evidence-review-mediation-civil-justice accessed 31 July 2019), 2-3.

[4] *International Evidence Review*, 51-52.

[5] Discussed in C Irvine, "What do 'lay' people know about justice? An empirical enquiry" *International Journal of Law in Context* (2020) 1-19, para 2.5.

[6] Discussed in B Clark "Not so simple? Court connected mediation in Scotland", 2020 39(1)CJQ 23-46, 24, 26 pointing to the Court Reform (Scotland) Act 2014 ss75, 103 & 104.

and hesitance, often good ones. Scots are known to be relatively slow to litigate in comparison with other nationalities,[7] which can create an erroneous impression that those who choose to litigate have made a positive decision to do so.[8] Scotland's civil courts suffered from a flat structure of access to courts, and much wasted time on cases that moved at the pace dictated by parties or their lawyers, a matter that the *Report of the Scottish Civil Courts Review* ("the Gill report")[9] in 2009 sought to address.[10]

Most causes of hesitation are not exclusive to Scotland and emerge in commentaries about mediation and civil justice around the world. Hesitance from the legal world comes from those who fear the loss of precedent and open justice[11] or fee income[12] due to cases being kept out of determination by the courts.[13] Some may be cautious because of a lack of strong empirical evidence about mediation, because of the role of parties or non-lawyers in reaching an outcome[14] or lack of experience with a "private for profit" provider of a service that sits within the public nature of litigation.[15] Yet it has been noted by Christman and Combe, that full cost recovery from litigants for funding of public litigation has effectively treated litigation as a private dispute resolution service.[16] Some (again usually lawyers) are put off by inability

[7] H Genn and A Paterson, *Paths to Justice Scotland: What people in Scotland do and think about going to law* (Hart, Oxford, 2001) (hereafter *Paths to Justice Scotland)* mentions the "Ach to hell with it syndrome" at viii and 83.

[8] M Ross and D Bain with DTZ*, In-Court Mediation Pilot Projects: Report on Evaluation of In-Court Mediation Schemes in Glasgow and Aberdeen Sheriff Courts,* Scottish Government Social Research (Edinburgh, 2010) (hereafter Ross and Bain*)* and available at https://www.webarchive.org.uk/wayback/archive/20170701074158/www.gov.scot/Publications/2010/04/22091346 (accessed 31 July 2019), para 3.32.

[9] *Report of the Scottish Civil Courts Review* (2009) "Gill Report" available in two volumes https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4, and https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=4.

[10] Gill Report, Chapter 2, Overview.

[11] N Bird, "Open justice in an online post reform world: a constant and most watchful respect" (2017) 36(1) *Civil Justice Quarterly* 23-33.

[12] A Zuckerman*, Reforming Civil Justice Systems: Trends in Industrial Countries.* (World Bank, 2000) available at https://openknowledge.worldbank.org/handle/10986/11421 (accessed 21 August 2019); B Clark, ***Lawyers and Mediation,*** para 2.4.

[13] For a spirited attack on anti-litigation E Thornburg, "Reaping what we sow: anti-litigation rhetoric, limited budgets, and declining support for civil courts" (2011) 30(1) *Civil Justice Quarterly* 74 -92.

[14] C Irvine, "What do 'lay' people know about justice? An empirical enquiry" *International Journal of Law in Context* (2020) 1-19. His empirical study of mediations in simple procedure in Scotland suggests a nuanced approach by parties and lay mediators, and that mediation can offer parties a chance to "co-construct" justice (at 19).

[15] E.g. Ross and Bain para 3.34, there was added concern because the provider was a commercial business.

[16] B Christman and M Combe, " Funding Civil Justice in Scotland: Full Cost Recovery at What Cost to Justice" (2020) 24(1) *ELR* 49, 63.

to find calibration in mediation with a view of civil justice in open court with which they feel familiar.[17] Whatever the reasons, discussed further below, sustained hesitance has prevailed over rising enthusiasm to the extent that it has been asked whether mediation for Scotland is a "damp squib".[18]

But perhaps the tide has begun to turn and gain swell. Mediation was discussed in, and reported on by, the Scottish Parliament's Justice Committee in 2018, [19] which was followed by a private member's consultation on a Mediation Bill. Following collaboration with an Expert Group from Scotland and with international input, Scottish Mediation published a discussion paper titled *Bringing Mediation into the Mainstream in Civil Justice is Scotland*[20] to which the Scottish Government issued a broadly supportive response in December 2019.[21] The Scottish Government also commissioned and published *An International Evidence Review of Mediation in Civil Justice* in June 2019.[22] A *Family Justice Modernisation Strategy* published by the Scottish Government in September 2019 also shows a clear appetite for more use of mediation in that context and support for the work of the Expert Group.[23] The Scottish Government's *National Performance Framework*[24] and annual published justice priorities[25]

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[17] Described as "Ignorance and Cultural Barriers" in B Clark, *Lawyers and Mediation,* para 2.5; Ross and Bain para *3.34 et seq.* For analysis of the challenges to players' philosophies of justice see J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Ambridge 2014), 201-228.

[18] J Sturrock "Mediation: A New Enlightenment or a Damp Squid" speech to Scottish Mediation AGM October 2018, available at http://www.core-solutions.com/core/assets/File/Articles%20and%20Resources/Scottish%20Mediation%20Lecture%2024%20October%202018.pdf (accessed 21 March 2019)

[19] Scottish Parliament Justice Committee *I won't see you in court: alternative dispute resolution in Scotland,* (Edinburgh, October 2018 SP Paper 381 9th Report, 2018 (Session 5)), available at https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/10/1/I-won-t-see-you-in-court--alternative-dispute-resolution-in-Scotland/JS052018R9.pdf, (accessed 21 March 2019) hereafter *I won't see you in court*.

[20] https://www.scottishmediation.org.uk/wp-content/uploads/2019/06/Bringing-Mediation-into-the-Mainstream-in-Civil-Justice-in-Scotland.pdf, (accessed 4 July 2019) hereafter *The Expert Group Report*.

[21] https://www.gov.scot/binaries/content/documents/govscot/publications/publication/2019/12/scottish-government-response-independent-review-mediation-scotland/documents.pdf.

[22] APS Group Scotland for the Scottish Government, *An International Evidence Review of Mediation in Civil Justice,* PPDAS598390 (06/19), (hereafter *International Evidence Review)* available at https://www.gov.scot/publications/international-evidence-review-mediation-civil-justice (accessed 31 July 2019).

[23] https://www.gov.scot/publications/family-justice-modernisation-strategy (accessed 28 October 2019) part 7.

[24] *National Performance Framework, Outcome "*We live in communities that are inclusive, empowered, resilient and safe." https://nationalperformance.gov.scot/measuring-progress (accessed 27 August 2019).

[25] Scottish Government *Justice in Scotland: Vision and Priorities* (for 2017-2020) available at https://www.gov.scot/publications/justice-scotland-vision-priorities/ and Scottish Government *Justice vision and priorities delivery plan 2018-2019 and overview of progress 2017-2018* available at

point towards choice, empowerment and resilience for individuals and communities.[26] That Government has extolled access to a range of dispute resolution options for decades.[27]

This article considers whether this tide has the strength and support to overcome a hesitance that has prevailed to date. It will consider whether mediation can be guided into the core of civil court proceedings in Scotland, an environment dominated by those trained in the law. The impact of Coronavirus on court business shows that a traditional landscape can accommodate change quickly when there is a need for access to justice by different means; will that need to adapt court business at rapid pace add to or inhibit momentum for embedding mediation in civil justice in Scotland?

A turning tide in Scotland

Statements of will

In October 2018, the Justice Committee of the Parliament of Scotland, then convened by Margaret Mitchell MSP for Central Scotland, was positive about increasing the profile of options in court in a report entitled *I won't see you in Court: Alternative Dispute Resolution in Scotland*.[28] Having received evidence the committee concluded that, although some progress had been made to increase choice and awareness, there should be

> "a co-ordinated programme to raise public awareness of the benefits and availability of different ADR methods in Scotland, and ensuring that bodies such as citizens advice bureaux, local councils and GP surgeries, as well as elected representatives, have the resources to advise people on ADR; a more robust duty on solicitors to advise their clients on the range of dispute resolution methods available to them, for example a requirement to keep records of this advice which can then be audited by the Law

https://www.gov.scot/publications/justice-vision-priorities-delivery-plan-overview-progress-2017-18-new (accessed 27 August 2019)

[26] *ibid Justice in Scotland,* Priority 1 "We will enable our communities to be safe and supportive, where individuals exercise their rights and responsibilities**.**"

[27] Scottish Executive Justice Department *Resolving Disputes without going to Court* (Edinburgh, 2004) available at https://www2.gov.scot/Publications/2004/07/19569/39735 (accessed 27 August 2019); and https://www.mygov.scot/alternatives-to-court/. Commissioned research led to Scottish Government *Public Awareness and Perceptions of Mediation in Scotland* (Edinburgh 2007).

[28] Scottish Parliament Justice Committee *I won't see you in court: alternative dispute resolution in Scotland,* (Edinburgh, October 2018 SP Paper 381 9th Report, 2018 (Session 5)), available at https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/10/1/I-won-t-see-you-in-court--alternative-dispute-resolution-in-Scotland/JS052018R9.pdf, accessed 21 March 2019.

> Society; legal aid for other forms of ADR, as is currently available for mediation; reviewed training for the judiciary to encourage a more consistent approach to court referrals to ADR; and consistent provision and funding of in-court ADR services, particularly for simple procedure cases."[29]

The committee favoured piloting mandatory information meetings on ADR prior to court action in all but cases where domestic abuse is alleged, and that legislation might help to "encourage the cultural shift the Committee heard is necessary to ensure a step-change in the uptake of ADR in Scotland."[30] Whether intended to make a statement or not, the report bore a photograph of a traditional court room, but empty of participants.

In May 2019 Margaret Mitchell MSP issued a consultation on a member's Mediation Bill, with a consultation period that closed in August 2019,[31] sub-titled

> "[A] proposal for a Bill to increase the use and consistency of mediation services for certain civil cases by establishing a new process of court-initiated mediation that includes an initial mandatory process involving a statutory duty mediator."

The cover bears a naive drawing of two people shaking hands over a table with a person in the middle (presumably the mediator). In the drawing there is a wall poster declaring "Mediation Working for you." In so far as it depicts the mediator (accurately) as a person in the middle of the parties' discussion, rather than merely a lever for compromise, so far so good. However, all disputants contemplating litigation are likely to be adults, many in business relationships, and they might have responded to a more polished image of a mediation setting. Whether intentionally or not, the image could appear to detract from the seriousness of the dispute for the parties, and omits any party representatives.

