# DOES MEDIATION DELIVER JUSTICE? THE PERSPECTIVE OF UNREPRESENTED PARTIES

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# Abstract

This study examines the justice thinking of unrepresented people who have taken part in mediation. The context is two mediation services, serving Scotland's two largest courts, from which the twenty four participants were referred to mediation by a judge (known as a sheriff) in the course of a small claim. The study addresses a notable gap in the literature on mediation: the modest attention paid to parties' perspectives on substantive justice (see Chapter 1.C and 3.C. below). Its aim was to provide a richer understanding of the thinking of mediation participants charged by the justice system with devising an outcome to their disputes, in particular their evaluations of the fairness and justice of that outcome.

It finds that those without legal training can nonetheless apply justice principles in resolving their disputes; this can be described as "justice outside the law." They were able to account for their decisions in terms recognisable to those operating the justice system: the encounter (replicating the day in court), the chance to tell their story, compensation, punishment of bad behaviour, closure and payment. However, their lack of formal legal knowledge can lead to injustice and the study highlights the key role of activist mediators in providing legal information when required.

Despite having forged the terms of their settlements, most participants were ambivalent when asked "Did you get justice?" The study notes several reasons. First, they are decision makers who are also decision recipients, meaning the other party, their legal opponent, has a say in the outcome. Secondly, they want to do, and be seen to do, justice. Thirdly, they also want to receive justice (and not injustice), yet often have to compromise and settle for "good enough" (see Chapters 5 and 6, below). And finally they have little interest in applying, still less in creating, legal norms. I conclude that mediation can deliver justice but not law.

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# Chapter 1 Introduction

## A. The inspiration

In 2008 I attended one of that year's Hamlyn Lectures, delivered in Edinburgh by Professor Dame Hazel Genn (2010). I was aware of Professor Genn's work as co-author of Paths to Justice Scotland (Genn and Paterson, 2001), a ground-breaking socio-legal study of how ordinary people deal with disputes, and author of several studies influencing government policy on mediation in England and Wales. The event took place in the Signet Library, a rather grand setting close to the Supreme Courts of Scotland, and was attended by the great and the good of the Scottish legal system. At that time the country's second most senior judge, Lord Gill, was leading a review of the civil justice system, and its remit named four areas for particular attention, including "the role of mediation and other methods of dispute resolution in relation to court process" (Scottish Civil Courts Review, 2009b, p.1). Lord Gill and the review board were in attendance. I therefore anticipated Professor Genn's topic, Civil Justice and ADR, with interest.

It swiftly became clear that on this occasion there was to be no conceptual confusion between forms of alternative dispute resolution (see Chapter 2.B. below); she was there to talk about mediation. However, rather than a balanced academic review of evidence or an effort to set out when and under what circumstances mediation might most usefully be employed, we heard what I called at the time a "verbal assault" (Irvine, 2009, p. 351). Like many of my mediator colleagues I had always assumed, perhaps naively, that our work was a helpful supplement to the legal system. Instead I learned that we were harming it, diverting cases away from a forum that dispenses justice into one that asks parties to "relinquish ideas of legal rights during mediation and focus, instead, on problem-solving" (Genn, 2010, p. 116). I heard that mediators exaggerated the harms of litigation to promote their profitable alternative, aided and abetted by senior judges. But what struck me

most forcefully at the time was the accusation that "mediators have no interest in justice and fairness" (Irvine, 2009, p. 351). This was later written up in the more ringing form of a rhetorical question: "Are mediators concerned about substantive justice? Absolutely not" (Genn, 2010, p. 116/117). One phrase from her peroration has become famous, or notorious, partly on account of its wordplay: "The outcome of mediation is not about *just* settlement, it is *just about settlement* [italics in original]" (*ibid*, p. 117).

As I listened, noting the evident satisfaction of senior judges present, my mind turned to my mediation clients. At that time most were separated parents locked into protracted and painful disputes over children and resources. What came to mind were numerous occasions when someone sat in my office in obvious distress at the injustice of their situation. In doing this work I quickly learned that fairness and justice were exactly what these people wanted, and mediation was only successful when both found it sufficiently fair and just to say "Yes" to the outcome. I had to be interested in justice because my clients were. I wondered what they would make of these accusations.

To be fair to Professor Genn, some of her observations about mediation were based on empirical study, which I later read (for example, Genn *et al.*, 2007). It does not paint a flattering picture, and further reading exposed me to the substantial quantity of earlier US writing in a similar vein (see Chapter 2.B. below). Yet each time I encounter these critiques I am struck by the absence of participants' voices. Most come from the legal academy, supplemented by social scientists with an interest in law, and when they do draw on empirical evidence much of it seems to come from lawyers and mediators. Even when the research targets mediation's end-users, they are rarely asked whether the outcome was just, or even fair (see Chapter 3.C. below).

**B. Some notes on terminology**

As I explain in the methodology chapter (Chapter 4.A.1. below), I have chosen to write in the first person. This reflects my personal involvement in mediation, as practitioner, teacher and academic. When reporting on the findings I want to be clear that the interpretations arise from my own perspective, that of an insider researcher who continues to combine these other roles. This also enables me to describe the inspiration for the study in a more natural way, as it involved an event at which I was present.

It is also important to say something about the two English words “fairness” and “justice,” given their repeated use throughout this thesis. They are often used interchangeably, as Professor Genn appeared to do above. Yet in the English language the terms “justice” and “fairness” have developed distinct meanings owing to their different etymological roots (Wilson and Wilson, 2006). “Fair” is a Germanic word with origins in visual properties like “clarity” and “unbiased alignment” (*ibid*, p. 805), rendering it “intangible and intuitive” (*ibid*, p. 806). “Just” and its noun, “justice,” come from the Romance languages, imposed on Britain following the Norman Conquest and still associated with political and legal power. The word justice mixes “subjective judgments (such as righteousness) with objective, legal facts and truths” (*ibid*, p. 805). So fairness is something on which anyone can have a view, while justice speaks of legal rules, courts and the law. Goldman and Cropanzano express a similar distinction in terms of the different work the two words are doing: “Justice describes normative standards and how these are implemented; fairness describes reactions to those standards” (2015, p. 315).

Where possible I have endeavoured to distinguish the two words, particularly in the results chapters (5 and 6, below). However, others do not and often employ both, side by side or interchangeably; this is particularly prevalent in social psychological

studies of justice (Lind, 2019). I have adopted this usage on occasion, especially where it seems the best way to convey the sense of what participants were describing, or in summarising academic writing. Often it is because I am summarising interviews that touch on both. Despite their different origins there is undoubtedly an overlap between the two words in contemporary English. I return to this question in Chapter 7.A (below).

## C. The study

The current study was conceived in the aftermath of Genn's lecture (A. above). Its principal motivation was to investigate empirically the place of fairness and justice in mediation parties' reasoning, with a particular emphasis on substantive justice: the outcome. In this sense it has a corrective impulse, given that mediation research involving those outside the "juridical field" (Bourdieu, 1987, p. 814) has tended to focus on other factors like satisfaction and procedural justice (see Chapter 3.B.3. and Chapter 3.C.2. below). This implies that only those trained in law have the capacity to offer a useful perspective on substantive justice. Bourdieu's term "juridical field" is used in this thesis because it well conveys the sense that those who study, practise and interpret law and legal institutions often speak to and about each other within "an entire social universe… which is in practice relatively independent of external determinations and pressures" (*ibid,* p.816). Bourdieu claims this helps maintain their monopoly over the right to define justice, leading to "the disqualification of the non-specialists' sense of fairness" (*ibid,* p. 828; and see Chapter 4, below).

As the literature review sets out (Chapters 2 and 3, below) Professor Genn is not the only scholar critical of mediation's impact under the heading of justice. This body of work employs a baffling array of terms. Examples include: "little injustices" (Nader, 1979, p. 1019); "informal justice" (Abel, 1982b, p. 267); "popular justice" (Merry, 1995, p. 31); "social justice" (Harrington, 1982, p. 36); "access to justice"

(Cappelletti, 1993, p. 282), "the administration of justice" (Burger, 1976, p. 89); "second class justice" (Edwards, 1986, p. 679; Maute, 1990, p. 369); "hit-or-miss justice" (Nolan-Haley, 1996, p. 51) "civil justice" (Genn, 2010, p. 1); "criminal justice agencies" (Auerbach, 1983, p. 135); "substantive justice" (Genn, 2010, p. 117); "distributive justice" (Stulberg, 2005, p. 3); and "procedural justice" (Rawls, 1971, p. 75; Thibaut *et al.*, 1974, p. 1271). This reflects both the profound significance of the idea throughout human history,[1] and its rhetorical versatility for those critical of alternatives to the traditional, adversarial legal system in common law jurisdictions (see Chapter 2.B. below). It is beyond the scope of this thesis to offer a comprehensive overview of justice, on both methodological grounds and because of its focus on a particular aspect of the phenomenon: substantive justice. In the section that follows I briefly set out the approach to both methodology and justice.

C.1. Methodology

This study sought to investigate a specific and neglected perspective on mediation within the legal system: when non-lawyers agree to settle or resolve their disputes with the assistance of a mediator, what criteria do they apply? Given the concerns of Genn and others listed above, it was important to establish the place of fairness and justice among those criteria. However, as set out below (Chapter 4.B), the inductive, theory-building epistemology of qualitative research requires the researcher to remain open to novel insights. That approach builds on an ontological position known as *critical realism*: this holds that there is an external reality, but that reality can only be known through human perception (Deakin, 2014; Ritchie *et al.,* 2014, p. 5). I therefore asked participants what *they* thought about justice and fairness, while endeavouring to hold my own assumptions on the question as loosely as possible.

[1] A Google search for "justice" in March 2024 produced more than 2.5 billion results.

An alternative, deductive, epistemology would build on law's normative ontology in providing standards and rules for everyday life (see Chapter 4.B.1. below). Such research would start with what the law requires and seek to establish how closely participants' reasoning corresponds. That approach is exemplified by studies examining dispute resolution processes for their "accuracy" (for example, Solum, 2004, pp. 242-252) or their capacity to apply the law (Grillo, 1991; Bryan 1992; Nolan-Haley, 1996; and see Chapter 2.B.3.b). In taking the law as a starting point, these studies tend to echo Genn's concern when she finds mediation wanting for its failure to deliver substantive justice.

The current study, in the inductive tradition, sought rather to elicit participants' perspectives on substantive justice – the outcome to their disputes – supplementing and extending the much larger body of research into their views on procedural justice – the process by which that outcome is delivered (see Chapter 3.C.2. below). Its original contribution is to analyse and interpret this data and construct theory to expand our understanding of how mediation outcomes are arrived at when the influence of law and lawyers is minimal. It is my contention that participants' approach to justice should be laid out in its own terms, rather than considering its "accuracy," its conformity to legal norms, or applying other criteria derived from law's view of justice.

A secondary motivation for the study was to supplement the limited amount of mediation research in my home jurisdiction, Scotland (Ross and Bain, 2010; Blake Stevenson, 2016; and see Chapter 3.C.2. below). Mediation is relatively underdeveloped in Scotland and, outside family cases, receives little state or judicial support (Irvine, 2010; Ahmed, 2020; Ross, 2021). There are no pre-action protocols and court rules do not require alternative dispute resolution to be considered, except in claims of £5,000 or below (Scottish Statutory Instruments, 2016a). In some respects this made it an ideal location to investigate the thinking of non-

lawyers when mediation has been suggested by the court; the relative absence of judicial input and preparatory material seems likely to reduce the influence of legal justice (see C.2. below) in their decision making. On the other hand it makes Scotland something of an outlier in comparison to jurisdictions where mediation is more thoroughly embedded in the civil justice system (Shestowsky and Brett, 2008; Sourdin, 2012; Charkoudian, 2014).

It was also important to find a setting where parties are largely unrepresented. This is not to diminish the value of legal representation in mediation, but rather to acknowledge that when lawyers are involved their perspective is likely to influence parties' thinking (Shestowsky, 2018). All participants apart from two legal practitioners were unrepresented during the mediation sessions.

It was thus convenient and achievable to locate the study within two small claims mediation projects in Central Scotland. I am the director of one, though I rarely mediate and did not interview anyone with whom I had, and this simplified the challenge of obtaining access to participants. The other is located close to Queen Margaret University, Edinburgh, and its coordinator was willing to facilitate access. The research topic, fairness and justice in mediation, involves complex concepts that are difficult to define narrowly and so I chose to conduct in-depth qualitative interviews rather than survey research. These allow for a rich exploration of participants' thinking and offer the possibility of investigating new insights as they arise (see Chapter 4.C.2.a. below).

Participants were parties to small claims in two Scottish courts. The first six had been referred to mediation under the former Small Claim Rules (Scottish Statutory Instruments, 2002, No. 133) with a maximum value of £3,000. The remaining 18 were parties to actions raised under the new Simple Procedure Rules (Scottish Statutory Instruments, 2016, No. 200) with a ceiling of £5,000. 13 were female and 11 were male and their disputes mostly concerned goods and services, unpaid bills

and housing matters. 16 settled and 8 did not. For more on the research locations and sampling strategy see Chapter 4.C.1 & 2 and Chapter 4.E.5 (below) and for a demographic breakdown of all participants see Appendix 1. I provide additional information on sums claimed and received in Chapter 6 (below).

## C.2. Justice

As noted at C. above the word carries enormous resonance and has been a topic of human interest for as long as records exist (Pirie, 2021; and see Chapter 2, Introduction, below). Given the law's stamp on both the context for and critiques of mediation, I now briefly summarise the legal approach to justice. And yet my interviewees, and most consumers of mediation under the schemes described below, are not members of the "juridical field" (Bourdieu, 1987, p. 814). I therefore also consider non-legal approaches to justice in the section that follows.

### C.2.a. Justice and the law

The association between justice and law is ancient (Aristotle, no date; Irvine, 2020; Pirie, 2021) and enduring, as exemplified by use of the term "justice system" as a synonym for legal system (Sourdin, 2015b, p. 95; Leveson, 2015, p.3). Ojelabi defines legal justice as "justice obtained through the application of legal principles within the justice system" (2012, p. 320). Space does not permit a more thorough treatment of the history of justice, but its contemporary relevance is illustrated by Richard Susskind, a prominent scholar of law and technology. He proposes that "justice according to the law" (Susskind, 2020, p.13) contains seven different conceptions of justice. These are:

- Substantive justice (fair decisions)
- Procedural justice (fair process)
- Open justice (transparency)
- Distributive justice (accessibility)
- Proportionate justice (appropriate balance)

- Enforceable justice (backing by the state)
- Sustainable justice (sufficient resources) *[bullet points in original]* (*ibid,* p. 14).

This thesis focuses on the first of these, substantive justice, for reasons outlined at A (above) and set out in more detail below (Chapters 2 and 3; Chapter 6.D.1). The most significant reason is to counterbalance the greater attention paid to other conceptions of justice in mediation research involving non-lawyers (see Chapter 3.C.2, below), in particular procedural justice (see Chapter 3.B.3; Chapter 4.E.4.b; Chapter 6, Introduction, below).

Some scholars employ the term distributive justice interchangeably with substantive justice (for example Stulberg, 2005; Colquitt, 2012; Deutsch, 2014b) and where this is the case I have adopted that usage. The relationship between mediation and legal justice is discussed at a number of points throughout the thesis, most notably Chapter 2, Introduction (mediation in ancient justice systems); Chapter 2.B (mediation's critics); Chapter 3.A (responses from mediation scholars); Chapter 5.A.4 (participants' philosophy of justice); Chapter 5.B (legal norms in mediation); and Chapter 6.A.1 (fairness, justice and outcomes). Chapter 7, Discussion, contains a more detailed consideration of the relationship between legal justice and mediation (Chapter 7.A. below).

It is also conceivable that different conceptions of justice could interact with each other. The relationship between substantive justice (fair decisions) and procedural justice (fair process) is discussed at Chapter 6.A.1 (below).

### C.2.b. Non-legal justice

Given its near-universal importance in human society justice has been the object of study by numerous disciplines. Most relevant for the present thesis is the contribution of social psychology:

> One of the central themes of this research is that individuals do not merely react to events by asking "Was that good?" or "Was that satisfying?" Instead, they also ask "Was that fair?" (Colquitt, 2012, p. 526).

Colquitt traces the development of this research in four phases. First came studies of "distributive justice" (*ibid,* p. 526) with a focus on the outcomes of decisions. The common sense assumption underlying this approach is that the better the outcome the more individuals will regard it as fair, although what can be regarded as "better" will vary according to situation. Deutsch (1975) proposed that optimal outcomes will be judged according to equity, equality or need depending on the setting.

A second wave of research took its inspiration from Rawls' (1971) "A Theory of Justice" and its use of the term "pure procedural justice" (*ibid,* p. 75; and see Chapter 3.B.3. below). Its focus was the process by which decisions are arrived at, and a very large body of research in the ensuing five decades has reinforced its significance. Tyler, for example, suggests procedural justice provides a "cushion of support" (2006, p.30) for authorities, contributing to their legitimacy. A key finding from procedural justice research has been that the experience of a fair process is more reliable that a fair outcome in predicting the acceptance of decisions (MacCoun, 2005).

Colquitt outlines a third development in social psychological research into justice, this time from organisational context: "interactional justice" (2012, p. 527, citing Bies and Moag, 1986). In this view the interpersonal interaction surrounding a process is independent of the procedure itself, and those affected are sensitive to its fairness as demonstrated by qualities such as respectful communication and truthful information. This was logically subdivided into two further categories (the fourth development): "interpersonal justice" – "the respect and propriety rules" –

and "informational justice" – "the justification and truthfulness rules" (*ibid,* p. 527, citing Greenberg, 1993).

A number of studies have investigated mediation's potential to deliver procedural justice: parties' perceptions of the process by which an outcome is arrived at, in particular their treatment by authoritative decision makers (summarised at Chapter 3.B.3. below). While it can be argued that mediators are not decision makers, they too are generally viewed as authority figures; it would be surprising if participants were not sensitive to mediators' behaviour towards them. Yet the impact of that behaviour is likely to be reduced when the parties themselves are the decision makers. This is supported by findings from this study's pilot phase (Chapter 4.E.4.b. below; Irvine, 2020, p. 154) and discussed in greater detail in Chapter 7.C.1.

To return to the inspiration for this study, Genn's target was not procedural justice (Chapter 7.A.2. below). In her view procedural justice has limited application outside the courtroom (Genn, 2010, p. 69; and see Chapter 3.B.3. below). Substantive justice, on the other hand, raises wider concerns for the justice system. Rather than parties' subjective perceptions of their treatment, substantive justice refers to "the fairness of the mediated outcome" (Waldman and Ojelabi, 2016, p. 393). It is the central focus of this study. While fair treatment may well affect parties' thinking, if mediation cannot be trusted to produce outcomes that are fair and just, its other claimed benefits count for little. Reduced cost, shorter timescales and consensual decision making hardly compensate for unfair or unjust results. Nonetheless where participants' remarks shed novel light on process fairness that is reported (Chapter 4.E.4.b. below), and the study's wider implications for understanding decision making in mediation is discussed at Chapter 7.C.1. (below).

