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Solicitors Attitudes to Mediation - A Canterbury Study

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The area of dispute resolution and particularly ADR provides a research rich landscape. It is therefore somewhat surprising that little empirical research has actually been undertaken in this area in the UK. Such university-based research not only encourages outreach into the legal services community and assists knowledge exchange activities, but also informs and enriches the undergraduate Law curriculum and on a macro level, can achieve impact and recognition through influencing policy-making. A recent small-scale study undertaken by the Canterbury Christ Church Mediation Clinic which is part of the School of Law¹ (*The Christ Church Study*) into solicitors' attitudes to mediation has been undertaken and the findings are compared to those of an earlier study undertaken by Dame Professor Hazel Genn.

Professor Genn's mediation-related research report published in 2007 at UCL, now somewhat dated, studied two voluntary court-annexed mediation schemes introduced and operated by Central London County Court; a voluntary mediation scheme (VOL) which had been operating in the court since 1996 and had been previously evaluated in 1998, and an experiment in quasi-compulsory mediation (ARM) which ran in the court between April 2004 and March 2005. Genn's initial findings published in 1998 found that mediation was at that time being very much under-used. She attributed this to the ignorance of legal professionals, along with the unwillingness of the parties involved to compromise. Her full review published in May 2007, looked at the number and type of cases mediated since the earlier evaluation in 1998, the outcome of the cases, and what had happened to the settlement rate at mediation during that time. The study also explored the views of parties and their lawyers about the mediation process. The research was based on a statistical survey of cases from 1999 to 2004, and on questionnaires sent to parties taking part in the scheme during 2003.²

The Genn research revealed amongst other things that there had been an increase in the use of the scheme which was particularly steep after the *Dunnet v Railtrack* case in 2002,³ when a combination of increasing judicial direction and cost penalties made refusing ADR a risky strategy. The findings of Genn's study suggested that the motivation and willingness of parties to negotiate and compromise is critical to the success of mediation;

'Facilitation and encouragement together with selective and appropriate pressure are likely to be more effective and possibly more efficient than blanket coercion to mediate'.⁴

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² See Dame Hazel Genn et. al. "*Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure*", available at http://www.ucl.ac.uk/laws/judicial-institute/files/Twisting_arms_mediation_report_Genn_et_al_1.pdf

³ [2002] EWCA Civ 302.

⁴ Note 1. p.iv.

The research undertaken by the Mediation Clinic during 2014 was made possible through the successful application for an internal research and enterprise development grant. The project gave the opportunity for a final year undergraduate Law student, Abigail Howland led by the Mediation Clinic research team including the author of this article, to engage in empirical qualitative research using participants from the local legal services community in Canterbury, Kent. Participants included Family, Civil/Commercial and Employment Law practitioners.

The majority of respondents in the small-scale study were family practitioners. The good response rate from lawyers practicing in this area of legal work might be due to an increased awareness of mediation, (an impediment to the use of mediation found in the Genn research). This may perhaps be a direct consequence of recent family practice direction changes and the introduction of the *Mediation Information & Assessment Meeting* (MIAM) for divorcing/separating couples who require a court order to deal with the financial/children's aspects of the relationship breakdown. The family practitioner centred research revealed that the government was perhaps wrong to introduce what some may consider amounts to a "compulsory" mediation awareness element to the legal advice process. Individual views held by family legal practitioners were slightly more negative about mediation and interestingly an emerging theme was the suggestion that the promotion of 'round-table' meetings would be favoured over the introduction of compulsory mediation for all family cases is an emerging theme.

Genn's study also considered the controversial subject of compulsory mediation but only in the context of civil litigation. Her research revealed that mediations which failed to provide a settlement agreement between the parties take longer and cost more. The findings here suggested that introducing compulsory mediation might not prevent a final hearing taking place, but made it more difficult. It is also worth noting that the research demonstrated that over two thirds of unsuccessful mediations reach a settlement at a later stage.⁵

In contrast to the negative findings revealed with regard to the compulsory element in family mediation, the Christ Church Study revealed that civil & commercial legal practitioners stated considered that it would be more beneficial to have a compulsory element for the use of mediation in civil and commercial disputes as demonstrated in other common law jurisdictions (notably Canada and in some parts of the USA). The research revealed there to be an increased use of mediation for civil and commercial disputes. Some respondents suggested that a more compulsory element was needed in order to correct the notion that solicitors often state that they had tried or at least attempted to use mediation in order to show a pro-mediation bias, when in fact no such steps had been taken in that regard. It was suggested that the requirement could be embedded within the *Civil Procedure Rules* to remove any misunderstanding over perceptions of civil & commercial lawyers' attitudes towards mediation.