There was no text of a Bill for consultation, but the gist of the proposals is: -

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[29] *I won't see you in court* para 130.
[30] *ibid* para 131-132.
[31] https://www.parliament.scot/S5MembersBills/Mediation_consultation_document.pdf; https://www.parliament.scot/gettinginvolved/111864.aspx accessed 4 July 2019 (Mediation Bill Consultation).

"1. Court initiates the mediation process for the parties involved (unless the case relates to an issue excluded from the Bill)[32] by issuing parties with a self-test questionnaire;[33]

2. Court appoints a mediator;

3. Parties meet with the mediator (in a Mediation Information Session) to consider the questionnaire responses and to agree whether to enter into a Mediation Commencement Agreement;

4. If parties do not wish to mediate then the process ends and parties are free to proceed as they wish (including by continuing with litigation);

5. If parties do wish to mediate, then they will be required to appoint a mediator and sign up to a Mediation Commencement Agreement;

6. If mediation is successful, then parties will sign a Mediation Settlement Agreement."[34]

Situations proposed for exclusion are proceedings involving domestic abuse or sexual harassment, rape or other sexual offences; proceedings as to family status, arbitration, employment, tax and customs, and judicial review. [35] The consultation proposed that the cost of stages 1-3 including the duty mediator and the Mediation Information Session be met by the government from the Justice budget. But "[I]f the parties agree to mediate then they would be required to appoint a mediator, likely to be a different person, and pay for that service themselves".[36] No reference is made to availability of legal aid.

Consultation responses to the idea of the Bill were published by the Bill's promoter.[37] A rich source of input to the embedding mediation debate is to be found in these responses. From the 62 responders, there is considerable support for better information about choice of mediation to be available to disputants, but only partial support for mandating this. There are

[32] *ibid* at 15-16.

[33] *ibid* and Annex. The proposed self-test questionnaire draws upon one used successfully in the courts in the Netherlands to help the parties and the mediator assess the suitability of the case for mediation., Netherlands is discussed in the consultation document at 12-13. The questionnaire is noted as key to uptake of referral to mediation in the Netherlands, but the other factors that had been pivotal to referral there such as the attitude of the judiciary and the linkage with the legal aid system. There is more discussion about factors that can lead to referral in M Pel, *Referral to Mediation* (The Hague, 2008) ch 6.

[34] *ibid* at page 14.

[35] *ibid* at page 15-16

[36] Mediation Bill Consultation page 15.

[37] Available at https://www.margaretmitchell.org.uk/mediation-consultation (last accessed 11May 2020).

suggestions that personal injury and commercial actions which already have pre-action protocols should be excluded, and that exclusions should be more nuanced to parties' dispute situations (for example whether a matter of public law is engaged) rather than by category of claim. There was marked hesitance for change on the part of the establishment responders, viz the Scottish Courts and Tribunals Service and the Lord President,[38] who were responding before the civil justice system had to adjust to deal with Coronavirus restrictions.

Given the strength of support the promoter intended to proceed to the next stage of a formal Bill before the end of the current parliamentary session,[39] and secured cross party support.[40] Parliamentary time was not found, but the Bill has provided scope for thoughtful analysis of what legislation could do for embedding mediation in Scotland,[41] both in terms of providing information and choice to the parties and educating the legal profession.[42] The proposed timing of the mandatory information process after, rather than before, proceedings are begun has been compared unfavourably with the earlier intervention that is well-established via pre-action protocols in England, [43] and the limitation to low value cases chimes with Clark's "cheap option for cheap cases" criticism.[44]

In June 2019 Scottish Mediation[45] published the report of an Expert Group entitled *Bringing Mediation into the Mainstream in Civil Justice is Scotland*[46] ("*the Expert Group Report*"), offering a summary, backdrop and blueprint for embedding mediation in civil justice in

[38] Available at https://www.margaretmitchell.org.uk/sites/www.margaretmitchell.org.uk/files/2019-09/RAD%20-%20SCTS%20-%20Organisation.pdf and https://www.margaretmitchell.org.uk/sites/www.margaretmitchell.org.uk/files/2019-09/RAD%20-%20Lord%20President%20-%20Individual.pdf respectively, accessed 11 November 2019.
[39] The promoter sought practical and financial support for drafting from those who responded to the consultation, communication from Margaret Mitchell MSP on 19 December 2019 to those who had responded to the consultation on the Bill. As Bills must be presented by 1 June 2020 for enactment by spring 2021 it is expected that this will not be achieved, particularly in coronavirus times.
[40] Under a slightly revised title of "a Bill to increase the use and consistency of mediation services for certain civil cases by establishing a new standardised process for mediation in Scottish courts which includes provision of a mandatory information process," and limited to cases of £5000 or below. Communication from Margaret Mitchell MSP on 17 November 2019 to those who had responded to the consultation on the Bill.
[41] M Ahmed, "Critical Reflections on the Proposal for a Mediation Act in Scotland" (2020) 83(3) MLR 614-636.
[42] *ibid* 627.
[43] *ibid* 629-631.
[44] B Clark "Not so simple? Court connected mediation in Scotland", 2020 39(1)CJQ 23-46, 45
[45] www.scottishmediation.org.uk (previously Scottish Mediation Network). It receives an annual grant of £100,000 from the Scottish Government which is its largest direct investment in mediation in Scotland.
[46] https://www.scottishmediation.org.uk/wp-content/uploads/2019/06/Bringing-Mediation-into-the-Mainstream-in-Civil-Justice-in-Scotland.pdf, accessed 4 July 2019.

Scotland. It proposes a change in practice and culture, underpinned by rules of procedure and in due course legislation,[47] whereby every civil litigant (with only a few excluded situations connected with abusive relationships)[48] is directed to information about early dispute resolution (mediation) from a court-based coordinator. It differs most clearly from the Mediation Bill when it expects mediation to be a presumptive step,[49] at no cost if the claim value is low and at affordable rates for higher value cases.[50]

The Expert Group Report also highlights the importance of funding,[51] education and training (particularly of legal professionals about mediation)[52] and culture change to embrace the reforms proposed.[53] In terms the Expert Group says the time is right, let's just get on with it,[54] but calls for good data collection to be put in place so that there can be evaluation along the way.[55] The report refers to the "profession" of mediation, and the role to be played by such professionals in the proposed system. The Scottish Government have noted their support of the work of the Expert Group[56] and in December 2019 issued a formal response to the report.[57] The Ministerial Foreword notes "the time is right to re-examine how best to embed mediation in the civil justice system" but the government will consult publicly and "bring together representatives of delivery bodies" (the National delivery group) before considering reform on a "whole system" basis.[58] The final words of this response state

[47] *Expert Group Report* chapter 8.
[48] *ibid* chapter 5. The exclusions being where "Mediation has already taken place, or a mediator is currently engaged; existence of time-bar (unless provided for in legislation); contractual clauses stipulate specific ADR method; another preferable ADR method exists; the case involves a protective order or enforcement order; disputes where there is a risk of domestic abuse, sexual violence or any other gender-based violence." *ibid* 37 Recommendation 6.
[49] In this article the arguments against offering mediation in civil justice are not explored. That "well-trodden ground" is summarised and noted in M Ahmed, "Critical Reflections on the Proposal for a Mediation Act in Scotland" (2020) 83(3) MLR 614-636 at 615-616.
[50] *Expert Group Report* chapters 4-6.
[51] *ibid* Chapter 6.
[52] *ibid* Chapter 9.
[53] *ibid* Pages 4, 6 and Recommendations 20-27.
[54] *ibid* chapter 4.
[55] *ibid* chapter 5(6).
[56] https://www.gov.scot/publications/family-justice-modernisation-strategy (accessed 28 October 2019), particularly paras 7.7 & 7.21.
[57] https://www.gov.scot/binaries/content/documents/govscot/publications/publication/2019/12/scottish-government-response-independent-review-mediation-scotland.pdf.
[58] *ibid* Ministerial Foreword by Ash Denham, Minister for Community Safety. It is understood the delivery group was making good progress prior to Coronavirus interruption.

> "In moving this work forward, it will be critical to focus on the user of the system to ensure that the reforms empower our people, our organisations and our communities to resolve disputes and other civil justice problems at the earliest opportunity and in the most appropriate way, whilst always retaining the rights of people in Scotland to access courts in determination of their rights."[59]

How the user's needs are met is clearly intended to be a key part of system reform. Within a few months of that response being published, and with days' or at most weeks' notice, changes to court business, for our purposes civil business, began to emerge in order to deal with Coronavirus lockdown. Closing the courts to civil cases involving witnesses, and allowing some remote access on 19 March 2020 was replaced by 25 March with suspension of all but "urgent and necessary"[60] business and consolidation of all sheriff court civil business to ten courthouses across Scotland.[61] Prior to this only Simple Procedure could be undertaken online.[62] However the Coronavirus (Scotland) Act 2020,[63] assumes remote rather than in person attendance if attendance is needed at all, allows for electronic signatures in all civil procedures, and requires guidance issued by the Lord President to be followed.[64]

Effective 1 May 2020, a guidance note provided a process for restarting civil business only remotely.[65] Increased reliance on technology, digital documents and the first virtual appeal were described as "the new normal" by the Chief Executive of the Scottish Courts and Tribunals Service.[66] There had been significant pressure from the legal profession and organisations supporting the public for the courts opening up, and in a consistent way across

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[59] *ibid* page 9.
[60] *Civil Court Priorities Coronavirus Response* https://www.scotcourts.gov.uk/docs/default-source/default-document-library/urgent-civil-business---website-notice.pdf?sfvrsn=6 accessed 30 April 2020.
[61] www.scotcourts.gov.uk/coming-to-court/attending-a-court/coronavirus#my_anchor accessed 30 April 2020.
[62] See below.
[63] 2020 asp 7.
[64] Sched 4 part 1.
[65] *COVID 19, Guidance in respect of Progressing Certain Categories of Civil Business in the Sheriff Courts* https://www.scotcourts.gov.uk/docs/default-source/default-document-library/coronavirus-guidance---progressing-certain-categories-of-civil-business-29-04-20.pdf?sfvrsn=2 (accessed 1 May 2020). All guidance notes are subject to regular updating in keeping with the requirements of the Coronavirus (Scotland) Act 2020 for regular review of restrictions.
[66] https://www.lawscot.org.uk/news-and-events/legal-news/sheriff-courts-restarting-but-not-business-as-usual/ (accessed 1 May 2020) and https://www.bbc.co.uk/news/uk-scotland-52358830 (accessed 1 May 2020).