A number of scholars place some responsibility for substantive justice on the mediator (Waldman, 1997; Nolan-Haley, 1999; Frey 2000; Waldman and Ojelabi, 2017; Di Girolamo 2017), yet few have considered the parties' own capacity to

arrive at substantively fair results. This study addresses a gap in our understanding of the mediation process: people's thinking in both arriving at and evaluating the outcome to their disputes.

## D. Thesis outline

The thesis is set out over another seven chapters. Chapters 2 and 3 review the extensive literature on mediation, adopting both a chronological and thematic approach. Chapter 2 traces the history of mediation, in particular its relatively recent rediscovery by the US justice system and subsequent widespread adoption. This chapter also reviews the first wave of critical responses to these developments in four sub-themes: neutralising conflict, expanding the reach of the state, removing protection from the disadvantaged and loss of law. Chapter 3 examines responses to these critiques from within the mediation field under three headings: first, efforts to improve the process, reviewing influential models of practice; second, developments in mediation theory, including self-determination, neutrality and procedural justice; and third, empirical research, noting the lack of qualitative data on mediation parties and substantive justice.

The methodology is set out in Chapter 4. The philosophy underpinning qualitative research is generally interpretivist and this led me to critical realist ontology from which flows a constructivist epistemology. This chapter also describes the sampling frame, study procedure and the thematic approach to analysis. Finally it reports in detail on the pilot phase and subsequent adjustments to my approach. Some of the material written for the pilot phase was subsequently written up into an academic article (Irvine, 2020) and that has been incorporated at the end of the thesis.

Chapters 5 and 6 report on the results of the analysis, while the majority of implications are discussed in Chapter 7. However, the richness of participants' responses has led to an unorthodox approach to reporting results and their

implications in the interests of narrative flow and readability. A number of themes are developed in the course of both results chapters; where the implications flow directly from a theme these are included immediately after, rather than being held back for the Discussion. This places them in context and enables the Discussion to focus on the most significant themes and implications.

Chapter 5 deals with participants' references to fairness and justice during general discussions about their mediation experience and reasons for settling (or not). The chapter is divided into non-legal and legal thinking. The non-legal criteria influencing participants' decisions were proportionality, compromise, balance of risk, philosophy of justice and two non-economic goals, "point of principle" and "shouldn't happen to anyone else" (see Chapter 5.A.5. below). The second part describes participants' sources of information about legal norms, including: their own understanding; mediator input on the law; the court; and legal advice. The second, mediator input, is of particular importance in small claims mediation with unrepresented people and highlights the risks when mediators make no comment on the law, a theme further developed in the discussion (Chapter 7).

Chapter 6 provides a detailed picture of participant responses to a single question: "Did you get justice?" I cannot locate any previous instances where unrepresented mediation parties have been asked this question, and this chapter forms the centrepiece of the research. The responses fell into three broad groups: those who were positive, those who were ambivalent and those who were negative. The positive group spoke about the encounter, the money, getting paid, the good enough result and "more than justice" (see Chapter 6.B.5. below). The ambivalent group, as the title suggest, touched on a spread of both positive and negative considerations. The good enough result re-appeared here, along with combatting injustice as general themes. On the more positive side were the themes of: the settlement amount; "my choice;" and closure. More negative themes were:

mediation's privacy; and the tension between principals and agents (Mnookin, Peppet and Tulemello, p. 69).

The negative group mostly comprised those who had not reached a settlement in mediation. Their responses fell into two overall themes. Under substantive justice they included low offers and lack of substantive legal content, while under subjective justice they included the bad opponent and low expectations.

Chapter 7 discusses the further implications of these results under three headings: justice and law in mediation; mediation and injustice; and decision-making in mediation – a neglected dimension. The first reinforces the finding that, although participants wanted both to do and to receive justice, a relatively small number believed they had. A larger group characterised the outcomes in more pragmatic, ambivalent terms: "good enough" justice. Despite the evident importance of getting a result I conclude that mediators must be open to cases not settling.

The second section discusses the importance, at least in court-referred mediations, of mediator input on the law as a backstop against injustice. In its absence the risk of injustice is increased, and this section discusses the implications for mediator practice. And the third heading, decision-making in mediation, sets out a novel insight into the challenging task facing mediation participants. By understanding them as simultaneously decision makers and decision recipients the thesis offers an explanation to the puzzle noticed by earlier researchers: ""why do one-third of the litigants agree to settlements that they later claim to be *unfair*? [italics in original]" (McEwen and Maiman, 1981, p. 259). This section ends with a proposed model for understanding the relationship between compromise and justice in mediation (see Chapter 7.C.3.a., Diagram 6, below).

Chapter 8 summarises the research journey and outlines the study's contribution to our understanding of mediation and those who use it.

# Chapter 2 Literature Review (i): Mediation and Justice

## Introduction

Mediation is an ancient practice. Roebuck's brief history suggests it may be "the most natural and pervasive means that humans have devised for managing disputes" (2007, p. 105), offering examples from Ancient Greece, Medieval England and Early Modern Europe. Pirie goes further back in her effort to depict four thousand years of the rule of law (Pirie, 2021). The earliest known written code, from Mesopotamian ruler, Ur-Namma, dates from around 2100BCE. While its rules provided guidance for the resolution of everyday disputes their application seems to have involved mediation: "In all likelihood, the judges of Ur were mediators and conciliators who would cajole or pressure people to reach agreement along well-established lines following known customs" (*ibid,* p. 21). Pirie's early chapters on Ancient Mesopotamia, India and China are peppered with references to mediators and mediation. Sanchez's (1996) study of dispute processing in Anglo-Saxon England notes the widespread integration of a mediation step and Roebuck provides several examples from the Middle Ages.

The focus of this study is mediation's relationship to justice. It is located in Scotland, a relatively small jurisdiction within the United Kingdom (see Chapter 4, Methodology), heavily influenced by policy and jurisprudence from England & Wales. Mediation practice in this part of the UK has looked to North American writers alongside some from England, Australia and New Zealand. I will not, therefore, attempt to provide a comprehensive history of the practice in all times and places. Rather, I review a number of strands of English-speaking scholarship that contribute to a confused and contradictory view of mediation within the legal academy. It has been cast as saying one thing and doing another (Abel, 1982a); promoting

empowerment while disempowering (Grillo, 1991); offering greater access to justice while delivering therapeutic encounters (Engle-Merry, 1990); and peddling a more humane form of dispute resolution that turns out to favour the powerful and inhumane (Nader, 1993).

Given the explosion of late twentieth century scholarship the bulk of the literature reviewed in chapters 2 and 3 dates from the 1970s onward. However, Roebuck voices concern that an ahistorical understanding of mediation, assuming it "sprang to life in the mid-twentieth century United States" (2007, p. 105), could fuel the assumption that it was invented by and for contemporary justice systems. "Rediscovered" or "rehabilitated" would be a more apt term. I start with a neglected puzzle: why did mediation need to be rediscovered, and when did it stop being an integral part of the justice system? To put it in terms more recognisable to contemporary readers: when did "alternative dispute resolution" (Sander, 1976, p. 113) become alternative? This chapter focuses on two early and influential periods: the first section considers the antecedents and aftermath of the 1976 American "Pound Conference." The second examines the reaction: "the largely unchallenged critiques of 'informal justice' appearing at the beginning of the 1980s" (Roberts and Palmer, 2012, p. 9).

## A. Clarity and conflation – Sander's new phrase

### A.1. Pre-Sander

It hardly needs stating that disputes are a human constant. Given the costs and risks of warfare and the blood feud it has long been a priority to devise peaceful means to resolve them. Ury (2000) suggests that ancient hunter-gatherer societies employed a combination of avoidance, shaming and group mediation to keep the incidence of violent conflict relatively low. Scholars like Pirie (2021) and Roebuck (2007) take their starting point from a later period of agricultural societies and city-states. Alongside mediation are added more definitive appeals to authority figures, resembling

adjudication, as individuals and communities sought vindication and an end to disputes. Over time these decisions could be recorded. Ur-Namma's code (Introduction, above) appeared to be part of an effort at state-building. A key component of ancient rulers' authority flowed from their claim to provide peace and justice (Pirie 2021).

Yet it is difficult to map contemporary categories – courts, arbitrators, mediators – onto these earlier processes. For one thing, those with disputes could at some periods select from a wide range of authority figures, not simply the ruler or the ruler's representatives. Sanchez's research on Anglo-Saxon England found rules allowing for legal actions to be heard by judges or arbitrators, and even the king chose arbitrators for high value cases (1996, p. 19).

Further, once chosen, those authority figures were not wedded to a single process. Writing of an earlier period, Roebuck claims:

> Everywhere in the Ancient Greek world, including Ptolemaic Egypt, arbitration was normal and in arbitration the mediation element was primary. However formal the procedure, mediation was attempted first and a mediated settlement was preferred, so that even an adjudication might, where possible, be incorporated in an agreement (2007, p. 106).

Godfrey notes a similar phenomenon in medieval Scotland: "At first the arbitrator was understood, as in amicable composition, as not delivering a sentence but facilitating a settlement between the parties" (2009, p. 368). Sanchez's study of pre-Norman English procedure found settlement discussions occurring after judgment had been delivered, often mediated by the judge or arbitrator in what she terms: "bargaining in the clear light of legal certainty" (1996, p. 26).

The use of mediation or mediation-like approaches seems to have persisted throughout the Middle Ages and into the modern era (Menkel-Meadow, 2000; Roebuck, 2007). This has been labelled "informal justice" (Abel, 1982b; Roberts and

Palmer, 2012, p. 10), describing efforts to resist centralised state monopolies over dispute resolution. The list of motivations for informalism places religious, political, ethnic, occupational and territorial impulses alongside a desire to reform and rationalise the justice system (Roberts and Palmer, 2012, pp. 18-40). Auerbach's (1983) exclusively American history describes similar drivers for over three centuries of efforts to avoid state law. Nonetheless, by the time Frank Sander addressed the USA's 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, he could assert: "we have tended to assume that the courts are the natural and obvious dispute resolvers" (Sander, 1976, p. 112). Despite many centuries of "process pluralism" (Menkel-Meadow, 2020), by the second half of the twentieth century litigation seemed to many the only show in town; a kind of process monism. It is a view that retains many supporters, as this literature review attests.

A.2. State-building and centralism

Some scholars present the distinction between formal and informal justice as a perennial tension between two poles: "As with a child's see-saw, the instant of ascent assures the inevitability of descent" (Auerbach, 1983, p. 139). On the one hand regimes have historically sought to centralise the justice system in the interests of national coherence: "Since the arrival of political authority in the form of the state, the provision of dispute resolution mechanisms has been bound up with the ambition of those in power to govern" (Roberts and Palmer, 2012, p. 11). On the other, individuals and communities often resist centralised authority in the interests of maintaining particular identities. The choice between these two poles will depend on circumstance and individual choice, a "pattern of pluralist socio-legal ordering" (*ibid,* p. 15).

According to this logic the range of methods Sander presented as alternatives in 1976 had simply fallen into disuse because the pendulum had swung back towards formality. Or, prefiguring some of the later critical work on mediation, they had been left behind because large, urban, industrialised populations could no longer rely on

the community norms underpinning informal dispute resolution (Nader, 1979; Auerbach, 1983). Some believed that advanced Western nations like the USA had simply perfected a superior system of justice. Speaking at the same conference as Sander, Chief Justice Burger hoped change would not be resisted by the legal profession, doing: “what we lawyers often do - praise our system as the best ever devised and denounce anyone who dares to suggest that we consider, not only periodic adjustment, but major and systemic changes” (1976, p. 89).

Arthurs (1985) presents a less haphazard history of the demise of legal pluralism in England and Wales. Far from simply falling into disuse the rich array of traditional dispute resolution forums was the target of nineteenth century legal centralism. On the grounds of efficiency and consistency, over the course of some fifty years, the county courts of the common law took over the jurisdictions of numerous local legal entities. Examples include the palatinates of Lancaster, Chester and Durham, courts of Wales, manor courts and a number of forester courts (Arthurs, 1985, pp. 16-18). Arthurs names the real target of these reforms as “pluralism – the tolerance of English law for many forms of dispute settlement, for a multiplicity of normative systems, for the sharing out of authority beyond the ranks of the legal profession” (1985, p.16).

He attributes this centralising urge to three causes. First was state-building – the desire of the imperial state to ensure order and uniformity in the home jurisdiction. Galanter’s classic article on legal centralism defines it as: “the view that the justice to which we seek access is a product that is produced - or at least distributed - exclusively by the state" (1981, p. 1).

Second was the nature of law itself, with its hierarchical worldview in which inferior tribunals are reviewed by superior courts. For Arthurs this: “can only be to ensure deference by the lower orders to the world-view of the higher” (1985, p.6).

Third was the legal profession. Lawyers' opposition to the idea of multiple jurisdictions grew throughout the nineteenth century and the matter came before Parliament via two committees and a Royal Commission. The legal community consistently referred to the importance of uniformity and principle, despite commercial entities' competing desire for pragmatism. For a flavour of the debate Arthurs offers this sample of a dissenting opinion:

> It is unreasonable to insist that the parties interested shall, as a condition of having their dispute determined, be required, at an enormous cost and inconvenience to themselves, to create a precedent for the benefit of society, and to add a rule of law to a commercial code (p. 60, citing A C Ayrton's dissent from the 3rd Report on the Judicature, 1874).

This extract illustrates the sophisticated and principled tone of the debate. At stake are some of the battlegrounds explored below: the proper role of the courts, their "cost and inconvenience" and society's interest in the generation of precedents.

A modicum of pluralism continued in relation to arbitration thanks to the business community's desire to avoid the courts. The courts ensured their pre-eminence, however, by requiring arbitration agreements to be formalised, thus incurring judicial scrutiny. And that changed what arbitration offered: "instead of responding to norms internal to the commercial community, arbitrators had to respect the external norms of the common law" (Arthurs, 1985, p. 71). By the 1870s, according to Arthurs, the process of legal centralism was complete. The courts of common law, principally the country courts, had become the default portal for those with disputes. This had an enduring impact on the way the legal profession approached its task: "formalism, the rule of principle, had triumphed in the conceptual thought of lawyers and their intellectual associates" (Arthurs, 1985, p.84).

Arthurs' tale of the demise of legal pluralism suggests that the tension between formalism and informalism may be closer to a mortal struggle. For forward-facing, self-confident Victorian England, the loss of centuries of rich local tradition may have

seemed a price worth paying for the political and trading benefits of a unified dispute resolution system. However, it was not just tradition that risked opposition from the legal profession. Kessler's (2005) study of a failed American juridical experiment in the same period suggests lawyers could deploy the same arguments against innovation. She describes a keenly debated proposal to introduce conciliation courts to the USA, borrowed from the French *bureaux de conciliation* which were introduced by the revolutionary parliament in 1790 (Kessler, 2005, p. 22).

It is instructive because the backdrop was growing discontent at the expense and delay of the young American justice system, another instance of the rise of the see-saw towards formality (Auerbach, 1983). These concerns re-surfaced more than a century later (see A: 3, below). Like Arthurs, Kessler describes the growing power of the legal profession and its success in "ensur[ing] that the formal court system would be the sole repository of adjudicatory power" (2005, p. 29). Despite holding out the promise of lower cost, higher compliance and less acrimony, conciliation courts were ultimately rejected by the New York Constitutional Convention of 1846. Kessler summarises the reasoning of opponents:

> A commitment to formal, adversarial adjudication, they therefore concluded, was a distinguishing American feature—one integrally linked to the new nation's unique capacity to promote both freedom and free enterprise (2005, p. 9).

This section has focused on two relatively modern episodes in the perennial tug-of-war between legal centralism and pluralism. They suggest that anyone proposing radical procedural innovation would do well to expect opposition. I turn now to one of the more recent and, on some measures, successful proposals for change.

<u>A.3. The pendulum swings again: "resolving disputes outside the courts"</u>

(Sander, 1976, p. 112)

To extend the metaphor a little further, despite or perhaps because of the legal profession's efforts, justice systems periodically swing away from a centralised

formal approach in search of something more accessible, local, affordable and "common sense" (Roberts and Palmer, 2012, p. 10). As Kessler's history illustrates, formal justice has a shadow side that includes cost and delay, usually compounded in the public imagination by a view of lawyers as further complicating and thereby profiting from the system (Galanter, 1994). So when the Chief Justice of the US Supreme Court, Warren Burger, convened a conference to consider such issues in 1976 he recycled the title of a 1906 event with the same aim: Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Burger, 1976). This is often known as the "Pound Conference" (Sander, 1976, p. 134) thanks to the involvement of famed American jurist, Roscoe Pound, in the 1906 original.

Burger's keynote address begins by noting the differences between the two eras, but quickly moves on to acknowledge similar problems: delay and cost, wasting jurors' time and "our propensity for multiple trials and appeals" (Burger, 1976, p. 92). His shopping list of areas for improvement included finding ways to resolve small claims "more fairly and more swiftly" (*ibid,* p. 93); outsourcing adjudication to arbitrators; finding speedier and less expensive ways to deal with medical negligence and personal injury cases; and addressing family disputes "outside the formality and potentially traumatic atmosphere of courts" (p. 95).

Burger thus flagged up what was to follow. The third speaker was Professor Frank Sander of Harvard Law School, known for his commitment to social justice and clinical legal education. Sander had recently engaged in a "crash course" in alternatives to court (Eisenberg, 2021, p. 337) and had no doubt shared his talk with the Chief Justice. That speech has become justly famous for coining the term "alternative dispute resolution" (in fact Sander added the word "mechanisms") (1976, p. 113, and 1985, p. 1). It also spawned the concept of the multi-door courthouse, though Sander did not use those words at the time (Eisenberg, 2021, p. 387).