⁵ Note 1, pp. 72-74.

Some of the litigation lawyers interviewed suggested that if the number of solicitors who claimed to be 'pro-mediation', did in fact use mediation, the process would be used much more widely. This attitude may be a consequence of the adversarial focused nature of lawyers' training and because practitioners remain unconvinced about the value of mediation. Issues were also raised by some respondents about the lack of mediation guidelines, standards of assessment or codes of practice for mediators, which allow for diverse mediation practices and varying standards. Some of Professor Genn's findings were therefore reinforced by the Christ Church research, particularly the fact that in civil and commercial legal disputes, practitioners sometimes appear ignorant about the use of mediation and are more 'hard-wired' to the idea of litigation. Some respondents practising in this area of legal work actually felt that they just did not have the right attitude for mediation.

One key theme therefore emerging from the interviews with the civil and commercial practitioners, was the fact that many of them thought that lawyers still tended to view litigation as the more traditional and effective way of responding to their clients' needs and in recommending litigation they would be acting in their clients' best interests.

Unlike Genn's 2007 findings however, there was a general acceptance from the current project that there has been an increase in the uptake of civil/commercial mediation work and this increase may well be due to developments in the law which promote/encourage the use of mediation. Support for this has been demonstrated by the *Civil Procedure Rules* implemented by the *Civil Procedure Act 1997*, which among other things, place greater emphasis on using ADR and also present the threat of costs orders should an offer of mediation be unreasonably refused, as consistently demonstrated by judicial decision-making over the past decade, notably *Dunnett -v- Railtrack*.⁶

The Christ Church Study revealed that mediation was also considered to possess disadvantages (over some other dispute resolution processes) since there could be a danger of the process failing to produce an outcome. Common themes emerged to the effect that mediator quality and qualifications has a significant impact on mediation and mediator choice. Many family practitioner respondents favoured lawyer mediators. There were differing views about the timing of legal advice and what impact this may have on mediation. Findings from the study suggest that pre-mediation legal advice can make parties positional and discourage early mediation intervention. Perceptions generally suggested that a client not taking legal advice on the merits of their case before mediation may give rise to the potential for an unfair agreement. Respondents' general attitudes towards mediation suggest therefore that mediation does possess some major advantages (over litigation) including increased party control over an outcome crafted by the parties themselves, along with increased communication between the parties during the mediation process.

The fewest responses were provided by employment law practitioners. Recent law changes and the introduction of the ACAS Code, where the focus with employment

⁶ Note 2.

disputes is much more on conciliation rather than mediation, may well explain this. The updated Tribunal Rules introduced recently as a result of secondary legislation set out a new duty for the Employment Tribunal to encourage the use of ADR, including ACAS conciliation.⁷ The ambivalence of employment law practitioners towards mediation may be due to the fact that a referral to mediation is not required within their area of legal practice or even perhaps within the range of dispute resolution processes foremost considered. With the employment lawyers it was mainly the view that mediation is not used due to the existence of the ACAS conciliation scheme.

The Christ Church Study concluded that the findings from local practitioners appears to reinforce aspects of the earlier larger scale research undertaken by Professor Dame Hazel Genn during the last decade, and which indicates that the attitudes of legal service providers towards mediation are still mixed. Whilst many legal practitioners favoured and supported its use, there is still a certain amount of ambivalence towards the process.

A longitudinal study into the use of mediation regionally is planned by engaging with the legal services sector more widely in Kent. This extended study will provide a broader sample and data set which in turn will produce more accurate findings in terms of lawyers' attitudes to mediation for the Kent region and as such it is planned that the findings of the study will enhance the unique applied empirical research already undertaken in this field.

The research undertaken has nevertheless provided an opportunity for academic staff at CCCU to engage in research informed teaching and the findings of the *Christ Church Study* will undoubtedly provide useful evidence-based research which will contribute to the dispute resolution curriculum, a pathway which is central to the LLB within the School of Law at Canterbury Christ Church University. Special acknowledgement is due to Yvonne Rosamund, the Christ Church Mediation Clinic Manager, who ably facilitated the co-ordination of the project. We are also indebted to all the Canterbury solicitors who participated in the study.

⁷ *The Employment Tribunals (Constitution and Rules of Procedure) Regulations, 2013.*