Scotland at Sheriff Court level.[67] User needs and the speedy action of the Scottish Courts and Tribunals Service, working with other relevant agencies, has combined quickly to provide some responsive civil justice supported by technology and remote working. This is despite, and sometimes because of, lockdown conditions, where disputes, insolvency, family conflict and domestic violence have been very concerning by-products.[68]

Language of change: reframing

In mediation practice the process of reframing of parties' positions or assertions to uncover and emphasise shared interests is pivotal to opening options for agreement. Graphics, language and style all create potential openings or roadblocks. The imperative to respond to Coronavirus has reframed the image of courts, and has led to engagement with change and influenced appetite for making more of what we have rather than adhering to how things have always been done. The new behaviours, although different from the paper and persons reliance of courts in dispensing justice, are likely to last beyond the lockdown. Although some may consider this a Pandora's Box, not all are undesirable.[69] The rapid move to adjustments in the operation of the justice system,[70] may lead to greater appetite for dispute resolution that offers accessible and self-managed outcomes. Conversely, the economic pinch upon traditional actors in the court system may pull in the other direction; there is only so much change that can be absorbed at one time. Arguably remote working courts may be more attractive to disputants than their physical predecessors thus reducing the need for embedded a dispute resolution alternative. It will be impossible to tell unless an embedded alternative is in operation across the country.

Writing well before Coronavirus impact on the courts, the authors of the *Expert Group Report* take a leap of faith in suggesting that all but exceptional cases will be presumed to go to an Early Dispute Resolution Office. That is more directive than the provision of information

[67] https://www.lawscot.org.uk/news-and-events/law-society-news/gradual-extension-of-court-business-is-positive-development-for-access-to-justice/ (accessed 1 May 2020).
[68] *ibid*
[69] The virtues of the virtual summary criminal trial are extolled by one Sheriff Principal to members of the Law Society of Scotland https://www.lawscot.org.uk/news-and-events/legal-news/virtual-summary-trials-should-be-the-norm-pyle/ (Accessed 20 July 2020).
[70] Coronavirus (Scotland) Act 2020 asp 7, s5 and sched 4.

proposed in the Mediation Bill. They propose a model akin to the British Columbia approach[71] which has indeed been lauded for internal coherence and can be easily costed by policy-makers in their decisions about implementation. [72] The effectiveness of the British Columbia approach stemmed in part from decisive implementation but is also surrounded by a range of approaches to dispute resolution that are top-down and more diverse than what has been contemplated so far in Scotland. Change there was driven by government, with a heavy publicity campaign to support it.[73] There is significant overlap between the Civil Resolution Tribunal jurisdiction and what now exists in Scotland within Simple Procedure or in the Housing Private Property Tribunal[74] to which jurisdiction in most landlord and tenant cases has been transferred. Moving such disputes away from traditional court approaches in Scotland has carried much less public press and government backing than the reforms in British Columbia, but is being absorbed.[75] The point has been made that courts and lawyers only embrace change if it mirrors what they recognise as justice, [76] unless it is taken completely out of the court's domain, as with matters transferred to the administrative tribunal system.[77]

In *The Expert Group Report* there is an emphasis on the collaboration that was adopted within the Expert Group and on such an approach being required to further progress for embedding mediation. Lawyers and mediators on the Expert Group operated in mutual respect, and widen the term "profession" to embrace non-lawyer mediators. This might call out opposition from lawyers pointing to the major difference in training regimes between lawyers and

[71] Available via https://civilresolutionbc.ca / (accessed 31 July 2019). See also B Billingsley and M Ahmed," Evolution, revolution and culture shift: a critical analysis of compulsory ADR in England and Canada", (2016) 45(2-3) *Common Law World Review* 186-213 comparing reforms in England and Alberta.
[72] Available via https://civilresolutionbc.ca/ (accessed 31 July 2019). In British Columbia a new Civil Resolution Tribunal was created to deal with cases up to 5000$CAN in value or apartment building dispute cases of any value, thus removing such cases from the courts to a separate jurisdiction.
[73] *ibid*.
[74] Neighbour disputes account for a significant number of Simple Procedure cases. Civil Justice Statistics for Scotland, available at https://www.gov.scot/publications/civil-justice-statistics-scotland-2017-18/ (accessed 31 July 2019) and https://www.gov.scot/publications/civil-justice-statistics-scotland-2018-19/ (accessed 8 May 2020).
[75] Not without discomfort according to the Sheriff Principal in *Cabot Financial UK Ltd v McGregor, Gardner and Brown* [2018] SAC (Civ) 12 at para [72] of the judgment.
[76] C Campbell in *Lawyers and their Public,* noted that the law "provides courts and tribunals for doubt about the meaning of..claims (or values) to be determined but insists these tribunals (or methods they would recognise) are used for resolving disputes."C Campbell, "Lawyers and their Public" [1976] *Juridical Review* 20, citing "The Legal Routine" his inaugural lecture to Queens University Belfast in 1975.
[77] Such as employment law, mental welfare civil orders, and disputes between landlord and tenant.

mediators. The Law Society of Scotland has been concerned about extending reliance on lay advisers and participants in early dispute resolution[78] and the potential of widening legal aid for lay advice, and opposed to parallel proposals for an independent regulator of legal services.[79] Might this play out against mediation and early dispute resolution as further incursion into the work of civil court practitioners who have had to absorb the impact of the structural reforms of civil courts that followed the Courts Reform (Scotland) Act 2014.[80] But in the aftermath of Coronavirus lockdown all players in civil justice have had to re-calibrate thinking. Any return to paper and attendance-based lawyer practice must be challenged if it limits the accessibility of civil courts for the user.

None of the statements of will towards embedding dispute resolution in Scotland has proceeded *purely* on ground of budgetary or system efficiency or on an express aim of proportionate justice. By contrast those have been the bywords for embedding dispute resolution in the litigation system of England and Wales, [81] which are considered to have mitigated against culture change in England and Wales and set legal professionals at odds with expansion of dispute resolution at the court end of the dispute management spectrum.[82] Nonetheless courts have embraced the civil procedure rules requiring parties to engage with dispute resolution unless refusal is reasonable, and parties can access a body of case law in which judicial attitudes to dispute resolution can be traced.[83] No doubt because there is little reference to dispute resolution in court rules, no such body of case law exists in Scotland.[84]

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[78] September 2019 *Consultation Response: Legal Aid Reform* https://www.lawscot.org.uk/media/363609/19-09-19-la-consultation-legal-aid-reform.pdf (accessed 31 October 2019), particularly response to question 21.

[79] E Roberton, *Fit for the Future: Report of the Independent Review of Legal Services Regulation* (Edinburgh 2018) at 32, available at https://www2.gov.scot/About/Review/Regulation-Legal-Services (accessed 21 March 2019), and responses available at https://www.lawscot.org.uk/research-and-policy/legal-services-review/ (accessed 28 October 2019).

[80] 2014 asp 18. There has been a 48% drop in civil business in the Court of Session since 2015 and civil business generally was at a ten year low, Scottish Government, *Civil justice statistics in Scotland: 2018-2019*, Chapter 1 opening para, https://www.gov.scot/publications/civil-justice-statistics-scotland-2018-19 (accessed 8 May 2020).

[81] Discussed in depth in J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Ambridge 2014).

[82] *ibid*

[83] A recent strong statement of the court's role in bringing parties to the table, in that case for Early Neutral Evaluation, is to be found in *Lomax v Lomax* [2019] EWCA Civ 1467, which is also discussed in M Ahmed, "Critical Reflections on the Proposal for a Mediation Act in Scotland" (2020) 83(3) MLR 614-636,621-622.

[84] Occasionally a case includes reference to mediation having been attempted or refused before the procedure reported, e.g. *Logan v Future Technology Devices International Ltd* [2019] CSIH 46; *David MacBrayne Ltd v Atos IT Services (UK) Ltd* [2018] CSOH 32. Courts have been influenced by mediation outcomes in the sense of being

Absent the negative bywords and the lack of public record of judicial attitudes in case law in Scotland, there is some evidence to draw upon.

Evidence about use of mediation

Scotland

Although a country with few court-based mediation offerings, those offerings have been evaluated. Mediation in Edinburgh Sheriff Court by the Citizens Advice Bureau, and in simple procedure in courts around the Glasgow and its hinterland via the Strathclyde Mediation Clinic has been the subject of annual reporting.[85] The study by Ross, Bain[86] and DTZ[87] of users of a pilot project to offer mediation in two large Scottish civil courts[88] uncovered positives including party choice, settlements that were implemented, and protection of credit scores through fewer judgements.[89] Education as to choice was found to be limited due to lack of information[90] and procedural opportunities to inform litigants and lack of proactivity by lawyers.[91] It also made an evidenced case for the economic efficacy of spend (whether public or private) on an in-court mediation service as compared to, or alongside, litigation.[92] A further study of in-court advice and mediation options published in 2016[93] reaching similar conclusions in terms of satisfaction and need for greater knowledge as to options.[94] Both studies noted the import and impact of an in-court advisor to assist disputants to understand

of evidential value in *FJM v CGM* [2015] CSOH 130 or legally binding effect in *Maclehose v Wilson & Pagan* [2014] CSOH.

[85] The Edinburgh Citizens Advice Bureau reports annually, and notes the support of the Scottish Legal Aid board for its In Court Adviser and Mediation Service, e.g. *Citizens Advice Bureau Edinburgh Annual Review 2016/17* available via https://www.citizensadviceedinburgh.org.uk/annualreports (accessed 20 October 2019); Strathclyde Mediation Clinic Annual reports 2017 to 2019 are available at https://www.strath.ac.uk/humanities/lawschool/mediationclinic/ (accessed 20 October 2019).

[86] Lecturer in Law, University of Aberdeen, Taylor Building, Aberdeen AB24 3UB, d.bain@abdn.ac.uk.

[87] DTZ Consulting Edinburgh (economist John Boyle).

[88] Ross and Bain [fn6]. Both pilots and the evaluative study were funded by the Scottish Government.

[89] Ross and Bain paras 5.17-5.21 and 6.31.

[90] Ross and Bain paras 7.4-7.6 and 7.10-7.11.

[91] Ross and Bain paras 3.17-3.18, 7.21.

[92] Ross and Bain paras 1.19-1.21 and Chapter 6.