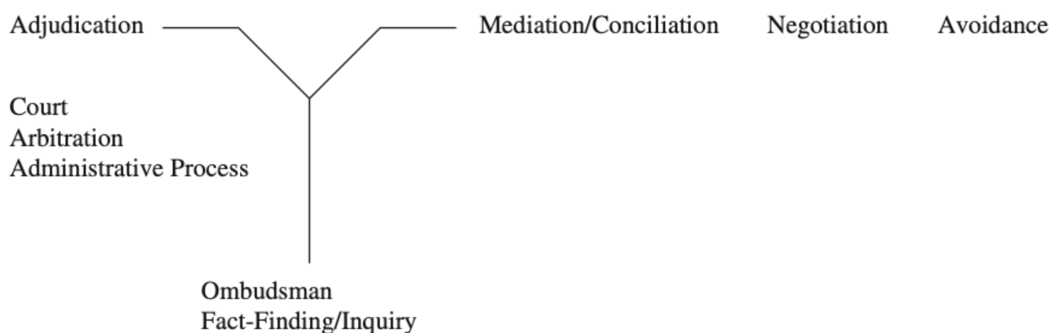
Given the influence of this novel phrase and its catchy acronym, ADR, it is important to review what Sander actually says. First he evokes the sense of crisis animating the conference by quoting Barton's "Behind the Legal Explosion" (Sander, 1976, p. 111, citing Barton, 1975). Despite expressing scepticism about Barton's dire predictions, he devotes the remainder of his talk to escaping that "specter *[sic]*" (*ibid,* p. 112). After a cursory glance at dispute prevention initiatives, such as no-fault regimes and decriminalisation, Sander turns to what is clearly his real interest: "alternative ways of resolving disputes outside the courts" (1976, p. 112).

He offers two sets of definitional questions, first concerning the characteristics of the various alternative dispute resolution mechanisms (ADRMs), second determining how and when to use them. Perhaps Sander's greatest innovation lies in the idea that the selection of dispute resolution method should be a system concern. As this review sets out (A 1 above), for millennia the options for those with disputes have depended on a mix of personal choice and availability. Most have no choice at all. Sander would certainly have encountered the recent wave of enthusiasm for non-court dispute resolution processes, with initiatives like neighbourhood justice centres springing up in an unplanned and haphazard way across the USA (Smith, 1978; Sarat, 1983; Coy and Hedeen, 2005; Cohen, 2022). Now he proposes "rational criteria for allocating various types of disputes to different dispute resolution processes" (Sander, 1976, p. 113) later recasting this in the catchier term "fitting the forum to the fuss" (Sander and Goldberg, 1994).

A further innovation is his taxonomy, gathering diverse processes under a single heading. Given the number of references to the term ADR in the remainder of this literature review one might imagine the definition is clear. Not exactly. Sander's first listing of ADRMs reads: "adjudication by courts, arbitration, mediation, negotiation, and various blends of these and other devices" (Sander, 1976, p. 113). The inclusion of adjudication by courts suggests he could simply have used the term DRMs (dispute resolution mechanisms).

His accompanying chart continues in the same vein:

Diagram 1 Alternative dispute resolution mechanisms (Sander, 1976, p. 114)




The chart makes things a little clearer. Sander highlights three traits of adjudication (which, as the diagram suggests, includes arbitration):

> the use of a third party with coercive power, the usually "win or lose" nature of the decision, and the tendency of the decision to focus narrowly on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties (*ibid,* p. 115).

Mediation is quite distinct, differing from adjudication on all three traits. Sander adds "or conciliation," (1976, p. 115), as the term was often employed as a synonym for mediation at that time. He selects mediation's lack of coercive power for special mention but also makes clear that he envisages a process eschewing win/lose outcomes and willing to concern itself with wider issues including the relationship between the parties. As the diagram suggests, mediation, conciliation, negotiation and avoidance all represent a different branch of the dispute resolution family tree from adjudication by reserving decision-making power to the disputants themselves (Irvine, 2021b).

Sander then considers possible criteria for selecting an ADRM: 1) nature of the dispute; 2) relationship between disputants; 3) amount in dispute; 4) cost; and 5) speed (1976, pp.118-126). He concludes by offering another famed innovation: the "Dispute Resolution Center" (*ibid,* p. 131). In line with his quest for a memorable phrase he later renamed this the "multi-door courthouse" (1985, p. 9, citing Green, Goldberg and Sander, 1985). Like the term ADR, it has endured and remains a platform for fierce debate among mediation scholars (for example see Alfini, 1991, p. 50; Roberts, 1993, p. 458; Resnik, 1995, p. 216; Stempel, 1996; Lande, 1997, p. 843; Brazil, 2005, p. 246; Reynolds, 2014, p. 261; Lord Thomas of Cwmgiedd, 2015, p. 14; Sourdin, 2015, p. 96; Nolan-Haley, 2018, p. 381).

To recap, Sander's talk at the 1976 Pound Conference gave us two memorable ideas: alternative dispute resolution mechanisms (ADRMs), later shortened to ADR, and the dispute resolution centre, later rebranded the multi-door courthouse. On a more profound level he shifted responsibility for the choice of dispute resolution method to the courts and the legal profession. This has remained controversial and laid the foundation for many of the critiques reviewed below.

### A.4. Critique and conflation

The conference, and Sander's talk, appear to have had an effect, or at least to have accelerated an existing movement (Smith, 1978). A number of American states set up programmes to divert cases away from litigation, often towards mediation. In Maine, for example, a group of "academic humanists" set up a mediation project that was endorsed by the Chief Justice and supported by court funding in 1979 and legislation in 1980 (McEwen and Maiman, 1981). In 1981 California made mediation compulsory for child custody matters (Waldman, 1996) and by 1982 180 groups were apparently providing mediation in as many US cities (Abrahams, 1982). In the same year Riskin wrote of mediation programmes having "proliferated at a breathtaking rate in this country" (1982, p. 31).

This rapid growth brought increased scrutiny. As a reading of Arthurs (1985) and Kessler (1985) might suggest, much of this came from the legal academy, though sociologists, psychologists and anthropologists made significant contributions. The second half of this chapter narrates the principal themes from these debates. However, before turning to what mediation's critics say it is important to notice an unintended consequence of Sander's catchy phrase. Almost immediately, thanks to what might be described as conceptual overreach, it became possible to lump together both adjudicative and consensual processes under the label alternative dispute resolution. Of particular interest for the current study is the conflation of arbitration (an adjudicative process) and mediation (a consensual process).

As a result the term "ADR" has joined the term "informalism" as a useful rhetorical device for anyone wishing to deplore the pendulum's swing away from legal centralism. For example, when a writer says: "The rhetoric of justice, rights, conflict recedes, replaced by that of compromise, feelings, and a version of community that looks suspiciously like the status quo" (Delgado, 1988, p. 147, citing Hochrichter, 1987) the target sounds like mediation. In contrast, a critique of the "slick and profitable new ADR industry" which can "remove their [consumers] recourse to courts" (Gardner, 2018, pp. 15/16) must surely be describing arbitration (given that mediation participants can refuse to settle and so return to the courts.) Harrington's recap of her work on informalism asserts:

> the third-party mediators *or arbitrators* have less coercive authority over disputing parties, enabling the person who is mediating the dispute to draw out information from the parties that may assist in getting the parties to reach an agreement, a "consent agreement" (versus issuing a legal judgment) [italics added] (2008, p. 381).

This sentence describes mediation, even using the verb "mediating"; the insertion of the words "or arbitrators" appears to be serving a purely rhetorical purpose.

The muddle is compounded by writers using different meanings interchangeably. Weinstein's essay on privatising justice speaks of ADR's "focus on problem-solving tactics" (1996, p. 277) (surely a reference to mediation), while devoting much of its ire to dozens of instances of mandatory arbitration. One UK legal digest divides alternatives to litigation into ADR (meaning mediation) and arbitration (meaning arbitration) (Lexology, 2023). By the mid-1980s Cain had already noted the dispiriting consequences "when all modes of adjudication other than the formal and professional are conceptually conflated" (1985, p. 335).

This is a study of mediation rather than ADR or informal justice. Where conflation occurs, I attempt to clarify and disentangle the meaning applied to ADR, while endeavouring to include critiques that apply equally to mediation and other processes. Thanks to its pervasiveness the term ADR cannot be avoided but unless the context demands it I will not use it as a synonym for mediation.

To conclude this introduction, the remainder of this chapter will review the wide-ranging academic scrutiny to which mediation was exposed almost from the moment of its reintroduction in the 1970s. The current study was inspired by one particularly ringing criticism, accusing mediation of inattention to justice (Genn, 2010). That was itself an English restatement of the "largely unchallenged critiques" referred to above (Roberts and Palmer, 2012, p. 9). They remain influential. While it is not the purpose of this thesis to defend mediation, any study seeking to consider mediation's relationship to justice must critically engage with this early scholarship and its enduring impact.

**B. The first wave: critics of informalism**[2]

As noted above, moves to reduce the cost and complexity of dispute resolution were not new. However, each era has its own sensibilities. The 1970s and early 1980s were a time of turmoil across Western societies, in particular the USA. The political and ideological struggles leading to street violence and student unrest also manifested themselves in relation to the justice system. Burger's 1976 conference was as much a culmination as a beginning, reflecting disquiet at the way the US justice system operated. It led to the institutional adoption of approaches that started out as radical alternatives to that system, triggering the backlash outlined below.

In the following section I consider four distinct critiques of informalism: 1) neutralising conflict, 2) expanding the reach of the state, 3) removing protection from the disadvantaged, and 4) loss of law (Irvine, 2020, p. 148-149).

B.1. Neutralising Conflict

(Abel, 1982a, p. 280)

A surprising strand of opposition to informalism, in particular mediation, takes issue with one of its central claims: to resolve conflict. Around the time of Sander's address, he and others advocating for change laced their rhetoric with phrases like "therapeutic effect" (1976, p. 121), "healers of society's conflicts" (Burger, 1976, p. 96), "a warmer way of disputing" (Smith, 1978) and the "gentler arts of healing and reconciliation" (Bok, 1983, p. 583). There may have been an element of hyperbole in these claims, but they seem to have infuriated some scholars who saw vociferously expressed conflict as a symbol of an open, democratic society governed by the rule

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[2] The pilot phase of this study was written up and published as an academic article (Irvine, 2020b) and is included at the end of this thesis. The following section adopts and expands on the framework set out in that article's literature review.

of law. In this view the reduction (or suppression) of conflict helps the powerful evade scrutiny and leaves injustice unchallenged.

One of the most influential was Laura Nader, sister of consumer champion and one-time Presidential candidate, Ralph Nader. She had earlier documented the mediation efforts of the Zapotec Indians of Mexico, helping to cement a view that non-adjudicative conflict resolution was effective in (and only in) small, tight-knit communities (Menkel-Meadow, 2000, p. 10, citing Nader, 1991; and see Auerbach, 1983; Greenhouse, 1985; Engle-Merry, 1990; Milner, 1996). Such communities could enforce the social norm of harmony through a closely intertwined network of relationships in which shaming and exclusion have serious practical consequences. Her work on consumer complaints contrasted this sharply with contemporary USA:

> In a modern, industrialized society dominated by large corporations and sprawling governmental bureaucracies, public opinion and interpersonal ties can no longer serve as effective mechanisms of social control (Nader, 1979, p. 1000/1001).

In her 1979 article Nader examines a range of "extrajudicial settings" (p. 1003) for complaints-handling, including city consumer departments, professional associations and private companies' own systems. She lists what she describes as “constraints” (*ibid,* p. 1007) on those handling complaints, such as the influence of powerful interests on broadcasters carrying consumer helplines. Most read like Nader’s criticisms rather than mere constraints. One is the claim that such systems set out to monopolise complaints so as to prevent their customers going elsewhere. Another is to compare complaints systems to teams of fraudsters who delegate a member to pacify their victims through an apparent display of empathy, known as “cooling the mark out” (pp. 1012-1015, citing Goffman, 1952).

The next is perhaps what she is best known for: “Failure to See the Forest” (Nader, 1979, pp. 1015-1018). Even if individual complaints are resolved, a pattern of poor products and poor service remains unchallenged. The profusion of complaints

schemes contributes to the isolation of individual complainants, convincing them that their complaint is petty and not worth pursuing. More importantly it obscures systemic failures so as to remove pressure for large corporations and public bodies to change: “no matter how alternative complaint mechanisms are strengthened, their case-by-case approach cannot remedy all the harms identified by consumer and citizen complaints” (*ibid,* p. 1020).

Picking up a theme from her earlier work Nader connects this to: "a pattern linked with industrialization: the atomizing of the social organization into smaller and smaller consuming units" (*ibid,* p. 1015). While informal methods like mediation could restore harmony in relatively small communities, for large urbanised populations like the USA the cocktail of individualism and corporate capitalism has effaced the conditions for their success. What is needed is law, and Nader calls for “little injustices” (*ibid,* p. 1019) to be aggregated, perhaps via class actions and government regulation.

Other writers make similar points. Abel sets out a litany of harms arising from “informal institutions” (1982a, p. 269). The concluding chapter of his seminal collection, “The Politics of Informal Justice, Vol 1: The American Experience” (Abel, 1982b), suggests that Sander’s conflation of adjudicative and consensual processes (see A.4 above) forms part of a longer tradition of scholarship. For Abel and his fellow authors anything other than a state court is informal. He applies the label to a wide range of processes: complaints procedures (p. 280), returns policies (p. 281), workers’ compensation (p. 281), no-fault compensation schemes (p. 281), ombudsman schemes (pp. 282, 284, 287), regulators (p. 284), arbitration (p. 281), mediation (p. 284) and even some courts: small claims courts (p. 284) and landlord-tenant courts (p. 290).

Like Nader, Abel’s primary objection seems to be the reduction of conflict. It is unclear whether he coined the term “neutralizing conflict” (1982, p. 280) or adapted

it from international conflict studies (Weede, 1976) but he links the practice to political suppression: “informal institutions neutralize conflict by responding to grievances in ways that inhibit their transformation into serious challenges to the domination of state and capital” (Abel, 1982, p. 280). He draws back from suggesting that these institutions are knowing agents of the powerful against the rest. Instead he casts those who devise and execute such schemes as the well-intentioned but naive accomplices of corporate capitalism. Their schemes are "paternalistic" (*ibid,* p. 282), part of a pattern of domination through appearing to offer support while remaining neutral. They also have the effect of: "discouraging self-reliance" (*ibid,* p. 283). Informal institutions’ offers of help, no matter how illusory, rob people of agency, making them more likely to give up and "'lump' their grievances" (*ibid,* p. 283). Abel links this to a further feeble component of informal institutions - their lack of teeth. Despite acknowledging low rates of compliance in small claims courts this critique seems particularly aimed at consensual processes like mediation.

The overriding impression is of perpetual, Darwinian struggle between the strong and the rest. In echoes of Hobbes’ “every man is enemy to every man” (1651, cited in Nell, 2006, p. 224), Abel characterises societies without a central authority as "frequently violent" (1982, p. 284). Courts are one stage of development in which violent conflict is converted into verbal combat with the aid of "specialists trained in aggressive advocacy" (p. 284). Informal institutions take this a step further by forbidding even verbal conflict. Abel dates himself, historically and culturally, by linking this to the prevalence of female mediators in the business of "help[ing] the parties accommodate" (p. 284).

Like Nader, Abel’s criticism of informal justice is in part provoked by the claims of its proponents. He portrays them as wilfully anachronistic, harking back to communitarian, high-context societies: “social settings where those demands [of oppressed groups] would never be made: small towns, nineteenth-century America, the patriarchal family, tribal societies, Far Eastern cultures” (p. 285). That reading of

Sander, Burger and others may be selective (they are at other times accused of a narrow, instrumental interest in improving court efficiency) but it further illustrates the difficulty for those advocating alternatives to the status quo.

Other scholars contributed to this theme. Engle-Merry avoids conflating mediation with adjudicative processes, documenting its widespread use in "small-scale pastoral and agricultural societies" (1982, p. 20). While not entirely dismissive of its potential in the USA she echoes Abel in warning that:

> mediation might become a means for containing and deflecting grievances that spring from tensions in society itself, thus meeting individual demands without affecting the underlying normative order of society (*ibid,* pp. 41/42).

Garth (1982), also writing in Abel's edited collection, is more careful than most to distinguish among informal processes. He sees conciliation (similar to what is now called mediation) as part of a longer Western tradition to de-emphasise legal formalism in favour of broader goals like peace and reconciliation. He speculates that this may be less challenging to the status quo than his favoured species of informalism – "making rights effective" (*ibid,* p. 186):

> Enforcing rights is bound to disturb many powerful interests; an approach that emphasizes low cost and social harmony is more easily marketed in the present political climate (*ibid,* p. 196).

Here again harmony is cast in a negative light by comparison to a more combative emphasis on rights.

Garth's and Engle-Merry's reference to politics highlights changes then sweeping across the Western world, manifested in the election of Ronald Reagan in the USA and Margaret Thatcher in the UK. What came to be known as "neoliberalism" (Cohen, 2009a) began to unpick forms of social organisation that had dominated public policy since before the Second World War. During that earlier "progressive period" (Harrington, 1982), when an expanding state took on greater responsibility for the wellbeing of its citizens, law and legal institutions played a key part. The US

Supreme Court delivered some notable judgments supporting the rights of minorities, most famously in “Brown v Board of Education” (1954, cited in Fiss, 1982, p. 122). Those critiquing informalism in the early 1980s made a particularly damning connection, suggesting that no sooner had the disadvantaged begun to acquire greater rights than the means to enforce them through the courts was removed:

> Not incidentally, alternatives prevent the use of courts for redistributive purposes in the interest of equality, by consigning the rights of disadvantaged citizens to institutions with minimal power to enforce or protect them (Auerbach, p. 144; and see Abel 1982a).

The central idea expressed in this section is that informal justice methods like mediation do little to serve the interests of those they are intended to benefit, and represent a reduction in the state’s offer of equal rights. While providing the opportunity to reach a resolution for a particular case, they leave untouched wider, systemic issues that affect whole classes of people (though for a contrary view see Smith, 1978, p. 207, claiming that informal processes have “facilitated the treatment of generalized and institutionalized problems rather than simply the problems of particular disputants.”)

While little of substance has been added to the arguments advanced above in the decades since the 1980s the allegation seems to have stuck. ADR has the effect of “deflecting energy away from collective action” (Delgado *et al,* 1985, p. 1391). It “takes the sharp edge off claims, diffusing them into generalized grievances to be worked out, harmoniously if possible” (Delgado, 1988, p. 151). Mediation “The New Snake Oil,” ensures that conflict is “domesticated and managed” (De Maria, 1992, p. 19). Revisiting her earlier critique, Nader called ADR “an often coercive mechanism of pacification” (1993, p. 1). Cohen later noticed the uncomfortable reality that methods such as negotiation and mediation share neoliberalism’s focus on the individual (2009, p. 66).

B.2. Expanding the Reach of the State

B.2.a. State Control

Despite, or perhaps because of, the focus on resolving individual disputes informal institutions were simultaneously accused of extending the tentacles of state control into more and more of people's lives. Here the target is more clearly mediation, particularly some of its early uses in "neighborhood dispute centers *[sic]*" (Smith, 1978, p. 205).