[93] Blake Stevenson Ltd, *Research into Participant Perspectives of Dispute Resolution in the Scottish Courts: Final Report to Scottish Legal Aid Board,* (Edinburgh, 2016) (hereafter Blake Stevenson available at http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/publications-by-other-organisations/research-into-participant-perspectives-of-dispute-resolution-in-the-scottish-courts23ba14a7898069d2b500ff0000d74aa7.pdf?sfvrsn=2 (accessed 31 July 2019)

[94] Blake Stevenson paras 7.6-7.10

choices, particularly disputants who had become involved in proceedings without legal advice.[95]

The *Report of the Scottish Civil Courts Review* ("the Gill report")[96] in 2009 did not propose including legislative levers for mediation, nor cost sanctions such as had been put in place after the Woolf report in England.[97] That omission attracted criticism,[98] but it is worth recalling that the report (about civil courts rather than civil justice more broadly) was critical of the civil courts as they then were in terms of cost, speed and antiquity of procedures.[99] Most reforms proposed were to the structure of courts and the judiciary.[100] The report did contain a chapter and Annex entitled "Mediation and other forms of Dispute Resolution."[101] What it concluded then was

- "Mediation is most likely to be successful when entered into willingly and when the parties are prepared to negotiate;
- Referral to mediation, or a suggestion that it be considered, is most likely to result in a high settlement rate if it is done on a case-by-case basis; whereas a policy of blanket referral or diversion is likely to result in a high opt-out rate;
- If ADR is successful, it is generally less expensive than litigation, but if it is unsuccessful, it can increase costs;
- Although the majority of people in Scotland have heard of mediation, most do not have a clear idea of what it involves and what it can offer;

[95] Ross and Bain paras 3.46-3.48; *Blake Stevenson* para 7.9. The point is developed in B Clark "Not so simple? Court connected mediation in Scotland", 2020 39(1)CJQ 23-46

[96] *Report of the Scottish Civil Courts Review* (2009) "the Gill Report" available in two volumes https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4, and https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=4.

[97] Rt Hon Lord Woolf *Access to Justice: Final report* (1996) available at https://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm (accessed 21 August 2019).

[98] C Irvine, "The Sound of One Hand Clapping: Gill Review's Faint Praise for Mediation", (2010) 14(1) Edinburgh Law Review 85-92; C Irvine 'Scotland's 'Mixed' Feelings About Mediation' (July 12, 2012), available for download at https://ssrn.com/abstract=2713346; *cf* E Thornburg, "Reaping what we sow: anti-litigation rhetoric, limited budgets, and declining support for civil courts" (2011) 30(1) *Civil Justice Quarterly* 74 -92.

[99] The Gill Report Chapter 2.

[100] The Gill Report Volume 1 pages 245-272

[101] Chapter 7 and annexes at pages 296 to 321 of Volume 1.

- Those who have taken part in mediation generally react positively to it and would use it again. They appreciate its privacy and informality, the opportunity to each party to be listened to, and the qualities of mediators.
- Mediation and facilitated negotiation schemes targeted at lower value claims cases seem to achieve a good settlement rate and a high level of user satisfaction. They may also save court time;
- The legal profession has not yet uniformly accepted mediation as a worthwhile dispute resolution option."[102]

Ten years later all of these statements still apply. The 2019 *International Evidence Review* rehearses the issues in a current and robust manner, whereas public reports and literature reviews undertaken in Scotland in the intervening years[103] tended to be descriptive and hesitant.[104] Alarmingly, the Scottish Government's *Overview report of Alternative Dispute Resolution in Scotland* in 2014 states that little evidence of the volume and impact of publicly funded mediation can be found,[105] ignoring that many third sector organisations have been offering mediation at low (or no) cost to the disputants, through grants of public or charitable funding.[106] They are required to account annually and publicly to their paymasters, to their governing boards and to the Office of the Scottish Charities Regulator (OSCR), for the efficiency of their operations and their spending.[107] The use of mediation in legally aided cases[108] was acknowledged in the 2014 *Overview*,[109] but ran contrary to its comment on lack of evidence of the impact of publicly funded mediation.

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[102] Chapter 7 para 9.

[103] Such as Scottish Civil Justice Council *Access to Justice Literature Review: Alternative Dispute Resolution in Scotland and other jurisdictions* (July 2014) available at available via https://www.slab.org.uk/about-us/what-we-do/policyanddevelopmentoverview/AlternativeDisputeResolution/ (last accessed 21 August 2019). http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-pubilcations/literature-review-on-adr-methods.pdf?sfvrsn=2 (last accessed 21 August 2019) ; and, directed in particular but not exclusively to family law, Scottish Government *Making Justice Work: Enabling Access to Justice Project – International Literature Review of Alternative Dispute Resolution,* (November 2014) available via https://www.slab.org.uk/about-us/what-we-do/policyanddevelopmentoverview/AlternativeDisputeResolution/ (last accessed 21 August 2019).

[104] Such as Scottish Government and *Making Justice Work: Enabling Access to Justice Project –Overview Report of Alternative Dispute Resolution in Scotland* (November 2014) particularly in its conclusions.

[105] *ibid* paras 115-117.

[106] Such as Citizens Advice Edinburgh and local services affiliated to Relationships Scotland.

[107] *The Expert Group Report* captures some of this activity at paras 66-68.

[108] Some charities offer mediation services on the instructions of solicitors holding legal aid certificates in family cases in local services affiliated to Relationships Scotland, https://www.relationships-scotland.org.uk.

[109] *Overview* at para 51

Beyond Scotland

Fragmented consideration of evidence has also been a feature in England and Wales. Koo[110] retrospectively undertook a thorough review of the courts' attitude to dispute resolution, but viewed from the doorstep of the court the much wider landscape of options open to the public for resolving disputes is missed. Hodges,[111] in his extensive review of models of dispute resolution in England and Wales outside and within the courts, notes that in England and Wales change and evaluation is conducted within "silos".[112] He is sceptical of the value of judge-led reviews of justice processes. He comments that judicial leadership brings an inherently legal professional lens, lacking both experience of people management and overview of the very wide spectrum of dispute resolution providers to which the public now has access (including e.g. ombudsmen and trade conciliation schemes).[113] The counter argument might be that judge-led reviews have a stronger history of levering change within policy-makers and legal professions.[114] Hodges highlights the importance played by the wide range of organisations that help the public deal with disputes, and pleads for a holistic approach where we look away from litigation as the focal point and instead treat it as one point of referral or determination within a coherent, integrated framework of disputant options.[115] Irvine finds that lay people bring their own conceptions of justice to the table and that they should have more part in "co-constructing" their processes and outcomes.[116]

The *International Evidence Review*[117] focusses on mediation studies only in the designated comparator countries of England & Wales, Ireland and parts of Canada, the USA and Australia. This Review highlights, among many important factors, two which are interconnected and of particular note here. First it makes clear that the context in which mediation is being offered

[110] A Koo, "The role of the English courts in alternative dispute resolution" (2018) 38(4) *Legal Studies* 666-683.
[111] C Hodges, *Delivering Dispute Resolution; A Holistic Review of Models in England and Wales* (Hart, Oxford, 2019), ch18.
[112] ibid
[113] ibid
[114] Although recent experience in Scotland has not seen wholescale adoption of judge-led recommendations. For example the *Carloway Review* (Scottish Government, 2011) in so far as it proposed removal of the corroboration requirement in Scotland.
[115] Hodges (n95).
[116] C Irvine, "What do 'lay' people know about justice? An empirical enquiry" *International Journal of Law in Context* (2020) 1-19, para 5.
[117] N3.

and considered in a particular case is vital, just as Gill had noted and Irvine has found.[118] This must be acknowledged regardless of any general lessons that can be learned from the evaluation of mediation in courts elsewhere.[119]

Second is the point that is often missed in critical commentaries of relationships between mediation and civil justice. The *International Evidence Review* notes

> "..baselines are lacking in the civil justice system: if we do not know where we started with mediation and other ADR we cannot be sure what impact any intervention has had."[120]

Scrutiny of court effectiveness generally has been much less focussed in most countries than the extensive scrutiny given to embedding mediation. When mediation is measured for its effectiveness and benefits it can rarely be set against meaningful baseline data as to what the courts themselves do for the litigants, absent a mediation option. There will be data as to volume of use,[121] generic court user satisfaction surveys[122] (which apply e.g. to court premises and staff helpfulness more than processes), the calls upon legal aid budgets for litigated cases[123] and occasional large scale judge-led reviews such as Gill or Woolf.[124] Suspension of civil court business due to Coronavirus has called into question what is a minimum service to be expected of the courts. Perhaps at last the practical starting point is to be what the courts should do for users, rather than what they have always done.

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[118] C Irvine, "What do 'lay' people know about justice? An empirical enquiry" *International Journal of Law in Context* (2020) 1-19.

[119] *International Evidence Review* 38, 48-49.

[120] *International Evidence Review* 14, citing Mack's report for NADRAC (Australia's National Alternative Dispute Resolution Advisory Council), K Mack, *Court Referral to ADR: Criteria and Research* (2003) 21 available at https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Court%20Referral%20to%20ADR%20-%20Criteria%20and%20Research.PDF (accessed by this author 21 August 2019)

[121] Civil Justice Statistics for Scotland, last published for 2017-2018 in April 2019 available at https://www.gov.scot/publications/civil-justice-statistics-scotland-2017-18/ (accessed 31 July 2019)

[122] The biannual to annual surveys are exit surveys conducted independently of the courts. The last published for 2017 is available at http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/2017-court-final-report.pdf?sfvrsn=2 (accessed 31 July 2019).

[122] The biannual to annual surveys are exit surveys conducted independently of the courts. The last published for 2017 is available at http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/2017-court-final-report.pdf?sfvrsn=2 (accessed 31 July 2019).

[123] Scottish Legal Aid Board Annual reports available via https://www.slab.org.uk/about-us/what-we-do/annual-report/ (last accessed 21 August 2019).

[124] All of these were drawn upon by DTZ in the Ross and Bain study, para 6.8.

The need for better baseline data is acknowledged in the Scottish Government's *Family Law Modernisation Strategy* published in September 2019, [125] with stated aims of avoidance of delay[126] and expansion of alternatives to court. A non-statutory element in the modernisation action plan is to improve understanding of how family proceedings work in court for inclusion in published civil justice statistics, while not breaching anonymity.[127] It is asserted there that

> "government analysts are now embedded at the SCTS (Scottish Courts and Tribunals service) with access to the integrated case management system (ICMS). The system contains richer data about court processes and litigants, which enables better insight on cases than previously possible."[128]

By comparison, prior to the introduction of the ICMS, while evaluation of the mediation options in the Aberdeen and Glasgow pilots looked for baseline data and considered a comparator group of non-mediated cases, court use data was rarely in a form that was comparable and useful. Legal aid spend was usually on higher value cases, and the only traction for mediation had been achieved in lower value cases where legal aid would not normally be available.[129] Some studies have compared times to outcome, [130] but that is a blunt tool because so many factors can influence the litigants in progress of a case.[131] DTZ working with Ross and Bain found party spend was lower for mediation than for the litigated cases and much lower than what the parties feared litigation would have cost. [132]

Lessons from evidence or blind alleys?

The *International Evidence Review* notes that the evidence base "allows for a broad sense of the positives and challenges that mediation presents".[133] On most characteristics, the evidence is in fact mixed, and very context specific. So in the systems studied there are variable experiences of settlement rates, mandatory or optional schemes, and potential for cost and time-saving. It is not considered possible to conclude that mediation is an inherently

[125] https://www.gov.scot/publications/family-justice-modernisation-strategy (accessed 28 October 2019).
[126] The Supreme Court was stinging in criticism of delay in family cases in Scotland in *NJDB v JEG* 2012 UKSC 21.
[127] ibid Annex A actions 36 and 37.
[128] *ibid* Annex C.
[129] Ross and Bain paras 6.5-6.9.
[130] *International Evidence Review* 45-48.
[131] As was noted in C Irvine, "What do 'lay' people know about justice? An empirical enquiry" *International Journal of Law in Context* (2020) 1-19.
[132] Ross and Bain para 6.23.
[133] *International Evidence Review* 2.

good or bad option to offer,[134] rather one that "can have a range of positive outcomes for both users and the civil justice system,"[135] provided that one accepts that it will not work in every case. While some cases may be presumptively excluded, [136] a blanket approach is not necessarily appropriate. If opportunities for productive mediation are so context specific (including characteristics about both case and parties) exploring whether it has potential could also be done wholly case by case.

In contrast to England and Wales, the other countries studied in the *International Evidence Review* have met with more fertile ground for the growth of mediation. Whether championed by the judiciary or by the legislature or both, adoption of mediation into the culture of courts has been happening.[137] Despite this, a long list of gaps in depth of understanding from those countries is set out in the *International Evidence Review.* These are summarised as:-

> "drivers to engagement and settlement; characteristics of parties and the dispute; private, pre-court mediation; quality of outcomes, particularly in the longer term; awareness of and provision of information about mediation; mid-value claims; behaviour of mediators, lawyers, the judiciary and other court staff; robust cost and time savings evidence; negative and unintended consequences".[138]

These "gaps" overlap and the list is so long that one wonders whether much has really been learned at all; but we have little or no evidence of many of the matters on the "gaps" list in relation to use of the civil courts themselves. In contrast the evidence about mediation in court is pored over with a particularly critical eye, turning a blind eye to these things in cases that progress through the traditional routes of civil justice. That is not consistent with requiring a civil justice system that faces openly towards its disputant users rather than its

[134] To the contrary it has been found to increase concessions in certain circumstances which assists in settlement, K C Beardsley & N Lo, "Third-party Conflict Management and the Willingness to Make Concessions" (2014) 58(2) 363-392 although with some interesting observations about tenacity of these concessions for longer term commitment at 381-383.
[135] *International Evidence Review* 50.
[136] *The Expert Group Report* 37 Recommendation 6 proposes excluded situations where "Mediation has already taken place, or a mediator is currently engaged; Existence of time-bar (unless provided for in legislation); Contractual clauses stipulate specific ADR method; Another preferable ADR method exists; The case involves a protective order or enforcement order; Disputes where there is a risk of domestic abuse, sexual violence or any other gender-based violence." Responses to the draft Mediation Bill showed some resistance to excluding cases on the basis of category. Both the draft bill and the expert report proposed mechanisms for a more tailored approach.
[137] *International Evidence Review*, 29-32.
[138] *ibid* 2-3 and 14-16.

traditional professional players of judges and lawyers.[139] One may ask why so many years have been allowed to pass gathering evidence of what happens around the world, other than because it is anticipated that the legal establishment will not accept the promotion of a process within civil justice unless it has been tested repeatedly and not proved wanting compared to the rituals and norms of courts.

The creation of the Scottish Government's *Making Justice Work* programme and establishment of a Scottish Civil Justice Council, both policy responses to the Gill Report, were set within a governance structure from 2013[140] and purported to provide a platform for continual review of the Scottish Courts. It is debatable whether they have been able to prove themselves as able to do so in any holistic way. An expansion in profile of bodies engaged with the delivery of civil justice lies in the Scottish Civil Justice Council, the Scottish Courts and Tribunals Service and the Scottish Judiciary. Each has an online presence,[141] aimed at making justice more accessible and understandable. They produce publications about themselves and what they do, but data about cost, time and value for money of civil justice *in its entirety* are not routinely gathered or published. They are not streamlined, and as capable of analysis[142] as they could be and compare poorly to regulatory systems outside courts. It is reassuring to see the Scottish Government in the *Family Justice Modernisation Strategy* note greater engagement between statisticians and Integrated Court Management System (CMS) data so that more can be reported in the annual report on Civil Justice Statistics.[143] However collation of data and consultation in relation to which data need to be accessible requires greater engagement with those independent researchers evaluating reforms and innovations.

As the *Expert Group Report* points out, robust evaluation of the experiences of mediation going forward will be essential. However, for it to be more meaningfully compared with

[139] In C Irvine, "What do 'lay' people know about justice? An empirical enquiry" *International Journal of Law in Context* (2020) 1-19 lay motivations are aligned with theories of justice.
[140] https://www.scotcourts.gov.uk/about-the-scottish-court-service/making-justice-work/the-effective-courts-and-tribunals-programme-(mjw-1) (last accessed December 2019)
[141] www.scotcourts.gov.uk; www.scottishciviljusticecouncil.gov.uk; www.scotland-judiciary.org.uk.
[142] Noted as a key aspect of continual review and reflection of the civil justice system, by E Thornburg, "Reaping what we sow: anti-litigation rhetoric, limited budgets, and declining support for civil courts" (2011) 30(1) *Civil Justice Quarterly* 74 -92. C Hodges, *Delivering Dispute Resolution; A Holistic Review of Models in England and Wales* (Hart, Oxford, 2019) 244.
[143] *Family Justice Modernisation Strategy* Annex C.

experiences of court processes, the accessibility and the engagement with the Integrated Court Management Systems flagged in the *Family Justice Modernisation Strategy* will have to extend across civil justice more generally. That comparison is an important factor in elucidating where justice budget is best spent. Given what has been said in the *International Evidence Review* about limitations in the coverage and transferability of evidence and knowing that mediation arising in-court may have been preceded or surrounded by other dispute resolution options, is it appropriate to compare mediation only to court experiences? This seems to underestimate the status of mediation in its own right and over-estimate the importance of it having to justify itself predominantly in comparison to litigation.

In the overall context of what is known there is a paucity of evidence that would make for total certainty of disadvantage or advantage to individuals or to concepts of justice in offering mediation[144] or even on insisting that the parties consider or attempt it. If for no other aim, insisting that parties should consider it raises awareness and the potential for engagement. In their 2017 review of sixty years of *Journal of Conflict Resolution* articles about negotiation and mediation Druckman and Wall[145] record many different approaches to research and evaluation of mediation and the myriad cotemporaneous and interchangeable techniques used by mediators. But at one point they baldly conclude that

> "[T]he simple act of mediating appears to have a straightforward effect. Blood (1960)[146] and Rehmus (1965)[147] are probably correct that a mediator's presence helps. Beardsley and Lo (2014)[148] support this conclusion, as they report mediation increased

[144] *International Evidence Review* 50-52.
[145] D Druckman and J A Wall "A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation" (2017) 61(9) *Journal of Conflict Resolution* 1898, 1915.
[146] R O Blood, "Resolving Family Conflicts" (1960) 4(2) *Journal of Conflict Resolution* 209-219, cited by D Druckman and J A Wall "A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation" (2017) 61(9) *Journal of Conflict Resolution* 1898.
[147] C M Rehmus "The Mediation of Industrial Conflict: A Note on the Literature" (1965) 9(1) *Journal of Conflict Resolution* 118-126, cited by D Druckman and J A Wall "A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation" (2017) 61(9) *Journal of Conflict Resolution* 1898, 1915.
[148] K C Beardsley & N Lo, "Third-party Conflict Management and the Willingness to Make Concessions" (2014) 58(2) 363-392. This reviews political/state conflict and legal resolution. While it notes that mediation enhances concessions and is not challenged by the failure of earlier negotiation or mediation, long term adherence to political settlement is less likely than if an adjudicated outcome is obtained since doubts continue as to commitment of the opponent to settlement, 381-383.

disputant concessions. Thus mediation (vs. no mediation) reaps positive outcomes."[149]

So to offer an avenue to mediation would appear to be advantageous overall if resolution of a dispute is the aim. Have we left it too late to offer this across Scotland?

Momentum and Reform in Scottish Civil Courts

Time wasted?

It could be argued that those ten years since Gill have been wasted when Scotland could have been offering a mediation option to those who bring their civil disputes to court.[150] In that sense momentum has been lost. It has been established that momentum and confidence for a mediation culture[151] and for change in civil justice culture more generally[152] can take a decade or more to build. A pessimist would say that it is impossible to make up for that lost opportunity in Scotland and hence use it as a reason to delay further; but an optimist would say that we can learn, so far as it is possible, from what has happened elsewhere in the intervening decade and pitch in now at an appropriately mature point.[153] Despite the echoes of Gill's summary in the 2019 publications, it is not the case that there has been absolutely no advance from the situation noted by Gill. The civil justice context itself has changed considerably.

Even before the measures for doing court business without physical presence of parties or agents brought about by Coronavirus emergency measures,[154] there had been very significant reforms in terms of moving cases to the privative and appellate jurisdiction of the sheriff court and creating expertise in local and lower value cases in the hands of the new summary sheriff.[155] The judiciary are expected to take an active role in case management,[156] although

[149] D Druckman and J A Wall "A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation" (2017) 61(9) *Journal of Conflict Resolution* 1898, 1915.
[150] In only a small number of courts is there a mediation information service available, *The Expert Group Report* paras 55-63.
[151] The *International Evidence Review* 4,30.
[152] J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Ambridge 2014), 201-228.
[153] This was done in the design of the evaluation of the in-court pilot schemes in Aberdeen and Glasgow by Ross and Bain. Although these were set up decades after schemes across the USA, the learning from the evaluations in California was used in the design of satisfaction tests.
[154] Coronavirus (Scotland) Act 2020 s5 and Sched 4.
[155] Courts Reform (Scotland) Act 2014.
[156] Gill Report chapters 5 and 9 discuss this.

only in the new Simple Procedure is this truly overt.[157] The extent to which they do so may vary by individual sheriff or sheriff court, and by whether the case is family[158] or non-family. Nonetheless, parties or their agents can point to an expectation of case management within the court rules.[159] A general re-write of all court rules to incorporate Gill Report reforms is being overseen by the Scottish Civil Justice Council but was put on hold due to lack of staff to support the work,[160] well before the impact of Coronavirus.