Harrington most clearly enunciates this perspective in her contribution to Abel's collection: "Delegalization Reform Movements" (1982). The chapter provides a detailed history of more than a century of legal reforms such as socialized courts (pp. 51/52) and domestic relations courts (pp. 52-54), culminating in neighbourhood justice centres (pp. 59-63). In all of these Harrington sees the urge to temper the excesses of legal formalism, with its elaborate procedural rules and resultant costs, and replace it with "reconciling, harmonizing, and balancing formal and social justice" (1982, p. 36). However, rather than replacing law these experiments work alongside it, targeted particularly at "minor disputes and what might be called order maintenance problems" (*ibid,* p. 37).

Curiously, Harrington rehearses many of the same complaints as critics in the previous section (B.1. above) while reaching an almost opposite conclusion. Disputes that are highly significant to those involved, such as domestic violence or landlord-tenant problems, are "reduced to individual problems" while their roots in wider societal conditions are "depoliticized or ignored" (*ibid,* p. 62). Yet instead of seeing this as part of a state effort to reduce its involvement (and expenditure) by neutralising conflict, she frames it as an expansion of state power. The logic of this move becomes clearer when we notice that, for Harrington, even mediation is viewed through an adjudicative lens. Despite their use of mediators, characterised as "paraprofessionals" (*ibid,* p. 61), she describes justice centres as "tribunals" (*ibid,* p. 62). In this view the rhetoric of empowerment is mere form: participants cannot arrive at their own decisions (or they would not be there) so it must follow that

authoritative third parties, including mediators, impose them. That in turn underpins Harrington's final allegation about informal justice as "the concentration of judicial power under an ideology of expanding participation" (1982, p. 63).

The notion clearly resonated with the editor. Abel devotes a section of his concluding chapter to "Expanding State Power" (1982a, p. 270) extending his "Marxist" (Delgado, 1988, p. 1392) analysis to the existence of civil (i.e. non-criminal) law. For Abel, the forms of civil law such as the courts, arbitration or mediation are little more than a way of repackaging the components of a prosecution: referral rather than arrest, respondent rather than accused, (female) mediator rather than (male) judge (Abel, 1982a, p. 270). One of his more ringing barbs "the velvet glove has largely hidden the iron fist" (*ibid,* p. 270) is adapted from a critical analysis of the US police (The Center for Research on Criminal Justice, 1975). Instead of disputes involving two equally matched sides, informal institutions deal with "deviance" (Abel, 1982a, p. 271).

The close association between mediation and criminal justice may seem surprising to contemporary eyes, particularly outside the USA. During the intervening forty years mediation has become much more closely identified with civil justice, while the use of similar techniques in the criminal domain gradually dropped the label Victim Offender Mediation and replaced it with Restorative Justice (Brookes and Mcdonough, 2006; Menkel-Meadow, 2007). However, in the years leading up to Abel's 1982 collection a significant proportion of the referrals to neighbourhood justice centres and other mediation projects came from police and prosecutors. Harrington's chapter lists "violence against women [and] neighborhood quarrels" (1982, p. 62) while Auerbach claimed that the mediation centres received the majority of their referrals from "criminal justice agencies" (Auerbach, 1983, p. 135; see also Silbey and Merry, 1986). Engle-Merry, reviewing earlier research into mediation projects for her (1990) ethnographic study of disputing in inner-city Boston, found the proportion of cases received from the criminal justice system was

variously 93% (Massachusetts), 75% (Pennsylvania), 67% (Kansas), and "most" (New York) (*ibid,* pp. 183-188). She could only list one mediation programme that did not accept criminal cases (San Francisco) (p. 185) and her own research confirmed that ordinary Americans invoking the law were as likely to turn to the police as the civil courts.

The present study focuses on the civil justice system in Scotland, and all 24 participants had been referred by a small claims court. None was referred by the police or other parts of the criminal justice system. Yet despite the age and distinctively US context of these early critiques they have carried considerable weight in other jurisdictions (for three recent examples from England & Wales, see Genn, 2010; Mulcahy, 2013; Bartlet, 2019). It is therefore important to review both their substance and context.

Engle-Merry's (1990) research into litigation and mediation in urban neighbourhoods offers a more charitable explanation for the extension of state power, placing informalism alongside the civil rights movement and the New Deal as part of liberal efforts to improve American society for the least advantaged. From this perspective the expansion of justice institutions (formal and informal) is an "invitation" (*ibid,* pp. 176-179) which the working class people in her study enthusiastically accept. The courts offer protection from injustice, but they also offer an alternative source of authority to the gossip and patriarchy of small communities. Yet, paradoxically, when their problems were serious enough to turn to the courts her participants found themselves diverted: "Court officials, endeavouring to provide what they consider justice, convert these problems from legal to moral or therapeutic discourse" (*ibid,* p. 179). Those operating the justice system saw these claims as minor or unimportant, pushing litigants into processes they did not seek. In reality this engendered resistance, driving many to persist until they got the form of justice they recognised: a court. Others, however, lacked the energy to return to the formal justice system. Their legal claims were "deflected, transformed, extinguished while

tensions ease" (*ibid,* p. 180), echoing Nader's allegation of "cooling the mark out" (B.1, above).

Engle-Merry's conclusion is, on the face of it, similar to Abel's. She sees the invitation described above as a way to: "increase government supervision over areas of life long defined as private" (p. 182). Her analysis, however, avoids implying a capitalist conspiracy to extend state control. Characterising the urge to use the courts as "legal entitlement" (*ibid,* p. 181) she attributes some responsibility to litigants themselves, seeking to "construct a social world of autonomy and individualism, a vision deeply entrenched in American culture, by establishing closer ties to the state as a way to order family and neighborhood life" (p. 182). Here again we see the US focus of much of the early writing on informalism. While authors like Engle-Merry are clear that they are writing for and about Americans, these ideas have often been adopted in other countries without asking the simple question: does that apply here? That is one focus for the current study.

B.2.b. Co-option

Concerns about expanded state control through mediation persisted, but have tended to be expressed via the language of "co-option" (Roberts, 1993, p. 467), or "co-optation" (Coy and Hedeen, 2005). Auerbach sees justice institutions adopting informal methods like mediation to enhance their legitimacy and "siphon discontent from the courts" (1983, p. 144). Later commentators speak of "annexation" (Adler, 1995, p. 81) or "capturing" (Bush, 2008, p. 706) with Bush presenting mediation's relationship to the courts as a perennial oscillation between "staying in orbit" and "breaking free" (*ibid,* p. 705). Merry sees the courts' endorsement of informalism, or "popular justice" (1995), as part of a project to improve themselves rather than a fundamental change in the way disputes were handled.

It was not just the courts who might see benefits in co-opting mediation and other species of alternative dispute resolution. The legal profession quickly adopted them

as: “another weapon in the adversarial arsenal” (Menkel-Meadow 1991, p. 3). Lawyers in England and Wales could also be “proprietorial,” with one practitioner complaining that mediation had been “hi-jacked by other disciplines” (Raby, 1993, cited in Roberts, 1993, p. 467). Macfarlane categorised some Canadian attorneys as “instrumentalist” as they sought to capture mediation and mediators “to advance the clients' mostly unchanged adversarial goals” (2002, pp. 256-257). More recently Mironi’s cautionary tale concludes that well-intentioned efforts to reform the justice system may have unintended negative consequences for mediation itself. In his view the enduring effect of Israel’s “mediation revolution” (2014, p. 173) was to embed the idea of early settlement. Then, faced with huge caseloads and pressure for greater efficiency, courts and lawyers found speedier ways to achieve settlement without mediation, leaving it marginalised.

Whether called extended state control or co-option, the critiques summarised in this section alert us to a paradox woven into informalism. Mediation and arbitration appear to shift responsibility for dispute resolution from state institutions to private parties. Yet when Sander made their selection the concern of the justice system (A.3. above) he seems to have handed the initiative back to the state. Even if parties exercise some control over the outcome (and here it becomes important to distinguish arbitration from mediation) the choice of process is usually made by someone else, usually from the “juridical field” (Bourdieu, 1987, p. 814). In fact, where arbitration is imposed it is questionable whether the parties exercise much outcome control other than what Fuller described as “a particular form of participation, that of presenting proofs and arguments for a decision in [their] favor” (Sander, 1976, p. 115, citing Fuller, 1963; and see Abraham and Montgomery, 2003). Where mediation is imposed, or encouraged, the situation looks somewhat different: it promises to deliver self-determination, reserving a final say in the outcome to participants. However, as this section has already revealed, some critics suggest this promise is undermined by a fatal flaw: if those participants are unevenly matched that outcome may be unfair.

### B.3. Removing Protection from the Disadvantaged

#### B.3.a. Informalism and procedural protections

Viewing informal institutions as thinly veiled extensions of the criminal law lends particular weight to Abel's next critique. As well as extending state power these informal processes reduce procedural protection, with two consequences: "making it both easier and less expensive to extend control" (Abel, 1982a, p. 271) and "provid[ing] advantaged plaintiffs with a sword to enforce their rights while denying disadvantaged defendants an equivalent shield" (*ibid,* p. 296). The idea that alternatives to court facilitate the domination of the weak by the strong is a significant challenge to mediation, particularly given some of its proponents' roots in community and civil rights activism (Shonholtz, 1993; Mayer, 2000).

Before turning to the substance of these concerns, their presentation highlights again the slipperiness and rhetorical force of informalism as a label. The loss of procedural protections has the gravest consequences in a criminal setting, given the possibility of imprisonment. Critics like Abel and others were understandably concerned at criminal justice matters being referred to neighbourhood justice centres. However, some so-called informal processes, such as commercial arbitration or small claims courts, incorporate extensive procedural rules. It is mediation, with its emphasis on consensual decision-making by the parties, that most obviously eschews adversarial protections like rules of evidence or legal representation. These early critiques may have influenced its subsequent trajectory towards an exclusive focus on civil disputes. Nonetheless the idea that mediation oppresses the less powerful has stuck and continues to be a source of concern for mediators and academic commentators.

To some early commentators the logic was straightforward: procedural rules exist to ensure fairness so their removal will guarantee the opposite. For Garth, the use of conciliation (his preferred term for mediation; see A.3. above) "clearly reinforces the status quo and makes rights ineffective" (1982, p. 198). Auerbach's (1983) extensive

review of mediation's origins in an American context led him to conclude that it could only operate effectively in small, coherent communities. As large, anonymous urban centres grew and people turned to the courts, diversion to mediation would put "the weaker party… at an even greater disadvantage as informality compounds inequality" (*ibid,* p. 120). Edwards worried that mediation in family law would offer "second class justice" as a result of "unequal bargaining power" (1986, p. 679).

Further concerns emerged as mediation gained in popularity. One was that its lack of formal rules and confidentiality would allow prejudice based on race or class to influence outcomes, working against the interests of the disadvantaged (Delgado *et al.*, 1985; Delgado, 1988). This has spawned a seam of scholarship persisting to the present day (Seth, 2000; Sandefur, 2008; Press and Deason, 2021; Dukes and Cozart, 2023). Bachar and Hensler (2017) reviewed 38 studies conducted since Delgado *et al*'s 1985 article, investigating the effect of personal identities such as race, gender and class on the outcomes of informal dispute resolution. They concluded that "mixed and contradictory results" (*ibid,* p. 329) combined with patchy methodology made it impossible to confirm or reject the concern. Notably, they found that the focus in the first ten years of their review was on gender rather than race. Perhaps because of the rapid rise of family mediation in the USA, much of it mandatory, this process came in for particular scrutiny. Though based on personal experience as much as empirical research, two articles from the early 1990s have had a lasting impact on the debate.

B.3.b. Grillo, Bryan and feminist critiques

Grillo's (1991) article "The mediation alternative: process dangers for women" has rightly been described as "canonical" (Menkel-Meadow, 1997, p. 1418). Google Scholar (2023) showed 313 citations between 2015 and 2023 alone on topics ranging from international law, property, digital justice, crime and feminism to quantity surveying and interpreting. Grillo's headline finding was that family mediation had not delivered on its various promises, including an emphasis on relationship, emotion

and party decision-making. But rather than simply falling short of these ideals their seductive appeal to women, particularly disadvantaged women, made mediation "a process in which people are told they are being empowered, but in fact are being forced to acquiesce in their own oppression" (Grillo, 1991, p. 1610).

It is often overlooked that this long and complex piece is primarily an argument against mandatory family mediation, by then widespread across California. Grillo calls it "a *forced* engagement" [italics in original] amounting to "psychic rape" (1991, p. 1606). While acknowledging the good intentions behind the mediation movement and that for some it is preferable to an adversarial engagement, the article concludes: "When mediation is imposed rather than voluntarily engaged in, its virtues are lost" (*ibid,* p. 1610).

Grillo was herself a mediator, confiding that it was her favourite type of work. However, observations of other practitioners, conversations with their clients and her own experience of separation (Menkel-Meadow, 1997, p. 1417) raised profound misgivings. It is the article's composite case studies as much as its nuanced philosophical arguments that most vividly convey mediators' failure to deliver self-determination. She describes one mediator criticising a mother for not prioritising her children's needs and forbidding her from speaking about her own choice of topic (Grillo, 1991, p. 1556). This echoes earlier depictions of mediation as a setting in which decisions are imposed rather than freely arrived at (B.2. above). Another mediator appears to mock a woman's health problems, saying "You don't have to act sick to get what you want" (*ibid,* p. 1586).

Turning to the concerns of this thesis, Grillo touches on questions of justice and fairness. Mediation is presented as emphasising individual context rather than the law-like application of abstract principles. While this may sound potentially empowering for participants, her experience of mediators' practice raised the worry that it would minimise the consequences of poor behaviour and lead to domination

by the stronger individual. Women were rightly wary of a process that would "replace the rhetoric of fault, principles, and values with the rhetoric of compromise and relationship" (*ibid,* p. 1560). While not a "litigation romanticist" (Menkel-Meadow, 1996, p. 30), and equally scathing about women's treatment by the courts, Grillo's disillusionment with mediation led her to some quite conservative positions. She bemoans the ending of no fault divorce and the growth of "joint custody" orders (Grillo, 1991, p. 1551) because they limit women's ability to hold men to account for past behaviour.

Grillo raises another concern relevant to the justice thinking of mediation participants: "the informal law of mediation" (1991, p. 1555). Despite posing as neutral facilitators of party decision-making mediators impose strict rules governing who speaks and what is discussed. They can then ensure that outcomes reflect their own preferences: "the approved way of handling these issues" (*ibid,* p. 1557). Parties are forbidden from talking about the past or expressing anger and blame, often a crucial part of the healing and separation process for women who have experienced abusive (or even deceptive) relationships. It may also inhibit them from asserting their legal rights. Grillo draws on Felstiner, Abel and Sarat's (1981) typology of "naming, blaming, claiming" to conclude: "By making blaming off-limits, the process by which a dispute is fully developed – and rights are asserted – cannot be completed" (1991, p. 1565).

If these prohibitions are problematic for the majority of women, their impact is even greater for those from racial or ethnic minorities. Grillo cites earlier writing by Delgado and colleagues to underline the risk that mediators who close down the expression of anger are doing a particular disservice to minority women, already accustomed to being marginalised in US society. A further risk arises from mediators' frequent reference to fairness, on which "no community-wide view… exists" (*ibid,* p. 1594). If they draw on legal norms they undermine mediation's claim to give parties control of "the normative issues at stake in the mediation" (*ibid,* p. 1593). Yet

without reference to legal norms, she claims mediators are all too willing to impose their own view of fairness.

Others raised concerns about family mediation around the same time (D'Errico and Elwork, 1991; Menzel, 1991; Kelly and Duryee, 1992; Cobb, 1997). Most forcefully, Bryan's (1992) broadside characterises mediation as entrenching the advantages husbands hold over wives by making law irrelevant, ensuring "that preexisting *[sic]* power disparities, rather than law, will dictate the divorce agreement's terms" (*ibid,* p. 522). She characterises all bargaining, even over the parenting of children, as competitive; women therefore need all the advantages they can get, including "the caretaking mother's superior right to children" (*ibid,* p. 491). Mediators are portrayed as biased in favour of men (like Grillo, Bryan deplores the shift in legal norms in favour of shared or joint custody.) She concludes that mediation "perpetuates patriarchy by freeing men to use their power to gain greater control over children, to implant more awareness of male dominance into women's consciousness, and to retain more of the marital financial assets" (*ibid.* p. 523).

Both Grillo's and Bryan's articles are long on analogy and short on empirical evidence, often drawing on earlier evidence of women's disadvantages in other areas of American life. David Greatbatch and Robert Dingwall's extensive study of UK family mediators provided empirical support for at least one of their claims: mediators have significant power to influence outcomes (Greatbatch and Dingwall, 1989; Dingwall and Greatbatch, 1991). They coined the term "selective facilitation" (Greatbatch and Dingwall, 1989, p. 617) to describe how mediators could influence both agenda and outcome, not by providing evaluations of the likely court outcome but simply by pursuing or closing down particular topics. In contrast to Grillo and Bryan's assertions, however, the case study at the heart of their 1989 analysis shows a mediator working to close down the husband's preference, with "the effect of bolstering W [wife], who would normally be regarded as the weaker party in mediation, and the interests of the children" (Greatbatch and Dingwall, 1989, p. 638).

Their later overview of 79 recorded mediation sessions reinforced this view, conceding that "it would also be wrong to see the mediators' influence as entirely capricious" (Dingwall and Greatbatch, 1991, p. 296). Rather it is driven by widely acceptable community norms and mediators' experience of what works, combined with the practical demands of ensuring an effective negotiation: "Mediation can only succeed if mediators are allowed to make appropriate use of the techniques we have described" (*ibid,* p. 301).

This section has focused on the concern that mediation disadvantages those with least power by removing some of the protections offered by the adversarial system. These protections include rules about who gets to speak and what evidence can be led as well as the possibility of legal representation. Critics have focused particularly on family and low-value civil disputes, where parties are least likely to have lawyers and most likely to be compelled to mediate. Their characterisation of mediation as disadvantaging women and minorities clearly stung the profession into both refuting and addressing the claims. To take one example, McEwen, Rogers and Maiman's (1995) response draws on their own research to propose the introduction of legal representation in family mediation. At the risk of pre-empting the next chapter, on mediation's response to critics such as Grillo and Bryan, their influence on the subsequent trajectory of the profession is undeniable.

I turn now to a fourth critique of informalism, one that arguably applies more forcefully to adjudicative methods like arbitration (Abraham and Montgomery, 2003) but has nonetheless been invoked against mediation: that it undermines the law by diverting cases from the courts.

### B.4. Loss of Law

#### B.4.a. Against Settlement

Anxiety about informalism shifting cases away from the courts is laced through the previous critiques. However instinctive, this was initially expressed in terms of harms

for individual litigants (particularly the least advantaged) or for wider society (when the powerful are not held to account). Fiss's (1984) article, "Against Settlement", added a further casualty: the law itself. The term *canonical* is even more appropriate in relation to his contribution, with thousands of citations and a twenty-fifth anniversary symposium devoted to its influence (Erichson, 2009).

This jeremiad on the changing landscape of dispute resolution added a further complaint about the turn away from legal formality: we lose the benefit of public dispute resolution in developing and reforming societal norms, thus "reducing the social function of the lawsuit to one of resolving private disputes" (Fiss, 1984, p. 1085). In another variant on the range of terminology deployed by critics of moves away from adjudication, Fiss's target is not informalism, nor alternative dispute resolution, but settlement. This expansive term could extend to almost all civil disputes, given the "vanishing trial" evidence subsequently proffered by Galanter and others (Galanter, 2004; Dingwall and Cloatre, 2006; Lande, 2006) and surely well-advanced by 1984. Fiss only mentions mediation once (1984, p. 1073), although he twice quotes Bok's "gentler arts" (1983, p. 583) remark as an example of what he is against. Nonetheless, alongside the other work cited above (B.1-3), this prime example of the "the largely unchallenged critiques" (Roberts and Palmer, 2012, p. 9) continues to be deployed in support of arguments against mediation (Genn, 2012; McGregor, 2015; Resnik, 2015; Nussbaum, 2016; Bartlet, 2019).

The first half of the article concerns itself with three issues: "the imbalance of power" (Fiss, 1984, pp. 1076-1078), "the absence of authoritative consent" (*ibid,* pp. 1078-1082), and "the lack of a continuing basis for judicial involvement" (*ibid,* pp. 1082-1085). Fiss later admitted this part of the article "seems labored" (2009, p. 1276). The first issue is a refrain on concerns raised by others (B.3 above) that bargaining without judicial supervision risks reinforcing existing inequalities. The second and third seem rather esoteric, concerning the details of consent in US class actions and

the fraction of cases he had earlier dubbed "structural reform" (Fiss, 1982, p. 121) where judges continue to supervise large bureaucracies following judgment.

However, it is the second half of the article, "Justice rather than peace" (Fiss, 1984, p. 1085) that has had the most enduring impact. Fiss was determined to resist what he later called "the ever-increasing ascendancy of market ideology" (2009, p. 1275) with its emphasis on individualism and the reduction of the public sphere. Adopting a straw-man rhetorical device, he contrasts "a quarrel between two neighbors, the dispute-resolution story" (Fiss, 1984, p. 1076), which he claims is the founding archetype of alternative dispute resolution, with celebrated federal judgments in societally significant issues like school desegregation or antitrust cases, where "courts seek to safeguard public values by restructuring large-scale bureaucratic organizations" (*ibid,* p. 1083). Even the most starry-eyed ADR enthusiast would have to concede that settlement in the latter set of cases could be problematic, removing them from public view and allowing big bad bureaucracies to escape judicial scrutiny. To Fiss the dispute resolution story is the ally of the market-oriented ideological change, reducing publicly-funded and constitutionally essential judges to mere deciders of private disputes. He argues that this is simply too limited a conception of what courts are for, rejecting both resolving individual disputes and securing public peace as worthy purposes. Rather: "Their job is to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them" (*ibid,* p. 1085).

Seen through this lens, disputes resolved through settlement are lost opportunities for judges to fulfil this higher calling. Despite defending himself against the accusation that he might be calling for mandatory litigation Fiss is highly critical of the idea that the courts should encourage settlement. Once a case is initiated, following his logic, it ought to end in a hearing.

There is more to Fiss's elaborate arguments against the way he saw the American civil justice system moving. Explaining his thinking 25 years later, he conceded that he had "saddled the proponents of ADR with the dispute resolution model," (Fiss, 2009, p. 1276) exemplified by quarrelling neighbours and other cases he described as "trivia" (Fiss, 1984, p. 1087). He could thus dismiss efforts to improve the efficiency and affordability of the courts as: "a capitulation to the conditions of mass society" (*ibid,* p. 1075).

It is difficult, however, to see exactly what Fiss would put in its place. The consequence of more cases going to trial would be greater cost for most litigants, though he would probably have argued for increased legal aid. More likely, though, he was looking for allies in a larger battle against retrenchment of the state's role in improving society. In an earlier article he deplored the "privatization of ends" (Fiss, 1982, p. 127), worrying that both state and judiciary were moving away from a concept of public morality and returning to an earlier tradition of *laissez-faire* founded on the notion of the social contract. This accords with Cohen's more charitable reading of "Against Settlement," suggesting a serious-minded effort to keep the justice system focused on "moral deliberation" rather than mere "interest satisfaction" (Cohen, 2009b, p. 1147).

One of Fiss's remarks was echoed by some of the participants in the current study: "To settle for something means to accept less than some ideal" (1984, p. 1086, and see Chapter 6.C. and Chapter 7.B. below). Despite locating his opposition to settlement in constitutional doctrines about the privileged role of the judiciary, he appears to have tapped into something more commonplace: an intuitive sense that settlement can only ever be second best. Yet scholars' intuitive senses are best tested by empirical research (see, for example, Bregant, Robbennolt and Winship, 2021, suggesting that many people view settlements as the equivalent of judgments). One of the motivations for interviewing mediation participants was to seek the perspective of those whose court cases are resolved through mediated settlement. I

am apparently not alone in wishing to respond to Fiss's critique: Cohen asserts that "many, if not most" of those in favour of alternative dispute resolution have felt the need to do so (2009b, p. 1144).

B.4.b. The aftermath of Fiss's critique: ammunition for subsequent debates

The canonical status of Fiss's article may owe a good deal to its timing. His warning about the dangers of settlement was published in the middle of period when more and more cases were doing just that: settling. Whatever the causes, the percentage of federal civil cases reaching trial declined from 11.5% in 1962 to 1.8% in 2002 (Galanter, 2004, p. 459). "Against Settlement" can be read as a rallying call to anyone concerned about this dramatic change. Its uncompromising tone gives voice to a profound sense of loss on the part of legal traditionalists understandably more conscious of the harms than the benefits of fewer hearings. The occasionally intemperate rhetoric they employ in making their arguments is perhaps not surprising and should not obscure their substance.

Fiss put his finger on a key question for the current study: "what are courts for?" When people with disputes of modest value take the time and trouble to raise a court action, what should they expect? Equally significant, in the eyes of some, is what should society expect? Menkel-Meadow characterises this as the "unit of analysis" debate (1985, p. 488): who are courts for? Fiss had little difficulty in answering that question. In his view courts owe their privileged position to their constitutional significance, not their ability to resolve disputes. Others found him a congenial ally. Abel noted his critique of "settlement at the expense of norms" (1985, p. 379, n. 25) in an article concluding that adjudication is the only setting where unequal people can receive justice. Nader shared Fiss's scepticism about dispute resolution, seeing it as one manifestation of the "harmony ideology" (1988, p. 282) that had hi-jacked the US justice system since the Pound Conference. Resnik (1995) enlisted Fiss for support in expressing a related concern, that ADR's oppositional view of adjudication was altering perceptions and minimising its benefits.

The appeal of Fiss's article beyond the rarefied world of legal scholarship, however, may have less to do with his elevated call for justice over peace than with a relatively brief section where he bemoans the loss of "interpretive occasions" (1984, p. 1085). In the adversarial common law tradition courts cannot go looking for disputes. They are "reactive institutions" (*ibid,* p. 1085) and when cases settle, by whatever means, the law stays as it is. This has a powerful resonance, not just for academic readers but for legal practitioners and judges. A central feature of legal education in the Anglo-American common law tradition is its use of a relatively limited pool of appellate cases through which legal doctrines are enunciated (Lande and Sternlight, 2010). Whatever the limitations of this tradition (Schauer, 2006), cases like *Donoghue v Stevenson* (Appeal Cases, 1932) and *Roe v Wade* (U.S. Reports, 1973) become national or even international artefacts, celebrated for their contribution to law and culture.

The thought of such cases settling seems to have united lawyers, judges and legal academics in opposition to any process that might result in settlement. Luban includes Fiss as a supporter of "adjudication as a public good" (1995, p. 2622) and praises him for noticing the potential of settlements to produce "public bads" (*ibid,* p. 2626), like shifting responsibility for harm to third parties. Albiston extends this idea to legal precedents, "the common law as a public good" (1999, p. 905), once again citing Fiss in support, while Roberts saw Fiss as warning of danger to "the polity" if cases are diverted from litigation (1993, p. 455).

Hazel Genn, a socio-legal scholar who spent more than a decade studying mediation in England and Wales, drew on Fiss and others to propose a binary opposition in which: "the proponents of mediation are anti-adjudication and anti-litigation and the proponents of adjudication are 'against settlement'" (Genn, 2010, p. 86). Replicating Fiss's "dispute resolution story" of quarrelling neighbours (B.4.a. above) she adds her

own twist: neither legal norms nor substantive justice play any part in mediation (*ibid,* p. 116). Adjudication, on the other hand, is lauded as:

> a critical social practice that resolves disputes, defines and refines the law, reinforces important public values and is itself a defining democratic ritual that works the law 'pure' (*ibid,* p. 85).

The rhetorical force of these extracts illustrates the sense of loss driving observers of the justice system to remind readers of the glories of litigation.

Genn's words carried weight. A Scottish review of civil justice specifically approved them in its rejection of judicial encouragement for mediation (Scottish Civil Courts Review, 2009a; Irvine, 2010). When Lord Hope, then Vice President of the UK Supreme Court, addressed a large Scottish personal injury firm in 2011, he reminded his listeners of the dangers to the development of the law if more cases were mediated: "Where would we have been without Donoghue v Stevenson?" (Lord Hope of Craighead, cited in Irvine, 2012, n. 18). The Lord Chief Justice of England and Wales made the same point four years later (Lord Thomas of Cwmgiedd, 2015, p. 13) and anxiety about lost precedents continues to haunt UK legal commentary on alternative dispute resolution (Mulcahy, 2013; Bartlet, 2019; Martinez, 2019; Giabardo, 2020).

## C. Conclusion

This chapter has dwelt on two periods contributing to the way mediation is currently perceived. The reforming impulse of the 1970s, exemplified by Sander and other contributors to the Pound Conference (1976, p. 114), was quickly followed by a period of sharp criticism. Those who had worked to found mediation programmes, often motivated by the desire to improve ordinary people's experience of the justice system or even simply to reduce its cost and delay, must have been dismayed by the reaction. They may not have recognised the range of ways in which their efforts were portrayed: helping large, capitalist corporations by neutralising conflict (Nader, 1979;

Abel, 1982a); enabling the state to control more of people's lives (Abel, 1982a; Harrington, 1982); reinforcing rather than ameliorating inequalities (Abel, 1982a; Delgado *et al.*, 1985; Grillo, 1991); undermining the law and advancing market ideology by resolving rather than waging disputes (Fiss, 1984).

The next chapter considers the response from those more sympathetic to mediation. Given the explosion in mediation scholarship in the intervening thirty to forty years it is necessarily selective, and will confine itself to themes relevant to the current study:

A. Mediation's response: efforts to improve the process;

B. Developments in mediation theory: self-determination and informed decision-making, neutrality and procedural justice;

C. Empirical research

# Chapter 3 Literature Review (ii): Justice in mediation – theoretical and empirical responses

## Introduction

The debates and critiques set out in the previous chapter have had an enduring impact. Mediation was changed, sometimes for the better, not only by academic scrutiny but also through simple experience. Unlike the one-dimensional "strawpersons" (Menkel-Meadow, 1995, p. 2670) who preside over or even conduct oppressive acts, many mediators noticed when things were wrong and set out to improve them. Speaking from personal experience, by the time I trained as a family mediator in Scotland in 1992 a central plank of the course concerned mediation's potential risks for survivors of intimate partner violence and the implications for practice.

The impact of academic scrutiny should not be overstated. Mediation was changing anyway. It is no more immune than any other social process to societal and political fashions, from the communitarianism of the 1990s to post-2008 austerity and pressure to shrink state spending. Mediation has proved highly adaptable, thriving in regimes as diverse as China (Palmer and Roberts, 2020) and the USA. From the vantage point of 2023 some of the concerns raised by early critics appear outdated, or to have missed the point entirely. To take one example, the anxiety first expressed by Fiss (Chapter 2.B.4. above) that a rise in settlements would harm the development of the law now appears to have been misapplied when it comes to mediation. Even the originator of the term "vanishing trial," Marc Galanter, conceded that "the decline in trials is very general, across the board, and is not confined to sectors or localities where ADR has flourished" (2004, p. 517). Later scholars have noticed that it is private adjudication, in particular contractually imposed arbitration, that most

effectively removes disputes from the public justice system (Abraham and Montgomery, 2003; Mulcahy, 2013; Sourdin, 2015b).

Given that mediation appears to be here to stay, the focus of this chapter will be on concerns most relevant to participants in the current study. One strand of vigorous debate continues to rage over mediation's capacity to protect the poor and powerless. Underpinning that is a concern over injustice. What, if anything, can mediators do about it? And if they can, should they? Should they be more concerned about the outcome or the process by which it is achieved? And how do we judge what is just and what is unjust? Given the central role of the law in answering that question for wider society, what role ought law to play in mediation?

Before considering these themes and the scholarship they have produced, I start by reviewing four articles from the 1990s. Each in its way is a response to the critics, the first most directly so. The other three address the critiques by offering novel theoretical frameworks, one of which has remained remarkably influential. Each one looks beyond the binary question of whether or not mediation is a good thing to a more mature phase of development: how to maximise its benefits and minimise its risks.

## A. Theoretical responses

This section summarises four early reactions to the criticism outlined in Chapter 2.

### A.1. "Whose Dispute Is It Anyway?" (Menkel-Meadow, 1984)

Carrie Menkel-Meadow was already a prolific writer on alternatives to litigation with a deft knack for asking good questions (1984, pp. 760/761; 1985, pp. 512/513). The title of her 1995 article is a particularly well-crafted riposte: "Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (Menkel-Meadow, 1995). It speaks most forcefully to Fiss and his elevation of the

justice system's requirements over those of individuals, but also cites many of the critics mentioned above in its opening pages. Menkel-Meadow asserts early in her article that the relevant question is no longer whether to be "'for or against' settlement" (1995, p. 2664) but "*when, how, and under what circumstances* should cases be settled?" [italics in original] (*ibid,* p. 2665). Posed this way, the question also implies its reverse: when, if ever, should society insist that particular legal disputes are dealt with by state-sponsored adjudication?

The second part of the article offers five arguments in support of settlement. Each acts as a rebuttal of earlier arguments against, while acknowledging the need for empirical evidence to flesh out abstract academic debate. First Menkel-Meadow rejects the idea of settlements as "unprincipled compromise" (1995, p. 2672), noting that in reality most settlements take account of the law but adjust its application to suit specific circumstances and preferences. Next she questions whether settlements "preclude the use or creation of precedent" (*ibid,* p. 2678), pointing to the powerful influence of precedents on settlements ("the shadow of the law," Mnookin and Kornhauser, 1979) and the parallel public impact of some settlements. The third argument questions whether the privacy, or "secrecy" (*ibid,* p. 2682), of settlements is always a bad thing, noting its importance to vulnerable parties and the risk of powerful players opting out of the justice system altogether if, once invoked, it publicises every detail of their private and commercial business.

The fourth involves the positive assertion: "settlements often provide greater, not lesser possibilities for just results" (*ibid,* p. 2687), pointing to obvious inequalities faced by many litigants and the cathartic potential outside lawyer-dominated litigation. Menkel-Meadow closes this section with another positive claim: that settlements can increase access to justice. This is mostly an argument for choice, highlighting the tension between individual and collective interests in dispute resolution and concluding:

> The key issue is by what standards should we (the courts, the public, and academic critics) judge the processes chosen and the ultimate results. When is a settlement just and to whom must it appear so? (*ibid,* p. 2691).

The remainder of the article presents more arguments in favour of settlement while acknowledging two caveats: the law can play a crucial role in telling "bad" from "good" settlements (*ibid,* p. 2693); and some settlements ought not to remain private.

While the focus of this thesis is the justice of <u>mediated</u> settlements, as perceived by participants, the issues raised by the robust debates of this early period provide a useful lens through which to analyse the empirical data. Nader, Harrington, Abel, Merry, Fiss and others responded to early enthusiasm for alternatives to adjudication by alerting us to the pitfalls; Menkel-Meadow's counter-reaction exemplifies a less evangelistic, more nuanced approach from mediation's proponents that has largely endured to the present day (see A.2. and A.3. below). I turn now to three further offerings from the same period, each animated by earlier critics. In contrast to Menkel-Meadow's detailed rebuttal these authors sought to bring clarity by offering new ways of conceptualising mediation. In attempting to further shift the conversation from "whether" to "when" to use mediation they can be viewed as evidence of the maturing or "institutionalization" (Lande, 1997, p. 844) of a new profession.

<u>A.2. The "Grid for the Perplexed" (Riskin, 1996)</u>

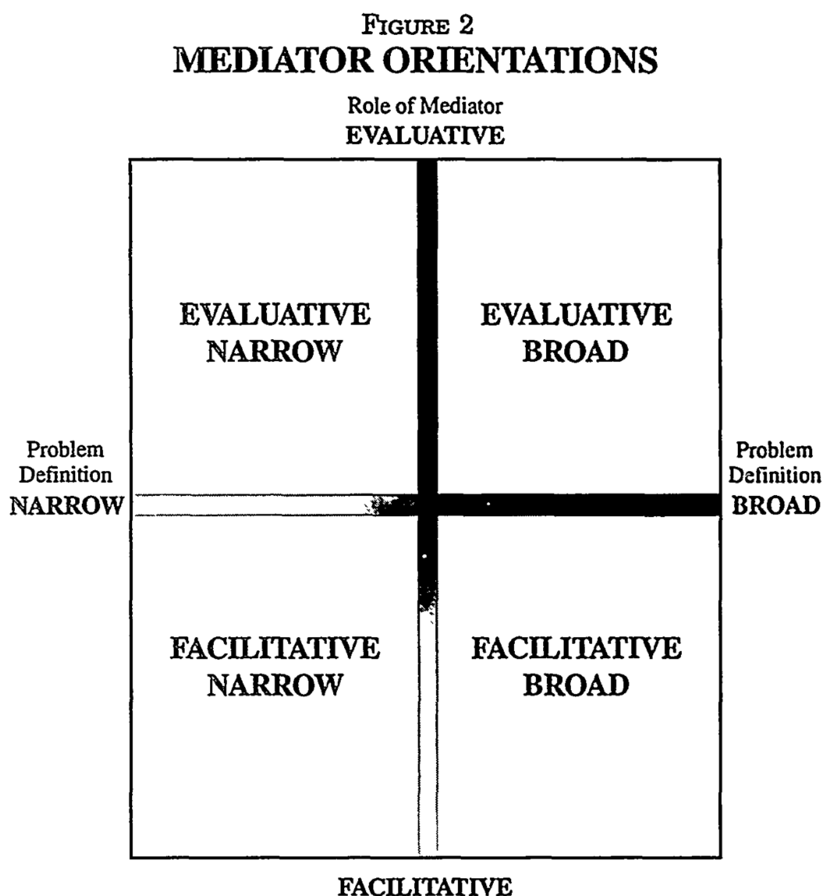
Leonard Riskin was a legal educator who had earlier documented the challenge mediation faced from "the lawyer's standard philosophical map" (1982, p. 43). In two articles in the mid-1990s (Riskin, 1994, 1996) he offered a different form of representation, a grid, to address the perplexity created by the "bewildering variety of activities" (Riskin, 1996, p. 8) described as mediation.