The fact that the Gill Report included such wide-ranging proposed reforms for the civil courts, which had a direct impact of those on players in the civil justice system, drew attention away from mediation at the time as a potential in-court option. It may have been assumed that a reconstruction of the civil justice hierarchy would naturally be the means for embedding the report's proposal for dispute resolution. However some changes triggered by the Gill Report may have reduced the perceived need for mediation embedded in courts. Those involved in personal injury cases, since 2015 focussed in an All-Scotland Personal Injury court[161] argue that the speed and consistency of approach achievable there, coupled with the impact of pre-action protocols, make embedding mediation superfluous in that particular context.[162]

The Scottish Courts and Tribunal Service, the Scottish Judiciary, the Scottish Government and the Scottish Legal Aid Board all have their parts to play in delivering civil justice post-Gill. The Scottish Civil Justice Council and Criminal Legal Assistance Act 2013[163] which set up the Scottish Civil Justice Council provides a set of guiding principles.

> "(a) the civil justice system should be fair, accessible and efficient,

[157] And viewed with reference to norms of judicial intervention as understood in Scotland, *Cabot Financial UK Ltd v McGregor, Gardner and Brown* [2018] SAC (Civ) 12 at para [72].
[158] *Family Justice Modernisation Strategy*, para 6.1-6.3.
[159] Provided for by Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956 (S.223) as amended, rule 9.12 and 33.22. Rule change for to expand scope for referral to mediation in family actions is proposed in the *Family Justice Modernisation Strategy* para 6.3.
[160] *Annual report 2018/2019 and Annual Programme 2019/2020,* 7-9, available at http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/annual-reports-and-libraries/20190808-scjc-annual-report-2018-2019-and-annual-programme-2019-2020.pdf?sfvrsn=2 (accessed 27 August 2019).
[161] https://www.scotcourts.gov.uk/the-courts/sheriff-court/personal-injury-court (last accessed 1 May 2020)
[162] Available at https://www.margaretmitchell.org.uk/mediation-consultation (accessed 11 November 2019).
[163] 2013 asp 3

(b) rules relating to practice and procedure should be as clear and easy to understand as possible,

(c) practice and procedure should, where appropriate, be similar in all civil courts, and

(d) methods of resolving disputes which do not involve the courts should, where appropriate, be promoted." [164]

The Access to Justice Committee of the Scottish Civil Justice Council did immediately press on with developing Simple Procedure with a dispute resolution focus. Furthermore that Committee and Council accepted some of the proposals put forward for dispute resolution developments by a Council Member.[165] These included better information for civil litigants about dispute resolution options in pre-action protocols generally, to sit alongside pre-action protocol expectations in personal injury and commercial actions. Those general developments have not yet been taken forward because they were to be included in the civil rules rewrite, now delayed.

The business of the Council seems to follow recognised boundaries of judiciary, legal profession, government and Scottish Legal Aid Board in terms of who can change what. The composition of the Council membership and committees includes members outside legal constituencies representing consumers and a broader group chosen by the Lord President, which has brought some cross-cutting thinking to the table. Still, the independent and consumer voice in the Council and its committees, while brought to the table by experienced and meritorious members, is so outnumbered by traditional interests of legal actors that it is a voice that can be lost in the wind. It can hardly have been the intention following the Gill Report that the new bodies proposed to make Civil Justice run more smoothly and effectively for litigants in Scotland, would continue to pass the civil justice football around between them rather than join forces to achieve the goals of a better system for those who need to resort to it, not to the norms of those who deliver it. Giving priority to developing Simple Procedure

[164] s2(3).
[165] Scottish Civil Justice Council Minutes May 2018, available at https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-meeting-papers/14-may-2018/approved-minutes---scjc-14-may-2018.pdf?sfvrsn=2 (accessed 25 September 2019).

demonstrates a clear target to aid disputants but sits devoid of resources and tools across the country to deliver it which Clark has described as "unsustainable".[166]

Simple Procedure and "alternative dispute resolution"

A Simple Procedure[167] for low value claims (cases under £5,000 in value) came into effect in November 2016 across all courts in Scotland. Proposed in the Gill report and led by the Scottish Civil Justice Council through its Access to Justice Committee, it is underpinned by express principles including that "(1) Cases are to be resolved as quickly as possible, at the least expense to parties and the courts, (2) The 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, (3) Parties are to be treated even-handedly by the court… and (5) Parties should only have to come to court when it is necessary to do so to progress or resolve their dispute." [168] The introduction of this procedure was *not* accompanied by the establishment of a Scotland-wide court-based dispute resolution service.[169]

The Simple Procedure rules adopt a closer linguistic affiliation with the idea of the civil court as a home for a dispute resolution process than before. They say

> "[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."[170]

The principles flow through expressly to obligations placed on the sheriff by the rules to "encourage" negotiation or alternative dispute resolution and the sheriff "may do anything or give any order… to encourage negotiation or dispute resolution."[171] The parties must "consider and approach with an open and constructive attitude" negotiation and alternative dispute resolution throughout the progress of a case.[172] In defended cases[173] the parties have no entitlement to a hearing, unless the court is satisfied that they have produced relevant

[166] Also noting that "the present hotchpotch system produces a fragmented, inconsistent approach across the country," B Clark "Not so simple? Court connected mediation in Scotland", 2020 39(1)CJQ 23-46, 45.
[167] Courts Reform (Scotland) Act 2014 ss72-83; Act of Sederunt (Simple Procedure) 2016 No. 2016/200.
[168] Act of Sederunt (Simple Procedure) 2016 No. 2016/200, Schedule 1 paras 1.1-1.2.
[169] *The Expert Group Report* para 59.
[170] *ibid* para 1.1(4).
[171] *ibid* para 1.4(3) and 1.8(2).
[172] *ibid* para 1.5(5) & (6).
[173] Confirmed in the conjoined appeals of *Cabot Financial UK Ltd v McGregor, Gardner and Brown* [2018] SAC (Civ) 12.

material to justify the court holding a hearing. It has been stressed by the Sheriff Appeal Court that the exercise of powers of the court in case management must be consistent with the operation of the sheriff's "inherent jurisdiction".[174] That inherent jurisdiction is traditionally to referee a contest rather than lead parties to resolution.

The Simple Procedure shows a move towards making sure that the parties are not marching inexorably or blindly towards a determination by the court which may not resolve the dispute.[175] Of course there is an express direction that if the case cannot be resolved by negotiation or dispute resolution the sheriff must decide it.[176] A parallel programme of providing simple procedure online sits well with the interpretation of keeping parties out of the physical court domain, thus limiting direct and indirect costs of attending such as fares for public transport, loss of earnings or child care costs. It was an initial ambition that in most courts, online would be the path taken by the case unless the initiating document was lodged in paper,[177] but in many courts that was not the case, and whatever the means of initiation the case became paper-based. This is being revisited following restricted access to courts because of Coronavirus. This emphasis on not having to come to court (if interpreted as meaning attend open court) potentially fell foul of the time-honoured assumption that a case will be heard in open court.[178] However, the speed at which courts adopted non-attendance in person when Coronavirus restricted movement in Scotland has been remarkable, and

[174] *ibid ,* Use by sheriffs of such orders in undefended cases was appealed successfully. Sheriff Principal Stephen noted at para [72] of the judgment "the court must operate within its powers and the mere existence of a power to make orders does not thereby extend the court's inherent jurisdiction. It does however provide the sheriff with better tools to manage proceedings effectively and in the spirit of the principles and rules in contested cases. The interventionist, proactive problem- solving role of the sheriff should be focused on those cases which are defended."

[175] The aim of the Woolf reforms in England and Wales. Simple Procedure Principle 1.2.(5) states that "Parties should only have to come to court when it is necessary to do so to progress or resolve their dispute". Whether "coming to court" means to *attend* or to *resort to* court is unclear. In either case, the use of "necessary" comes as close to the "litigation as a last resort" lever as one currently finds in court rules in Scotland.

[176] Act of Sederunt (Simple Procedure) 2016 No. 2016/200, Schedule 1 paras 1.4(4)

[177] https://www.scotcourts.gov.uk/taking-action/civil-online-gateway/civil-online-simple-procedure-faqs (accessed 27 July 2019).

[178] N Bird, "Open justice in an online post reform world: a constant and most watchful respect" (2017) 36(1) *Civil Justice Quarterly* 23-33; A Koo, "The role of the English courts in alternative dispute resolution" (2018) 38(4) *Legal Studies* 666-683 but *Cf* S Prince "Fine words butter no parsnips": can the principle of open justice survive the introduction of an online court?" (2019) 38(1) *Civil Justice Quarterly* 111-125; J Sorabji, "The online solutions court – a multi-door courthouse for the 21st century" (2017) 36(1) *Civil Justice Quarterly* 86-108.

shows that even in the highest stake cases in the civil courts, electronic communication and attendance via technology can and will work.

The early operation of Simple Procedure has been reviewed with the aim of further simplification, and, informed by surveys, an independent report and operational input, many streamlining rule amendments have been agreed in principle by the Scottish Civil Justice Council[179]("the Council"). Others of wider import (including access to alternative dispute resolution services), have not.[180] The request that rules should deal expressly with matters such as provision of services met the response that this is not a matter capable of being addressed by rules amendments, [181] begging the question why the Council refuses to engage with that matter. Although they have inherited rule-making functions of the former court rules Councils, taking such a narrow approach to who can drive change does not demonstrate them being a guardian of the principles of the 2013 Act under which they were established. Although not in a position themselves to allocate resource (the budget provider being the Scottish Government directly or through the Scottish Legal Aid Board) a steer from the Council could be pivotal. The Council could note that the rules in so far as they provide for referral to dispute resolution are meaningless if no services exist that are proportionate to the low value of the claim. This would help send the message that the actions of bodies which develop and oversee the shape of civil justice must be joined up. Hodges' plea for a holistic civil justice oversight system[182] rather than entities operating in silos is the antithesis of the atomised approach taken by the Council.