His 1996 article develops the grid in detail. Riskin first acknowledges previous efforts to categorise approaches to negotiation, for example "create value" and "claim value" (1996, p. 13, citing Lax & Sebenius, 1984); "distributive" and "integrative" bargaining (*ibid,* p. 13, citing Raiffa, 1982); "hard," "soft" and "principled" negotiation (*ibid,* p. 13, citing Fisher, Ury and Patton, 1991); and his favoured typology of "adversarial" and "problem-solving" (*ibid,* p. 13, citing Menkel-Meadow, 1984). He notes parallel attempts to categorise mediation: "settlement-oriented" and "problem-solving" (*ibid,* p. 14, citing Kressel et al, 1994); "bargaining" and "therapeutic" (*ibid,* p. 15, citing Silbey and Merry, 1986); and "dealmakers" and "orchestrators" (*ibid,* p. 15, citing Kolb, 1993). In his experience, however, the fiercest debates were triggered by the question of "whether a mediator may evaluate" (*ibid,* p. 9). This is the ground on which he raises his own descriptive flag.

Riskin adopts the simple technique of placing two polarities at a 90-degree angle on a graph, replacing two zero-sum games (where more of one means less of the other) with an almost infinite array of gradations in its four quadrants (for similar efforts see Kurtzberg and Henikoff, 1997, p. 78; Lax and Sebenius, 2006, p. 119). Despite the importance of evaluation to his thinking, he starts with a different polarity: how broadly or narrowly mediators define the problem they are invited to address. A typical narrow problem-definition would see mediators focusing on monetary outcomes to legal disputes. Mediators with a broader approach might bring business interests or personal relationships into the discussion or even, at the broadest end of the scale, community interests (Riskin, 1996, pp. 19-21). Overlaid onto this is Riskin's second and most influential polarity: how mediators understand their role, defined by the "strategies and techniques" (1996, p. 23) they employ. At one end of the spectrum lie evaluative mediators, girded by two assumptions: the parties want evaluation and they, the mediators, are qualified to provide it. At the other, facilitative mediators assume that the parties are best placed to evaluate potential solutions, meaning the mediator's role is simply to "clarify and enhance communication" (*ibid,* p. 24).

The complete grid is reproduced below.

Diagram 2 "Mediator Orientations" from Riskin, 1996, p. 25




It is difficult to overstate the enduring impact of this offering. As well as over 1,000 academic citations (Google Scholar, 2023b) the terms evaluative and facilitative have entered everyday mediator parlance (while his narrow v broad problem definition is rarely mentioned). If anything, Riskin's attempt to bring clarity to a fraught debate spawned even fiercer rhetoric (Kovach and Love, 1996, 1998; Waldman, 1998; Schwartz, 1999; Zumeta, 2000; Levin, 2001) and his own second thoughts led him to re-model the grid more than once (Riskin, 2003, 2005). Nonetheless, a sizeable proportion of practising mediators would call themselves either facilitative or

evaluative, and despite Riskin's efforts to clarify his descriptive, not prescriptive, intentions the two terms have come to represent competing models and allegiances (Woolford and Ratner, 2005; Wade, 2012).

Riskin's model and its aftermath are relevant to the current study because they provide a framework for analysing a parallel, neglected negotiation: between mediators and mediated. Unrepresented parties in mediation are rarely portrayed as having much agency in this regard (in contrast to the legal purchasers of mediation, see Zariski, 2011; Waldman, 2017; Galton, Love and Weiss, 2021); if the mediator has a facilitative style, that is what parties get. Conversely, an evaluative mediator assumes her clients: "want and need her to provide some guidance as to the appropriate grounds for settlement" (Riskin, 1996, p. 24). Riskin does not accuse mediators of complete insensitivity to context, conceding that some: "attempt to develop their orientation in a given case based on the participants' needs" (1996, p. 36). Nonetheless, even this positions mediation's consumers as passive recipients of their mediator's diagnosis, underplaying their own influence on the style of mediation they are offered.

Yet Riskin's grid could equally be used to explain participant preferences: did they find themselves pushing to extend the problem definition from, say, a narrow focus on litigation outcome to other, broader, issues (as predicted by Kovach and Love, 1998, p. 73)? Did they attempt to coax a facilitative mediator into providing legal information? Conversely, did some find themselves ignoring a mediator's efforts to offer an evaluation, using the session to negotiate as they saw fit? This is not to discount mediators' power and influence in the process they offer. Very few aspire to be the "potted plant" message-bearer caricatured by one Kansas lawyer (Riskin, 1996, p. 12, citing Ralston, 1994). Nonetheless, in attempting to consider the justice thinking of unrepresented people in mediation it will be important to consider the extent to which they attribute it to their mediators, if at all.

A.3. Waldman's normative typology

The model offered by Ellen Waldman (1997) adds a historical perspective to earlier efforts, like Riskin's, to categorise mediator behaviours and respond to critics. In her view the way mediators went about their work had developed in response to mediation's increasing integration into the US justice system. The key factor distinguishing successive mediator models was their attention to "social norms" (*ibid*. p. 706), defined as "those principles and standards that have attained consensus status in society" (*ibid*. p. 708). These include legal norms, but Waldman extends the somewhat imprecise term to include principles and standards so widely held they rarely trigger disputes and others that legislators avoid or have only recently gained acceptance.

Waldman proposes three distinct approaches to social norms among mediators, linking each to a stage in mediation's development. The first is the "norm-generating model" or, to give it its full title, "Traditional Mediation: A Norm-Generating Process Using Mediative Techniques" (*ibid*. pp. 710-723). The association with tradition seems apt as she describes a series of stages familiar to most mediators (see for example Moore, 1986; Haynes and Haynes, 1989; Beer, Packard and Stief, 2012) and not dissimilar to Riskin's "facilitative" orientation (1996, p. 23). What distinguishes the norm-generating approach from later developments is its insistence that mediators confine their attention to the parties and their moral and ethical world: "In an effort to spur innovative problem-solving, the model situates party discussion in a normative tabula rasa" (Waldman, 1997, p. 718).

That is not to say that social norms are absent; participants habitually use normative terms to describe disapproved behaviours or self-evidently righteous proposals. Rather, as the word "generating" implies, as long as these norms emerge from and are acceptable to the parties, the mediator will not interfere. Waldman sees the model as particularly suited to certain settings, such as where legal norms do not apply or are unclear, or where the primary focus of the mediation is the relationship

(rather than legal rules, see Conley and O'Barr, 1990), often exemplified by community mediation.

Waldman was, however, well aware of the critical response described in Chapter 2, citing among others Abel, 1982; Auerbach, 1983; Fiss, 1984; Delgado *et al.*, 1985; Grillo, 1991 and Bryan, 1992. As suggested in the Introduction to this chapter she notes that mediation did not stand still, but rather developed new approaches to address the perceived threat to "principles that society holds dear" (Waldman, 1997, p. 725). The first of these she calls the "norm-educating" model (*ibid,* p. 723). Mediators in this tradition anchor the conversation in social and legal norms. This is not seen as limiting party choice, but rather as "enhanc[ing] autonomy by enabling parties to make the most informed decisions possible" (*ibid,* p. 732).

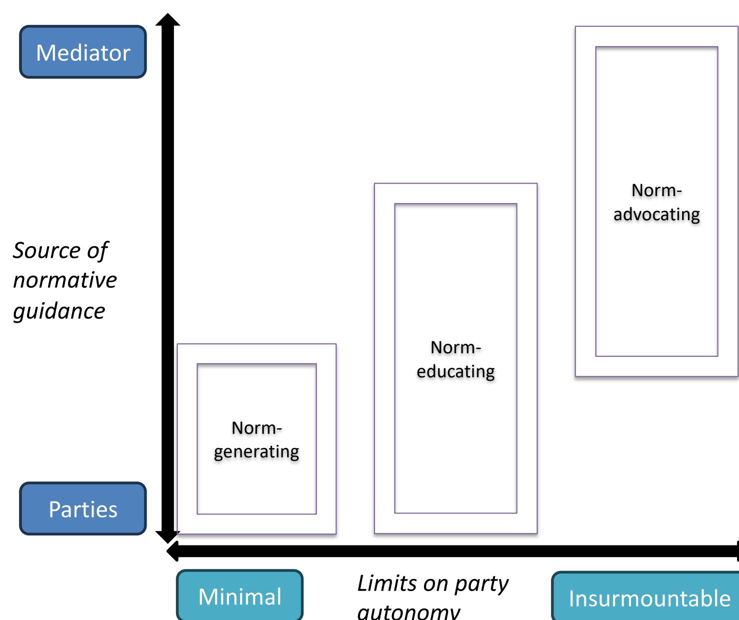
The subtle move from decision-making to <u>informed</u> decision-making reflects a strand of mediation scholarship concerned with mediation's purpose: is it to ensure conformity to the law, or to ensure party autonomy, or both (see B.1 below). Norm-educating mediators are clear: once participants are informed about the relevant legal and social norms, they make the decisions. Noticing that this elevates individual preference over wider societal considerations, Waldman offers some "qualities" (*ibid,* p. 739) to take account of in weighing when to apply the model. These include relative equality between parties so that a decision is the product of free choice rather than the will of the more powerful, and the impact on others outside the mediation. Even when parties choose not to apply the law, knowledge of the legal norm may still have helped one of them advance a claim they might not have been aware of, thus providing "an important bargaining chip" (*Ibid,* p. 742).

Furthest along Waldman's spectrum is the "norm-advocating model" (1997, p. 742). Here mediators are not content simply to introduce social and legal norms; they "insist… on their incorporation into the agreement" (*ibid,* p. 743). This model seems most responsive to critics' concerns, both about parties of unequal power and the

application of wider societal values. She cites examples such as end of life disputes, cases of environmental pollution and disability and discrimination claims under employment legislation. Perhaps heading off criticism that this approach, like Riskin's evaluative style, limits party autonomy, Waldman suggests that the differences between her three models may not be so great in practice. For example, if the norm itself is unclear or "open-textured" (*ibid,* p. 755) the mediator may, at least for a time, adopt a norm-generating approach. Nonetheless, she offers the norm-advocating model as a distinct approach arising out of the growing use of mediation techniques in highly contentious legal disputes.

Waldman did not provide a diagram to illustrate her model. If she had it might look like the following.

Diagram 3 Waldman's Typology of Social Norms in Mediation



As with Riskin's grid, this attempt to characterise mediator choices can usefully be applied to participants. To what extent did they wish for normative guidance? Seek it? Resist it? To what extent did they perceive it as biased, either towards the other party or towards an outcome preferred by the mediator? If they did not receive that guidance from the mediators, where else did they turn? And what role did the mediators' normative guidance, or lack of it, play in assessing the fairness and justice of the result? These are questions that can be investigated by empirical research, and the current study seeks to expand our understanding of the mediation experience from the perspective of its participants.

A.4. Kurtzberg and Henikoff's Rights/Interests Grid

1997 saw another attempt to respond to mediation's critics: "Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation" (Kurtzberg and Henikoff, 1997). These two former members of the Harvard Mediation Program had seen at first hand the efforts mediators made to deal with significant imbalances of resources and knowledge in landlord/tenant disputes, claiming: "Almost all mediators recognize that mediation is both dangerous and inappropriate in cases involving large power imbalances" (*ibid,* p. 76). Their article set out to counter what they saw as two blind spots in critiques of mediation: an "idealized view of adjudication" and a "narrow view of the role of law in mediation" (*ibid,* p. 54).

On the face of it housing disputes exemplify critics' fears, with parties of vastly unequal resources and tenants who are frequently ignorant of their legal rights and protections. Massachussetts housing law had seen a significant but complex extension of tenants' rights in the preceding decades, fuelling the fear expressed by Abel (1982) and others that poorer people would be deprived of the means to assert these newly granted legal entitlements by being referred to informal processes (see Chapter 2, B.3, above). Kurtzberg and Henikoff had also seen at first hand tenants'

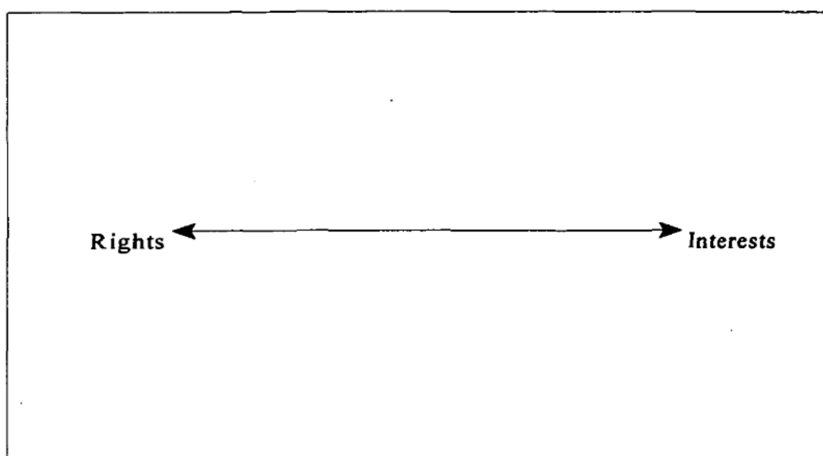
lack of assertiveness in court, in contrast to landlords who tended to be represented by experienced agents and lawyers.

Contrary to critics' assertion that adjudication is the best way to protect the disadvantaged, however, their research into housing court data revealed a range of glaring inequalities. They examined "summary process cases" (Kurtzberg and Henikoff, 1997, p. 71) in four courts, mostly dealing with non-payment of rent and evictions. 82% of landlords had lawyers compared to 8% of tenants. 72% of tenants failed to file an answer (defence) and only 12% knew to ask for discovery. The results were predictable: landlords were successful in 97% of eviction hearings, and not a single landlord was ordered to carry out repairs in any of the courts (*ibid,* p. 72).

Turning to mediation, they echo Riskin and Waldman in noticing the important role of the law in contemporary practice. Mediators: "often consider the law to be neither controlling nor irrelevant, but rather a germane reference point that enables the parties to reach a truly fair agreement" (ibid. p. 74). Those they observed aspired to strike a middle way between ignoring or imposing legal norms, in an effort to "free the parties from the law" (*ibid,* p. 75, attributing the phrase to Gary Friedman). The goal is to ensure people have a sufficient understanding of the law to be able to apply or reject it in reaching their own decisions. There are echoes of Waldman's norm-educating model (A.1.c above) and the growing influence of informed decision-making as a potential standard to ensure fairness.

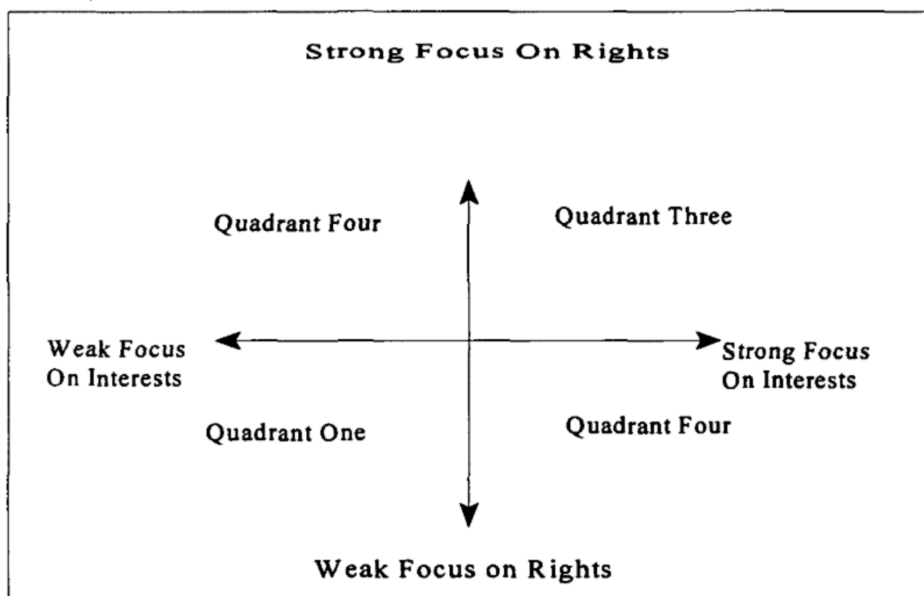
At the heart of their analysis are two concepts familiar to mediators: rights and interests. Rights refer to legal entitlements while interests speak to the broader range of considerations driving disputants, famously defined by Fisher, Ury and Patton as "needs, desires, concerns, and fears" (1991, p. 24). Kurtzberg and Henikoff notice that these are often presented as a form of zero sum game where the more mediators focus on one the less attention they pay to the other, as illustrated in their diagram, reproduced below.

Diagram 4 Kurtzberg and Henikoff's rights/interests dichotomy (1997, p. 78)




These authors suggest that by 1997 mediation practice had moved beyond this binary characterisation, using another grid to illustrate the development from *either/or* to *both/and*.

Diagram 5 Kurtzberg and Henikoff's rights/interests grid (1997, p. 78).




[Quadrant two (top left) appears to be mislabelled as quadrant four.]

There are evident similarities to Riskin's grid, with the focus on rights resembling the evaluative/facilitative spectrum and the focus on interests corresponding to problem-definition. Kurtzberg and Henikoff then applied this framework in examining four mediation services dealing with housing disputes, characterising most as operating in quadrant three. The main distinction between them was over how and when to introduce rights talk. There are echoes of Waldman's informed decision-making in one conclusion: "True empowerment, we would argue, entails making an informed, autonomous choice about one's own future" (Kurtzberg and Henikoff, 1997, p. 113).

Like the other two, above, this framework can be enlisted in analysing participants' thinking as well as mediator practice. It raises similar questions: how much choice were they given in the focus of the mediation? If the mediators kept the focus on interests, how did participants deal with questions of rights? And did the focus of the mediation, whether on rights or on interests, affect participants' view of the outcome?