No indication is given in the Simple Procedure rules of what type of alternative dispute resolution is envisaged, or how it is to be provided. In some sheriff courts where there is a local available no-cost provision through a Citizens Advice Bureau or student clinic, referrals

[179] Scottish Civil Justice Council, Access to Justice Committee minutes February 2019 available at https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/access-to-justice-committee-files/2019-02-11/20190211---atj-approved-minutes---february-2019.pdf?sfvrsn=2 (accessed 27 August 2019)
[180] Scottish Civil Justice Council, Access to Justice Committee minutes April 2019, https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/access-to-justice-committee-files/29-april-2019-papers/20190429-atj-minutes---april-2019-for-publication.pdf?sfvrsn=2 (accessed 27 August 2019)
[181] ibid.
[182] C Hodges, *Delivering Dispute Resolution; A Holistic Review of Models in England and Wales* (Hart, Oxford, 2019) 566.

to mediation are being made.[183] In most sheriff courts no such local free mediation provision exists and the most that can be done, other than active case management by the summary sheriff, is to refer any parties who want to mediate to the Scottish Mediation Helpline where names are available of mediators who will charge a fee. This led to 25 referrals via helpline to mediation across Scotland in the first year of operation of Simple Procedure, compared to 208 via an in-court free service in the Glasgow area alone.[184] For now in most parts of Scotland the alternative dispute resolution option in simple procedure is an empty one.[185] Unless self-motivated parties see the value of engaging and know how to access processes, the court oversight towards dispute resolution is a practical nonsense.

In Simple Procedure the court has no obvious lever to encourage a party to engage in mediation if either a party or the court know that no service exists, or no service is available at an affordable cost. Of course this could be remedied by public funding resourcing a court-based service, as is done by the Scottish Legal Aid Board in its grant for the Edinburgh In-court Advice and Mediation Service. In the context of family actions where in some courts much use is made of a rule that allows the court to refer a case involving parental responsibilities and rights to mediation, there exists alongside paid mediation an option via charities affiliated to Relationships Scotland to obtain mediation at low cost or delivered pro bono under the auspices of that charity.[186] Sheriffs who are aware of the existence of a local service, and have seen it work to good effect in disputed child cases, are inclined to refer, which in turn creates a tendency for parties or their solicitors to refer in advance of the issue being taken to the court for determination.

The poor state of choice to access alternatives to a court determination for those who bring their disputes to the surface through the civil court compares sharply with public access to

[183] Strathclyde Mediation Clinic, *Mediation under Simple Procedure: One Year On (*February 2018), available at https://www.strath.ac.uk/media/faculties/hass/law/mediationclinic/Simple_Procedure_Report_Feb_2018.pdf (accessed 27 August 2019).
[184] *ibid.* Strathclyde Mediation Clinic (source, Clinic Director).
[185] Strathclyde Mediation Clinic report for the Scottish Parliament Justice Committee (April 2018) available https://www.strath.ac.uk/media/faculties/hass/law/Mediation_Clinic_Report_for_the_Justice_Committee_April_2018.pdf, and Annual report of the clinic for 2018 available at https://www.strath.ac.uk/media/faculties/hass/law/Mediation_Clinic_Annual_Report_2018.pdf (all accessed 27 August 2019).
[186] Flagged to the public by the Scottish Government at https://www.mygov.scot/alternatives-to-court/ (accessed 8 May 2020).

options in dealing with their consumer disputes. Prince has contrasted the data on use of mediation in courts in England and Wales with that for use of online dispute resolution provisions available to the general public and notes the huge difference in demand and settlement between the two. She notes that courts are the "tip of the iceberg" compared to online dispute resolution processes open to consumers and businesses in which millions of disputes are being settled on a daily basis.[187] Hodges provides extensive data on that spectrum of remedies that sit outside the civil court range, and calls for integration of avenues to access these in which the court sits in a more appropriate place in the range than is the case at present.[188] Essentially this would be limiting the court to the place to do what only a court can do, in issuing a binding judgement at the conclusion of a case or to aid in recovering evidence.[189]

That makes sense to those of us who know the range of the court's powers, but may have the effect of diminishing public understanding of the court and its place in relation to resolution of civil matters. As Koo notes, there may have been "neglect of the hierarchical relationship between court adjudication and ADR" which needs to be addressed for reform in England to move forward.[190] Much of the success of the Maryland Dispute Resolution Scheme is attributed to judicial leadership and its location within the Office of the Judiciary of Maryland.[191] It is increasingly impossible to resist the notion that there should be more dispute resolution help to disputants accessible via courts and not just outside them if courts are to have a relevance to our increasingly "self-service society."[192] This need not be in an actual place (although that has worked effectively in court premises where mediation services

[187] S Prince "Fine words butter no parsnips": can the principle of open justice survive the introduction of an online court?" (2019) 38(1) *Civil Justice Quarterly* 111-125, 116; J Coben & N Welsh, "ADR and Numbers: An Introduction" (2015, Fall) *Dispute Resolution Magazine* 3.
[188] C Hodges, *Delivering Dispute Resolution; A Holistic Review of Models in England and Wales* (Hart, Oxford, 2019).
[189] The role of technology and artificial intelligence in assisting the court to complete a judgement is explored in J Morison and A Harkens, "Re-engineering justice? Robot judges, computerised courts and (semi) automated legal decision-making" (2019) 39 *Legal Studies* 618.
[190] A Koo, "The role of the English courts in alternative dispute resolution" (2018) 38(4) *Legal Studies* 666-683, 683.
[191] https://www.courts.state.md.us/macro/history
[192] M Buenger (Exec Vice President of the United States National Center for State Courts), *Re-thinking the Delivery of Justice Services in a Self-Service Society,* speech to ABA Dispute Resolution Section Meeting April 2019.

are sited) but in a virtual environment where the stamp of the wisdom and authority of the court sits over a range of options.

Roles of representatives, mediators and the court

The Simple Procedure rules do not attach to parties' representatives the same responsibility that the parties have to "consider and approach with an open and constructive attitude"[193] negotiation and alternative dispute resolution. Representatives may or may not be legally qualified. However representatives must respect the principles and

> "must act in the best interests of the person being represented, and not allow any personal interest to influence their advice or actions."[194]

It can be expected that "personal interest" includes personal reward in fees or share of success and personal preference for particular approaches to dispute resolution. For lawyer representatives this requirement of the Simple Procedure rules co-exists with a professional practice guidance statement by the Law Society of Scotland[195] which expects lawyers in all cases to advise clients on options for resolution of disputes, their advantages and disadvantages, and to be sufficiently informed to do so. Under a Fundamental Principle contained within a Practice Rule[196] that requires effective communication with the client and others,[197] sits guidance on understanding options and advising clients about dispute resolution. Breach of the rule can be the subject of an inadequate professional services complaint or a conduct complaint and sanction. The guidance is not binding as such, but the Law Society warns

[193] Required of the parties at para 1.5(5) & (6).
[194] *ibid* para 1.6(1) & (4).
[195] Law Society of Scotland Rules and Guidance are available at www.lawscot.org.uk/members/rules-and-guidance (accessed 31 July 2019).
[196] Rule B1.9 effective 2011.
[197] Guidance note B1.9 available at https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/guidance/b1-9-dispute-resolution/ (accessed 31 July 2019). It reads "Solicitors should have a sufficient understanding of commonly available alternative dispute resolution options to allow proper consideration and communication of options to a client in considering the client's interests and objectives. A solicitor providing advice on dispute resolution procedures should be able to discuss and explain available options, including the advantages and disadvantages of each, to a client in such a way as to enable the client to make an informed decision as to the course of action and procedure he or she should pursue to best meet their needs and objectives, and to instruct the solicitor accordingly. A solicitor providing advice on dispute resolution procedures is also expected to be able to identify where alternative methods of dispute resolution may not be in the best interests of the client. For example, this may be a particular consideration for mediation or arbitration in the context of family disputes or other situations where one party may be at risk of violence or intimidation by the other."

> "non-compliance will be taken into account should it be alleged that there has been a breach of a Rule, inadequate professional service, unsatisfactory professional conduct or professional misconduct. If you have chosen to depart from the Guidance in a particular situation, you will be required to justify your decision if a claim or complaint is made."[198]

The Expert Group Report proposes that this professional guidance is strengthened to a "robust requirement."[199] However it is hard to imagine that, even with a robust requirement, failure in a single case would amount to more than a basis for a finding of inadequate professional service. But repeated failure, especially if coupled with flouting of the procedural expectation, might attract an allegation of misconduct or consideration of contempt of court. The current text of the Guidance makes clear what is expected of the legal adviser and appears quite robust as stated. In Simple Procedure it will be critical for the sheriff proactively to expect compliance with the requirements placed on the adviser.

When mediation pilots operated in Scotland, not all individual judges were as convinced as others[200] and those who now offer mediation in the courts to support simple procedure continue to report variable attitudes from the bench.[201] More consistency from the bench arose in Edinburgh where the mediation option was well established, and a stable resident bench in place.[202] Ross and Bain found that "placing mediation in court ensures that awareness of the option is increased and gives greater integrity to the choice of litigation before the court on some or all of the issues in the dispute that do not require to be the

[198] https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/about/purpose-and-status-of-guidance/ (accessed 27 October 2019)
[199] Page 47 and recommendation 17.
[200] Ross and Bain 1.12; C Irvine discusses whether courts act as attracting magnets or repelling magnets according to their assumed legal system norm in "Civil or Common Law: what are the Sources of Scottish Judicial Attitudes to mediation" http://mediationblog.kluwerarbitration.com/2011/10/13/civil-or-common-law-what-are-the-sources-of-scottish-judicial-attitudes-to-mediation/
[201] Strathclyde Mediation Clinic, *Mediation under Simple Procedure: One Year On (*February 2018), available at https://www.strath.ac.uk/media/faculties/hass/law/mediationclinic/Simple_Procedure_Report_Feb_2018.pdf (accessed 27 August 2019).
[202] Not reliant on part-time sheriffs as Glasgow was at the time of their pilot, Ross and Bain 1.10 (a matter which should be less of an issue post the Gill Report).

subject of a court order. Courts need not fear that parties are being "fobbed off" to mediation.[203]

Blake Stevenson in their later study found that the sheriffs were willing to advise parties to attempt mediation; it felt like parties at times had engaged the litigation process just so that *someone else* would exert pressure on the opponent. That did not have to be by the sheriff; it could be achieved by referral to mediation.[204] In many low value claims no lawyer input can be expected. Therefore any lay representative, unless trained about options via a Citizens Advice Bureau or other quality-regulated agency, may be lacking in information and not subject to a system of quality oversight. The need for effective information flows to inform disputant choice is critical to the success of access to dispute resolution in Simple Procedure. Having the court, rather than advisers, as the issue point of information to the parties direct would be the most consistent and reliable means of helping ensure fair access to options for the disputant in proceedings at all levels.

It is clear that providers of dispute resolution in Simple Procedure are not intended to become in any way part of the proceedings, but to sit outside them assisting the parties to resolution.[205] They are neither representatives nor third parties. Some have had working space within the court building[206] which makes the process potentially more accessible and responsive for parties and creates a confidence that the process has the sanction of the court. The Early Dispute Resolution Office proposed in *The Expert Group Report* would sit in the court office. Now that courts have experience of moving processes to operate by electronic communication, that physical presence in the court may become less vital than the branding of the court in raising the option, provided that those who do not have private access to technology can obtain it, e.g. via public buildings or Citizens Advice Bureaux.

[203] Parties valued the service and were content with its integrity and quality, Para 7.29. See also C Irvine, "What do 'lay' people know about justice? An empirical enquiry" *International Journal of Law in Context* (2020) 1-19.

[204] Blake Stevenson para 3.26. A similar response is reported in C Irvine, "What do 'lay' people know about justice? An empirical enquiry" *International Journal of Law in Context* (2020) 1-19.

[205] *ibid* para 1.3 lists those who take part – the claimant, respondent, representatives and the sheriff supported by the sheriff clerk.

[206] As in Edinburgh, *Citizens Advice Bureau Edinburgh Annual Review 2016/17* available via https://www.citizensadviceedinburgh.org.uk/annualreports (accessed 20 October 2019).

Further, it has been proposed in *the Expert Group Report* that a case once mediated is added to data collected by the court (in aid of evaluation).[207] This is potentially more institutionalisation of the mediation than will be considered desirable. Some may be concerned that this places the court in a position of veto over a negotiated outcome that does not meet its normative framework. One of the recognised strengths of mediation is that it can produce outcomes that are within the contracting power of the parties but beyond the remedies available in the court (such as agreeing how future disputes will be approached).[208] If it can be made clear that the court in receiving mediated outcomes is not there to apply substantive monitoring but to be reassured that cases are indeed settling, there can be positive advantage for the profile of mediation and its acceptance within the civil justice system.[209] The court may have a role to play in allocating judicial expenses once a case had been mediated if that has not been part of the mediated settlement. An assumption has been made in most in-court schemes in Scotland to date parties to a mediation will agree that each party will bear their own expenses without an award being made in the case. Parties do not always see that as a fair aspect of the outcome, if only the raising of court proceedings brought the other party to the table.[210]

Information about mediation

The Gill Report overview stated that

> "mediation and other forms of dispute resolution (ADR) have a valuable role to play in the civil justice system. The court should ensure that litigants and potential litigants are fully informed about the dispute resolution options available to them and should encourage parties, in appropriate case, to consider ADR. The development of an ADR telephone helpline and court linked mediation schemes should be considered."[211]

[207] *The Expert Group Report* para 148.
[208] Ross and Bain 5.21 found that this approach of dismissing cases from the court system once they had settled in mediation, used in the Aberdeen pilot court, was more positive than the approach in Glasgow. In Glasgow cases once sent to mediation fell out of the knowhow of the bench, exacerbated by the fact that the resident bench did not then deal with low value cases so were not building any knowledge of the impact of the mediation offering. Ahmed, commenting on the Mediation Bill consultation is supportive of its proposal that the outcome could be converted to a court order, M Ahmed, "Critical Reflections on the Proposal for a Mediation Act in Scotland" (2020) 83(3) MLR 614-636, 628.
[209] *ibid* 3.35.
[210] Ross and Bain para 5.2.
[211] Chapter 2 para 53.

After Gill, despite the absence of a firmer recommendation, the Scottish Government did wish to ensure that alternative forms of dispute resolution remained in focus.[212] The options have always been highlighted by government publicly,[213] but the challenge has remained as to how that information find its way to those who have a dispute to resolve. Emphasis on educating and engaging the judiciary is placed in *the Expert Group Report*[214] within proposals to work on changing culture to embed mediation. The enhanced responsibilities of the Sheriff Principal recommended by the Gill report and enacted by the Courts Reform (Scotland) Act 2014 could smooth the way for this if it is accepted that pointing to alternative dispute resolution is "business of the court."[215] Taking the opportunity to issue more information direct to the parties when they, or their representatives, present the dispute to the court could be a straightforward matter to address under the power of the Sheriff Principal, even without the backing of new rules or legislation about mediation or early dispute resolution. This would not encroach on judicial independence, nor interfere with the expectation of professional guidance that lawyers will have already advised clients about appropriate options. Assuming that parties will somehow have learned about options from elsewhere, without testing whether that is the case, is arguably a failure in the business of the court.

A purist would argue that the court has no role to play in questioning whether a case is right for litigation at the first point it comes before it.[216] This would involve more than examination of its basic legal argumentation[217] but taking a view on suitability of litigation for the dispute in hand. The self-test questionnaire model would provide the court with much needed insight into what the parties feel about the dispute, and the Early Dispute Resolution Office or

[212] Scottish Government Response to the Report and Recommendations of the Scottish Civil Courts Review (Edinburgh, 2010) available at https://www2.gov.scot/Publications/2010/11/09/09114610/0 (accessed 27 August 2019).
[213] https://www.mygov.scot/alternatives-to-court/ where they also note that they provide funding for Scottish Mediation (formerly the Scottish Mediation Network) to maintain profile and registration for mediation providers. Before Gill there was a focus on making disputants aware of options, as in Scottish Executive Justice Department *Resolving Disputes without going to Court* (Edinburgh, 2004) available at https://www2.gov.scot/Publications/2004/07/19569/39735 (accessed 27 August 2019).
[214] Para 201 and recommendation 22.
[215] s27.
[216] But note the suggestion that this is already too late M Ahmed, "Critical Reflections on the Proposal for a Mediation Act in Scotland" (2020) 83(3) MLR 614-636, 629-631.
[217] An initial scan of the competence of a Simple Procedure case is undertaken by the clerk of court as noted in *Cabot Financial UK Ltd v McGregor, Gardner and Brown* [2018] SAC (Civ) 12, but once in the hands of the sheriff *and undefended,* a case management approach was disapproved as being outside the sheriff's inherent jurisdiction.

Mandatory Information Meeting, would assist the court in dealing with this enhanced information about party motivation while issuing information about a range of options. It seems hard to argue on common sense terms with that concept, and with its potential viability as a use of scarce justice funding. However what sounds simple of itself can meet a philosophical hurdle when more active management from the bench of the parties' litigation is advocated or when engaging further in the debate about the purpose of litigation. What has been evident in the response of the civil courts to Coronavirus, and the reaction of court users to suspension of all but "urgent and necessary" business is that the civil courts do a great deal which is valued by the public particularly in protecting the legal rights and responsibilities of individuals and businesses. Embracing an additional option to assist disputants to learn about and attempt mediation without requiring final determination of the case by the court could sit happily alongside confidence in the institution of the courts, whether as physical or virtual spaces.

Conclusion

This article sought to address whether championing mediation at this time will engage those actors in civil justice whose support for it will be necessary. The ten years since the Gill report have seen very significant change in civil justice structures and most of those working within the system have had to absorb and respond to change. While there is some evidence that this has been operating to make civil justice more accessible and responsive to the needs of disputants, true change from norms of civil justice behaviours and culture have been less evident, and are defended tritely rather than by reference to evidence of what works or does not work for those who bring their disputes to court. In particular the Scottish Civil Justice Council whose oversight is essential to change, appeared to hold back from steps that could potentially persuade other influencing bodies and establishment actors to embrace change and provide services in support of Simple Procedure. When essential change was required speedily in response to Coronavirus restrictions bodies involved in civil justice have pulled together to address change and this may bode well for the development of user-focussed change more broadly.

It would be immensely disappointing if measured attempts to suggest a way forward are treated in a perfunctory fashion by actors within the justice system who do not recognise

what it proposed because of a view of the world that arises purely from experience in the legal establishment. Coronavirus has played its part in challenging that. Those experts from stakeholder groups who contributed to the thinking behind *the Expert Group Report* could champion a robust and realistic discussion of professional motivations and broker agreement or assist in crafting a set of purposeful counter-proposals that are open-minded, respectful of hierarchies, but not based on legal traditionalism. Sheriffs Principal could take a proactive approach to the business of the courts in their area and make information available about mediation process and local providers.

Improved information, education and training so that lawyers, lay advisers[218] and judiciary are directing disputants to practical options fits very closely with the Scottish government's national priorities. The introduction of an Early Dispute Resolution Office with staff trained for that very purpose but situated under the "badge" of the court could help keep focus on the court, its clientele, and the norms of both civil justice and mediation. The costs associated with this should be seen as a proportionate investment in a civil justice system that will respond early to the needs of users. Many practical ideas have been aired for funding,[219] retraining and repurposing of expertise within court staff,[220] and targeted grant funding of organisations such as Citizens Advice Bureaux or other third sector providers.

Mediation should not be seen to be in complete infancy in Scotland despite there being no securely funded in-court provision at present. It has been advocated by government in public information for decades but with limited inroads on the civil courts generally. There is evidence of a greater will to make proportionate and empowering options open to the citizens of Scotland than we have seen at any time in the past, including the activity of the government sponsored National Delivery Group prior to Coronavirus interruption. This need not be out of reach when actors in the justice system look for solutions in a mutually respectful way. They are informed by the accumulated evidence of Scottish sectors of use, and, in so far as relevant, by broad lessons from other jurisdictions. Approached confidently, this could progress to maturity with considerable speed, aided by concurrent evaluation. The way forward is not to sit back for longer seeking more and more evidence of it benefit to disputants in Scotland but

[218] Lay advisers but with some understanding of the legal boundaries of the case, are discussed in B Clark "Not so simple? Court connected mediation in Scotland", 2020 39(1)CJQ 23-46, 43-45.
[219] Including by a levy on all civil cases filed, *International Evidence Review* 22.
[220] *The Expert Group Report* para 126.

to offer it within the context of our mature and reformative civil justice system and in a further move toward resilience and proportionate justice for disputants in Scotland. Those in the Scottish Parliament, Government and Scottish Mediation (supported by those in positions of influence in civil justice practice such as members of the Expert Group) have within little more than a year drawn us into a converging tide of urgency to grasp mediation with confidence and maturity. Courts have adapted rapidly to technology-based solutions for court practice due to Coronavirus in a way that they could not have imagined in the past. It is surely timely to build on that momentum rather than let momentum be lost once again as it was after the Gill Report.