To conclude this section, Menkel-Meadow's riposte and the three typologies or frameworks described above typify mediation scholarship up to the present day. Building on a foundation of critique, rebuttal and empirical research they do not set out to defend mediation so much as start along the next stage in its development, the painstaking work of continuous improvement (see B and C, below.) The authors might be described as critical friends. In contrast to some of those reviewed in Chapter 2 (for example Abel, 1982; Harrington, 1982; Fiss, 1984; Bryan, 1992; Nader, 1993) their purpose is not to "see off" mediation and return dispute resolution to the courts, but rather to improve it by offering novel ways of understanding an evolving practice.

I have suggested that these frameworks can also be enlisted in understanding mediation participants' choices as much as those of mediators, given that they probably share similar goals: ensuring that they are heard, that the process is fair, that they reach a resolution (at reasonable cost and speed) and that the outcome is not so unfair as to unravel. All four pose challenging questions about the mediator's role in achieving these goals, such as how much normative or legal information they provide (via evaluation, norm-education or rights focus) and how well they support parties in conducting their own negotiations (via facilitation, norm-generating or interests focus).

The next section is necessarily more selective, pursuing three particular threads from the large body of scholarship on mediation since the late 1990s. The first explores two answers to the question of mediation's overriding goal: self-determination and informed decision-making. The second considers the notion of mediator neutrality and the third examines the concept of procedural justice.

## B. Developments in mediation theory

### B.1. Self-determination and informed decision-making

Proponents of mediation have stressed its distinctiveness from adjudication on grounds other than simple efficiency: the "qualitative, justice, substance axis" rather than the "quantitative, efficiency, process axis" (Menkel-Meadow, 1985, p. 486). One claim that continues to animate discussion is that mediation promotes (and should promote) self-determination, in contrast to the imposed judicial decisions of the courts. This early statement typifies the hopes of some pioneers: "People have the right to make their own decisions, and mediation guarantees this right" (Haynes and Haynes, 1989, p. 14).

In contrast to critics like Harrington and Merry, who characterise mediation outcomes as imposed or at least manipulated (Chapter 2, B.2.a, above), this vision

positions the parties themselves as the guarantors of fairness, on the assumption that most people will not make a decision they regard as unfair or unjust. The principle appears in some ethical codes for mediators (American Arbitration Association, American Bar Association and Association for Conflict Resolution, 2005; Scottish Mediation, 2008; Mediators' Institute of Ireland, 2021). The US "Model Standards of Conduct for Mediators" defines it as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome" (American Arbitration Association, 2005, 1: A). Numerous scholars have listed self-determination among mediation's essential qualities (for example Kurtzberg and Henikoff, 1997; Menkel-Meadow, 1997; Nolan-Haley, 1999; Schwartz, 1999; Welsh, 2001; Gunning, 2004; Deason, 2005).

Some US writers have linked self-determination to the nature of their political order: "The basic deal in a democracy is that we may not always get our way but we will always have our say, and in return we will remain loyal citizens" (Mayer, 2000, p. 19; see also Bingham, 2004; Bush and Folger, 2005). Others have noted the Enlightenment values embedded in the "North American model" of mediation (Lederach, 1986, p. 17), with Lederach highlighting its individualism and Pinzon (1996) its rationality. Self-determination can be seen as elevating individual preference over other normative claims, either from law or morality (Cobb, 2001; Irvine, 2007). In this sense mediation becomes one of the "arenas of public choice" which, since the Enlightenment, are no longer viewed as:

> places of debate, either in terms of one dominant conception of the human good or between rival and conflicting conceptions of that good, but as places where bargaining between individuals, each with their own preferences, is conducted (MacIntyre, 1988, cited in Irvine, 2007, pp. 24/25).

The emphasis on individual preference as the warranty of fairness alarmed both critics and some supporters of mediation, who pointed out the potential for oppression where one party has more power or resources (Chapter 2.B.3. and this chapter, A. above). This apparently common-sense concern – that people will use

their endowments for their own advantage – has resonated with a number of mediation writers, who have in turn proposed ways to modify or even supplant self-determination. Waldman's "psychobiography" (2004, p. 247) of then current thinking on justice in mediation divides scholars into "self-determination theorists" (pp. 251-263) and "social-norm theorists" (pp. 263-270). As her title suggests, this attempts to personalise the two approaches in the attitudes and experience of those proposing them. Self-determination theorists are portrayed as optimistic about human capacity while maintaining considerable scepticism about the law's ability to deliver justice, like judges who: "distrust text and trust people" (*ibid,* p. 251). Social-norm theorists, on the other hand, are more pessimistic about "Darwinian encounters at the bargaining table" (*ibid*. p. 260) and see the law as a useful, if not always perfect, corrective to protect the vulnerable. Waldman sees similarities to another subset of judges who: "distrust people and trust text" (2004, p. 251).

It is difficult to discern a resolution of this dichotomy in the years since 2004, although some would see the distinction between the two camps as less categorical. For example, Wolski (2015) views lawyers as potentially supporting party self-determination through their commitment to advocacy (see also Korobkin, 2005). Sourdin takes a similarly integrative approach, suggesting a greater likelihood of delivering justice when formal institutions work together with "processes that support self-determination and participation" (2016, p. 165). Others employ self-determination as a widely shared starting point, if not quite a straw man, for proposals to improve mediation. Stulberg considers replacing or enhancing it with "informed decisionmaking *[sic]*" (2005, pp. 937/938) to better promote fairness. Midgley and Pinzon (2013) introduce a systemic perspective to conventional notions of self-determination in the hope of improving participants' satisfaction with their own agreements. Holtzworth-Munroe (2011) echoes the concerns of Grillo (1991) and others about the limits of self-determination when one party has experienced intimate partner violence, suggesting a more proactive role for mediators both before and during any joint meeting. More recently, Field and Crowe enlist a

modified version of self-determination, "relational party self-determination" (Field and Crowe, 2020, p. 186) in their critical reassessment of the principle of neutrality.

It seems unlikely that these debates will be resolved in the near future. Self-determination must imply being able to make choices even if they are to one's disadvantage. For many of mediation's pioneers it carried the more specific meaning of enabling parties to turn their back on legal norms and craft agreements based on their own criteria. Without this component some questioned whether a process could be described as mediation at all (Stulberg, 1981). Others believed that mediators could, or even had a duty to, reduce the risk of unfairness by taking a more proactive role.

One variant on this comes from the related ideas of informed decision-making and informed consent. They seem to offer an appealing middle way, not dissimilar to Waldman's "norm-educating" model (A.3. above) though more narrowly focused on legal norms. The aim is to level the negotiation playing field by ensuring that both parties are in possession of the same legal information. Nolan-Haley borrowed the term "informed consent" from healthcare, suggesting it could act as a "guiding principle for truly educated decisionmaking" (Nolan-Haley, 1999, p. 775). In her view mediators can play a role in ensuring parties are sufficiently well-informed to limit the risk of injustice, particularly where mediation is mandated by the courts. Both Waldman (1997) and Kurtzberg and Henikoff (1997) saw their models as supporting or enhancing informed decision-making, and the idea continues to attract mediation scholars (Macfarlane, 2002b; Colatrella, 2014; Keet, 2018). Others, however, question whether mandatory mediation in busy courts can actually deliver informed consent (Reid and Doyle, 2007; Noone and Ojelabi, 2014b; Waldman, 2017; Welsh, 2017).

B.2. Neutrality

The idea of neutrality is so embedded in contemporary perceptions of mediators and other dispute intervenors that the word "neutral" has become a noun. Even when examining postmodernism's challenge to concepts like objectivity and neutrality, Menkel-Meadow talks of "third-party neutrals" (1991, p. 37). Yet the early mediators discussed in Chapter 2 (A.1. above) do not appear to have concerned themselves with it. Kings, local warlords and senior religious figures saw their qualification to act as mediators in military or spiritual power, not neutrality.

Space does not permit a more in-depth history of Western thought but for one perspective on the central place of neutrality in Western justice systems I draw on Alasdair MacIntyre (1988; and see Irvine, 2007). In his view the Enlightenment and subsequent rise of liberal individualism marked a decisive turn away from reliance on religion as the normative foundation for ordering society. The deadly potential of religious wars meant states had to find ways of resolving conflicts that were independent of competing truth claims: "The function of that system is to enforce an order in which conflict resolution takes place without invoking any overall theory of human good" (1988, p. 344). This placed the justice system in a unique position of societal influence:

> the mark of a liberal order is to refer its conflicts, for their resolution, not to those [philosophical] debates but to the verdicts of its legal system. The lawyers, not the philosophers, are the clergy of liberalism (*ibid,* p. 344).

It follows from this that neutrality, the appearance of being above the fray of individual and group preferences, has become a foundational, even sacred, value for the justice system. Governments may change but justice cannot, and law must appear independent of any particular moral, ethical or political theory: "the rule of law is morally neutral, like a sharp knife as good for immoral tyrants as for just governance" (Finnis, 2010, p. 247). Thus if mediators and other interveners want to operate credibly within the justice system they too must be neutral (Zamir, 2011).

Neutrality has been described as a “folk concept” (Cobb and Rifkin, 1991, p.37) and “central myth” (Silbey, 1993, p. 350) for mediation. Fuller’s early analysis of mediation’s forms and functions presents it as an essential stance: an individual will decide “to remain neutral in order to qualify for the role of mediator” (Fuller, 1971, p. 313). Neutrality often appears in ethical codes for mediators (Centre for Effective Dispute Resolution, 2008; Scottish Mediation, 2008; College of Mediators, 2014; Law Council of Australia, 2018; Mediators’ Institute of Ireland, 2021), although some replace or supplement the word with the similar but distinct term “impartiality” (CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, 2002; American Arbitration Association, American Bar Association and Association for Conflict Resolution, 2005; Law Council of Australia, 2018). One of the most forceful advocates for neutrality is Stulberg (1981, 2005, 2012) for whom anything mediators do to influence the outcome of a dispute is a betrayal of their commitment to party self-determination.

It is hardly surprising that such a broad and imprecise term has come in for robust scrutiny. It can imply any or all of: indifference (Heck, 2016), passivity (Silbey, 1993), equidistance and the absence of bias (Cobb and Rifkin, 1991) and, as the above introduction suggests, allegiance to the principles of the legal system (Cobb and Rifkin, 1991). The critiques of neutrality fall into two strands, one descriptive, questioning its existence or at least attainability, the other normative, questioning its desirability. Within the first strand a number of scholars have viewed neutrality as a logical impossibility because it ignores the power of the mediator to shape the discourse available to parties (Susskind, 1981; Cobb, 1991; Rifkin, Millen and Cobb, 1991; Riva-Mossman, 2009). Greatbatch and Dingwall’s empirical research found family mediators strongly limiting party choice when proposals went beyond what they viewed as acceptable, “the parameters of the permissible” (Dingwall and Greatbatch, 2001, p. 380). Cobb goes further and suggests mediation needs to move beyond “first-generation” (2001, p. 1029) practice, in which mediators sought to mask their moral commitments via the language of neutrality, and replace it with a

"highly engaged mode of mediation practice that recognizes that mediators participate in the social construction of meaning" (*ibid,* p. 1028).

Those opposed to neutrality as a mediation principle tend to stress its failings at the level of fairness and social justice. Some worry that its implication of moral indifference authorises mediators to preside over unfair settlements (Maute, 1990; Mulcahy, 2000; Waldman, 2017). Coben presents neutrality alongside self-determination as one of mediation's "Two Towers" (2004, p. 66), proposing that it be replaced by an acknowledgement of mediator influence and an explicit commitment to "social equality and other fundamental aspects of justice" (*ibid.* p. 85). Jarrett traces both neutrality and impartiality to the need for respectability within the legal field, but thinks they are unsuitable for the work itself, preferring "mediation fairness" (2013, p. 10) as an ethical foundation. Field and Crowe call for a move away from the mediator-centred value of neutrality to the more party-centred "relational self-determination" (2020b, p. 3). Rather more forcefully, De Girolamo claims that procedural justice requires "an active mediator, rather than an anodyne facilitator who is portrayed as neutral, yet in action is not" (2019, p. 835) and that mediators achieve this by taking on a range of identities, including "party, advisor and facilitator" (*ibid,* p. 845).

The relevance of neutrality to the current study arises from the twin concerns identified in this section. One the one hand, if neutrality is unattainable and the mediators did in fact exercise power and influence, does this appear in participants' accounts? If so, in what direction did participants feel pushed? On the other hand, was there evidence that a strong allegiance to the idea of neutrality led some mediators to ignore or collude in unfair outcomes? Both possibilities are considered in the current study and discussed in Chapters 5 and 6, below.

B.3. Procedural justice

Almost fifty years ago John Thibaut and his colleagues, inspired by Rawls' discussion of "pure procedural justice" (1971, p. 75), launched the empirical study of legal processes (Thibaut *et al.*, 1974; Walker *et al.*, 1974). Their work has been highly influential, spawning a cottage industry of procedural justice scholarship (see, for example, MacCoun, 2005; Tyler, 2006). It draws this broad conclusion: when ordinary people come into contact with legal authorities, there is greater consensus about what makes for a fair *process* than there is on what comprises a fair *outcome*. Earlier researchers suggested that what mattered most was "decision control" – the belief that one could affect the outcome by participating in the process, but Tyler and others' later work proposes that "neutrality, lack of bias, honesty, efforts to be fair, politeness, and respect for citizens' rights" (Tyler, 2006, p. 7) provide a normative foundation for the phenomenon. This has an impact on people's respect for the law and their likelihood of compliance: "If unfavourable outcomes are delivered through procedures viewed as fair, the unfavourable outcomes do not harm the legitimacy of legal authorities" (*ibid,* p.107).

Researchers have examined the impact on these "procedural justice effects" of culture (Leung and Lind, 1986, p. 1134); status (Brockner *et al.*, 2001; E.Allan Lind, 2001; Chen, Brockner and Greenberg, 2003); context, including the workplace (Bollen, Ittner and Euwema, 2012); civil justice (Lind *et al.*, 1990; Solum, 2005; Moorhead, Sefton and Scanlan, 2008; Tyler and Hollander-Blumoff, 2011) and negotiation (Blumoff, 2011). Mediation is another context to which attention has turned and scholars have conducted empirical studies to examine the effect, if any, of procedural justice on outcomes and client perceptions (Pruitt *et al.*, 1990; Shestowsky and Brett, 2008; McDermott and Obar, 2010; Tyler and Hollander-Blumoff, 2011; Bollen, Ittner and Euwema, 2012; Douglas and Hurley, 2017). Others have applied procedural justice findings to critique mediation practice (Welsh, 2001a; Welsh, 2001b; Welsh, 2002; Collett, 2008).

Beyond the common sense notion that people appreciate being well treated, one consistent claim arising from procedural justice research is that most people's assessment of a fair procedure is independent of the result (although this has been questioned; see, for example, Bollen, Ittner and Euwema, 2012; Creutzfeldt, 2014; Creutzfeldt and Bradford, 2016). The idea is that, even if they lose, people on the receiving end of a decision are still likely to view it positively if they have been fairly treated. Tyler calls this effect the "cushion of support" (2006, p. 30) and Solum calls procedural justice a "very great good" because it gives "citizens a principled reason to respect the outcomes of civil process" (2005, p. 321). Conlon's review of procedural justice literature notes the development of a further justice dimension, interactional justice, which was in turn subdivided into interpersonal justice: "the sensitivity, politeness, and respect people are shown by authority figures during procedures" (2006, p. 245), and informational justice: "the explanations or information provided by decision makers as to why certain procedures were used or why outcomes were distributed in a particular way" (*ibid.* p. 249).

Mediation seems a strong contender for procedural justice effects. Mediators are trained to: i) encourage parties to "present their views, concerns, and evidence;" ii) to demonstrate they have heard and taken those views into account; and iii) to treat parties "in a dignified, respectful manner" (Welsh, 2001a, p. 820), all factors associated with procedurally fair processes. Collett suggests that pre-mediation efforts to build rapport should contribute to interpersonal justice while expressions of "substantive knowledge" (2006, p. 250) should enhance participants' sense of informational justice.

Less encouragingly for mediation, findings from early procedural justice research point to adversarial adjudication as the preferred option for most participants (Thibaut *et al.*, 1974; Walker *et al.*, 1974; Lind *et al.*, 1990). However, Thibaut *et al's* earliest research is experimental rather than empirical, drawing on an all-male cohort of graduate students. The experiment uses a singularly lurid set of facts involving a

friendship, heavy gambling and a bar fight that turns violent, with one party pushing the other to the floor and the other retaliating by stabbing him in the stomach with a piece of glass. Participants were assigned to one of the two roles and asked to choose which of five procedures they would prefer for the resolution of this dispute: inquisitorial, single investigator, double investigator, adversary and bargaining. The resultant finding of a preference for the adversary system seems unsurprising given the quasi-criminal situation and potentially fraught relationship between the parties (see Chapter 2.B.2.a. above, for more on the blurred line between civil and criminal justice in the USA). Mediation was not one of the options offered.

Thirty years later Shestowsky and Brett (2008) set out to investigate procedural justice effects among real disputants, hoping to improve on earlier post-facto studies by using a pre- and post-procedure survey to elicit views on what type of procedure they hoped for and received. From a small sample they found that those who wanted an adjudicative procedure tended to like the outcome it produced, while those wishing for a collaborative approach were less satisfied with the end result. Shestowsky later revisited the endeavour in three sites, recruiting 335 litigants in court-connected schemes that offered mediation, arbitration and adjudication (2018, p. 75). The most significant factor in their process choices was in fact their attorney's advice, followed by minimising cost and time (*ibid,* p. 77), both "quantitative-efficiency" grounds (Menkel-Meadow, 2014, p. 1165). Normative considerations like fairness and voice featured significantly less among a list of almost wholly instrumental factors, and Shestowsky acknowledges the potential influence of lawyers' perspectives on party preferences (2018, p. 77).

The current study, with its sample of unrepresented people, seems well placed to investigate participants' views on procedural justice in mediation. That is not, however, its primary focus. The catalyst for this research was Genn's Hamlyn lecture, in which she repeatedly used the term "substantive justice" (2010, pp. 113, 116, 117, 118 and 122) in her critique of mediation (see Chapter 1.B. above). This was not by

chance, and in an earlier chapter Genn dismissed procedural justice as irrelevant outside the courtroom, when in her opinion negotiating parties are “simply laying the ground for settlement” (2010, p. 69).

Nonetheless, in depth conversations about participants’ experience of small claims mediation are likely to reveal their views on the fairness and justice of the process as well as its outcome. These are reported in the section on the study’s pilot phase (Chapter 4.E.4.b. below) and in the published article summarising those findings (Irvine, 2020, bound in at the end of this thesis).

## C. Empirical Research

### C.1 Narrowing the field

A great deal of empirical research has been carried out into mediation since Sander’s (1976) bold speech at the Pound Conference. Wall and Dunne’s (2012) overview of 350 articles on mediation expresses disappointment at the absence of data and calls for more “studies of the mediators', disputants', and third parties' reactions to their outcomes” (*ibid.* p. 239). They highlight a difficulty for the present study: much existing research sheds little light on the place of justice in the thinking of small claims mediation participants. Given the array of critiques alleging the absence of justice for this group it might be imagined that they would be a focus for researchers.

Instead, a major strand of mediation research has studied mediators more than consumers, examining the wide array of approaches and techniques they use. These studies commonly observe or record mediators in experimental conditions (Silbey and Merry, 1986; Wall and Chan-Serafin, 2010; Kressel *et al.*, 2012; Kressel, 2013; Fischer-Lokou *et al.*, 2016; Wall and Kressel, 2017; Damen *et al.*, 2020) or while conducting real mediation cases (Greatbatch and Dingwall, 1989; Alfini, 1991; Zubek *et al.*, 1992; Jacobs and Aakhus, 2002; Prince and Belcher, 2009; Roberts, 2009; Wissler and Hinshaw, 2021). Some studies survey participants (usually lawyers) for

their views on the mediators (Daniel, 1995; Posthuma, Dworkin and Swift, 2002; Wissler, 2002; Alberts, Heisterkamp and McPhee, 2005; Galin, 2014; Eisenberg, 2016; Hill, 2018; Riera Adrover, Cuartero Castañer and Montaño Moreno, 2019).

Another focus has been effectiveness: does mediation deliver its promised benefits to the justice system? Numerous studies have examined settlement rates (Clarke and Gordon, 1997; Wissler, 1997; Hann *et al.*, 2001; Samuel, 2002; Genn *et al.*, 2007; Bingham and Hallberlin, 2009; Bingham *et al.*, 2009; McDermott and Obar, 2010; Charkoudian, Eisenberg and Walter, 2017). Wissler's (2004) summary of 52 US studies in small claims, general civil and appellate cases found that settlement rates were examined in almost all. Others have looked at cost or value for money (Ross and Bain, 2010; Boon, Urwin and Karuk, 2011; Wall and Holley, 2015).

Even where research has sought the views of mediation's end users, two factors limit its relevance to the current study. First, participants are seldom asked their views on the fairness or justice of the outcome. If they are asked about fairness it is generally in relation to the process (Wissler, 2004; Genn *et al.*, 2007; Charkoudian, 2014; Sourdin, 2015a). When it comes to outcome, researchers tend to enquire about satisfaction (Pearson and Thoennes, 1985; Wissler, 1997; Alberts, Heisterkamp and McPhee, 2005; Mason and Sherr, 2008; Prince and Belcher, 2009; Wall and Dunne, 2012; Galin, 2014) and one study asked about the fact of settlement and satisfaction with the justice system (Eisenberg, 2016).

A second factor limiting the number of comparable studies is the frequent predominance of legal representatives among the sample of mediation participants. In a range of research aimed at increasing our understanding of mediation, the parties themselves have made up, variously, 7% of the sample (Daniel, 1995); 20% (Hann *et al.,* 2001); 0% (Macfarlane, 2002a); around half (Wissler, 2002); 39% (Posthuma, Dworkin and Swift, 2002); 36% (Genn *et al.,* 2007); and 6% (ABA Section of DIspute Resolution, 2008). Wissler's more recent meta-analysis of 49 studies,

which aimed to examine the effectiveness of various mediator techniques, found that: "fewer than half of the studies assessed disputants' perceptions of the mediator, the mediation process, or the outcome" (2017, p.10).

The following selection of literature, therefore, focuses primarily on research in which the sample either comprises only participants or where the two cohorts (participants and representatives) are readily distinguished and the number of participants is sufficient to provide significant results. I also looked for samples made up wholly or largely of unrepresented people. While represented parties' views have been sought in several studies their perspective on mediation may be subject to "attorney influence" (Shestowsky, 2018, p. 82). Turning from sample to findings, I look primarily to research featuring participants' views on the fairness and/or justice of the outcome.

C.2 Participants and substantive justice

The principal interest of this study is substantive justice: mediation parties' judgments about the fairness and/or justice of the outcome. The following studies address outcome justice to some extent, though it was not the sole focus in any.

In one of the earliest detailed empirical studies of mediation, McEwen and Maiman (1981) examined a small claims mediation project started in the state of Maine in 1977. Their sample consisted of 403 cases, from which one party was interviewed in 98% and both in 75%, supplemented by 70 recordings of mediation sessions and notes on 30 trials. They examined a wide range of issues including settlement rate (66%) and settlement amount, comparing that to sums obtained at trial. Noting earlier critiques that parties' perceptions of fairness would be influenced by success – "winners should judge the outcomes 'fair' and losers 'foul'" (*ibid,* p. 257) – they presented participants' fairness judgments alongside their relative success. The correlation between outcome and fairness was significantly reduced for the mediation group compared to those who had gone to trial. 54% of plaintiffs who

settled mediations for no money still thought the outcome fair (compared to 8% losing at trial), as did 67% of respondents paying almost the full amount (compared to 37% ordered to do the same at trial) (*ibid,* p. 258). They also compared plaintiffs and defendants within the same case and found their ratings much closer together in mediation than trial.

However, McEwen and Maiman prefigure one of the findings of the current study (see Chapter 6, below) by asking: "why do one-third of the litigants agree to settlements that they later claim to be *un*fair? [italics in original]" (*ibid.* p. 259). Their study design did not allow for in-depth follow-up questions so their response was a quantitative one. They noticed a negative correlation between the time spent in mediation and fairness rating, with both parties finding the outcome fair in 61% of mediations lasting 10 minutes or less, while that reduced to 24% for mediations of over half an hour. They speculate that this may have been due to greater mediator pressure in more contentious, and thus longer, cases. Overall, however, the study's quantitative approach, largely based on binary yes/no questions, is a limitation and highlights the need for in-depth, qualitative research into subtle, attitudinal issues like fairness.

Some quantitative studies include outcome fairness but limit their value for the current study by asking parties to rate it on a simple binary scale, forcing participants to choose between the outcome being fair or unfair. Wissler's (1997) evaluation of mandatory mediation in Boston makes a fleeting mention of outcome fairness. Based on a sample of 171 telephone interviews she could detect no difference in participants rating the agreement as fair whether mediation was mandated or voluntary (*ibid,* p. 584). She did, however, find that mandatory mediation was associated with a significantly lower percentage rating the process as fair (58% v 84% for voluntary mediation; *ibid,* p. 584). In a later study of mediation schemes in nine Ohio courts, Wissler analysed responses to 7,289 questionnaires, of which 2,502 were from parties (2002, p. 703). In a similarly brief section on outcome fairness she

reports that, where cases settled, 52% of parties thought the outcome very fair, and 22% somewhat fair, compared to 75% of attorneys finding the settlement very fair and 22% somewhat fair (*ibid,* p. 667).

Hann *et al.'s* (2001) evaluation of an Ontario mandatory mediation programme asked both lawyers and their clients to compare the fairness of their settlement to what would have happened in litigation. In one city (Ottawa) 50% of lawyers and 40% of litigants thought it was fairer, while in Toronto that the figure was 31% for both lawyers and parties (*ibid,* p. 101). However, given the difficulty of estimating litigation outcomes, even for lawyers, these figures seem of limited value.

Genn *et al.'s* (2007) detailed evaluation of two London court mediation schemes provides rich data on a range of topics. The schemes had been inaugurated in the aftermath of largely positive impacts for the Ontario mandatory mediation schemes reported in Hann *et al.* (2001) and Macfarlane (2002a), and the evaluation takes a particular interest in the effectiveness of encouragement or compulsion to mediate prior to a hearing. "Quantitative-efficiency grounds" (Menkel-Meadow, 2014, p. 1165) feature strongly in the report as it explores the reasons given by parties (172) and their lawyers (308) for and against mediating. When it comes to the first (compulsory) scheme a great deal of space is devoted to mediation's drawbacks and low settlement rates. The only reference to parties' evaluations of the outcome is headed "Unhappiness despite settlement" (*ibid,* p. 105) featuring complaints about cost, intransigent opponents and frustration at the mediator's use of shuttle diplomacy. The somewhat shorter list of mediation's benefits is entirely instrumental and makes no mention of fairness or justice, stressing instead cost saving and the opportunity to hear the other side's case. Unsurprisingly the section on cases that did not settle is even more damning (and see Chapter 6.D. below).

When it comes to the second, voluntary, scheme the data are somewhat richer and more balanced between 130 lawyers and 136 of their clients (*ibid,* p. 153). Curiously,

though, while the survey asked both lawyers and parties about mediator neutrality (with generally very positive responses) it was only solicitors who were asked about: "how fairly the mediation was conducted" (*ibid,* p. 170). It seems that process fairness was not seen as something non-lawyers could usefully offer a view on. There is one short section on outcome fairness which provides no overall rating, simply noting that there was little difference between claimants and defendants. The researchers provide somewhat more information on unfairness, noting that more claimants than respondents thought the outcome unfair in settled cases (*ibid,* p. 177). Of those rating the settlement as unfair, 64% thought it was for the wrong amount and 14% said: "there was no justice in the settlement" (*ibid,* p. 177).

Long's (2003) study of compliance with adjudicated and mediated settlements was too small (39 defendants in a US state civil court) to allow for meaningful comparison between those who did and who did not comply. However, its findings on the reasons given offer a glimpse of participants' distinctive ways of thinking about outcomes depending on their source. In relation to court judgments, the most frequent reasons for compliance were "a sense of duty to obey the law" (50%) and a belief that the "case outcome was fair" (22%) (*ibid,* p. 149). When it came to mediated settlements, the two most frequent reasons were "because they had given their word to the other party" (*ibid.* p. 147) and "the desire to end the conflict and avoid spending more time and energy on the dispute" (*ibid,* p. 148). These findings are relevant to the current study in suggesting that participants may apply different criteria in evaluating court judgments and settlements they have devised themselves. In her, admittedly small, sample Long found no instances where participants listed fairness as a reason for complying with mediated agreements; instead they stressed their own morality alongside a pragmatic wish to end the dispute.

Prince and Belcher (2009) conducted a detailed evaluation of a small claims mediation project in Exeter, in the South West of England. They conducted 126 surveys, 45 telephone interviews and 151 post-mediation interviews with participants in 255 cases

(2009, pp. 21-25). While their principal interest was efficiency and value-for-money, and they did not enquire about outcome fairness, responses to their qualitative interviews shed some light on participants' thinking. Some were positive about their experience, particularly valuing the chance to speak to the other party and the fact that the case was over (*ibid,* p. 81, and see Chapter 6.C.3.c. below). One participant, prefiguring the current study's findings on proportionality (see Chapter 5.A.1. below), said "I am a great believer in compromise, it saves wasting more expensive people's time" (*ibid,* p. 81). In contrast, one survey respondent complained about the result: "I don't feel we got justice, if I had my time again I would not have used mediation. We felt pressured to compromise and the defendant got off light" (*ibid,* p.87, and see Chapter 6.D, below). Another felt deeply aggravated by the other party's behaviour, but explained "I made a commercial decision to pay vastly reduced sum at mediation to avoid large fees, time etc on fighting through the court hearing" (*ibid.* p. 89).

Some survey-based studies have examined outcome fairness via a Likert scale, typically asking participants the extent to which they agree with a statement such as "the agreement was fair." For example, Charkoudian's study of Baltimore civil claims, based on a sample of 361 parties, reported an average rating of 3.67 for the statement "outcome was fair" (2014, p. 19). The standard deviation of 1.21 was the highest of all their outcome measures, suggesting a wide variation among participants and further underlining the need for additional, in-depth, research on the topic.

Ross and Bain (2010) conducted an evaluation on a more modest small claims mediation pilot in two Scottish courts, including Glasgow Sheriff Court, one of the sites of the current study. The total number of cases mediated over the 18 months of the project was 138, with 107 settling (*ibid,* p. 36), and 42 surveys were returned. Participants were asked about process fairness, with most agreeing or strongly agreeing that it was fair; however, when it came to outcome they were only asked if it was reasonable, with a fairly even spread over responses in all five points on a Likert scale (*ibid,* p. 134). Participants were, however, asked if the outcome was in their

favour. The majority answered “completely” (31) or “on balance” (15), with only seven saying it was on balance against them and two that it was completely against them. Five thought it was a draw (*ibid,* p. 50).

McDermott and Obar (2010) surveyed 1,464 participants in employment discrimination mediation via the EEOC (Equal Employment Opportunities Commission) across the US. Their main interest was to discover whether procedural or distributive fairness had greater impact on the likelihood of settlement, and included in the survey questions such as “satisfied with fairness of session,” which they list under “distributive elements” (*ibid.* p.8), suggesting they consider it linked to outcome fairness. They found almost no correlation between this result (which was 4.15 for charging parties, effectively claimants, and 4.34 for respondents) and settlement, leading them to this conclusion: “the perception of distributive outcome or justice is not influential in the dispute resolution process” (*ibid.* p. 18). No in-depth examination of participants’ fairness judgments took place.

Qualitative research has become more common in recent mediation scholarship. However, as with other forms of research it has rarely been employed to deepen our understanding of participants’ views on the fairness or justice of the outcome. More commonly researchers investigate mediators’ perspectives (Kressel *et al.*, 2012; Ojelabi and Noone, 2013; Noone and Ojelabi, 2014a; Baitar, Mol and Rober, 2016; Douglas and Hurley, 2017). This may be because access to these professionals is easier to attain than access to their clients, particularly given the confidential and, to some, distasteful subject matter of conflict and disputes.

Genn and Paterson’s large scale study of Scottish people’s approach to “justiciable problems” (2001, p. 20) did contain a qualitative element (twenty nine interviews). Only a small proportion of their overall participants had used mediation. When asked about the outcome three said it was fair and one that is was not (*ibid,* p. 215). The

sample is too small to offer much beyond a glimpse of mediation in action, although this seems to have been in family and employment disputes.

A more directly relevant study interviewed 36 people who had used a small claims mediation service in two Scottish courts, including Edinburgh Sheriff Court, the other site of the current research (Blake Stevenson, 2016). The interviewers asked participants two direct questions about the outcome: was it what they expected and "whether they regarded it as fair" (*ibid.* p. 26). In terms of meeting expectations, responses were mixed. One said "Almost in that I won. I didn't get the monetary recoup that I wanted so it was successful to a limited degree" (*ibid.* p. 26). At the same time a number accepted that the solution allowed them to avoid going to court.

The researchers noted a link between expectations being met and outcome fairness. If the outcome went some way to meeting expectations, participants tended to view it as fair, but if it fell far short of what they wanted they did not. This suggests a link between perceptions of fairness and result (substantive or distributive justice) independent of how well the mediator handled the case (procedural justice). Some acknowledged having to compromise but still rated the outcome as fair on balance (*ibid,* p. 27). The current study will consider the impact of success or relative success on participants' evaluation of fairness and justice (see Chapter 6, below).

C.3 Conclusion

In this inevitably selective review I have attempted to set out the empirical research with the most direct bearing on the current study. This involved a considerable process of narrowing, first in relation to subject matter, then regarding participants and finally in terms of methods. With the sole exception of a 2016 Scottish study, whose breadth of subject matter militated against an in-depth focus on outcome fairness, I have not located another study that uses qualitative interviews to understand participants' perceptions of substantive justice and how they are arrived at. In the next chapter I turn to the methodology employed in the current study.

# Chapter 4 Methodology

## Introduction

This doctorate was inspired by a nagging sense that the prevailing wisdom in critical mediation scholarship was missing something, or rather missing someone. By discounting the views of non-legal actors and privileging those of the "juridical field" (Bourdieu, 1987) socio-legal research into mediation has tended to arrive at conclusions supportive to legal professionals' continuing pre-eminence in matters of justice. In this regard it achieves what Bourdieu predicts: maintenance of monopoly via "the disqualification of the non-specialists' sense of fairness" (1987, p. 828).

The present research has a corrective impulse. Macaulay's pioneering socio-legal work on contracts was motivated by an "implicit model (to what extent, if at all, is the picture being taught in law schools accurate?)" (Halliday and Schmidt, 2009, p. 22). My implicit model could be framed as this: to what extent, if at all, is the picture of mediation being presented by socio-legal scholars accurate? More specifically, how accurate is the portrayal of mediation as potentially unjust, and of mediators as indifferent to the issue? As the literature review (Chapters 2 and 3, above) sets out, much of the critical comment on mediation appears to be founded on a) jurisprudential and theoretical concerns about its impact on the development of the law; or b) an intuitive assumption that the strong will oppress the weak unless a judge prevents it; or c) empirical research in which the perspective of non-lawyers is confined to matters considered within their grasp: satisfaction, procedural justice and individual fairness. Unsurprisingly the conclusions reinforce the juridical field's claim to be solely capable of delivering substantive justice and, by happy coincidence, its monopoly.

An implicit model falls short of a hypothesis in that it makes no predictions of the type "if X, then Y". On the other hand it goes further than purely exploratory research, which sets out to investigate relatively novel phenomena without predicting the likely result. The implicit model is more like a loosely held hypothesis, open to confirmation or rejection; the resulting research could be described as "confirmatory" (Miles et al. 2014, p. 39).

In describing the chosen methodology it is helpful first to narrate the journey from animating impulse to interview-based qualitative study.

**A. Initial proposal and refinement**

The initial research proposal posed the question: "are mediation outcomes substantively just?" (Irvine, 2014) The question was informed by a number of factors:

- the experience of reviewing and teaching critical scholarship on mediation, much of it focused on mediation's failings in this regard;
- listening to a prominent socio-legal scholar proclaim:
  [Mediation] does not contribute to substantive justice because [it] requires the parties to relinquish ideas of legal rights during mediation and focus, instead, on problem-solving…. The outcome of mediation, therefore, is not about *just* settlement it is *just about settlement*" [emphasis in original] (Genn, 2010, pp. 116-117);
- many years of mediation practice in "the shadow of the law" (Mnookin and Kornhauser, 1979);
- a persistent observation that issues of justice and fairness appeared to be of pressing importance to clients.

The initial proposal had three sub-questions:

1) How do mediation outcomes compare to litigated outcomes in Scottish small claims actions?
2) How do parties to these actions view the justice and fairness of the outcomes?
3) Can mediation claim to bring about just outcomes to legal disputes?

As a naïve researcher (Gokah, 2006) I had not yet clarified the philosophical foundations on which such a study needs to rest (Grix, 2010, p. 57; and see below). The following narrative is not intended to suggest that these foundations are unimportant; rather to illustrate the iterative process by which the current methodology came to be chosen. Reflexivity is one of the foundations of credibility in qualitative research (Adam *et al.*, 2008; Webley, 2010).

A.1. First person voice

It is necessary to explain my use of the first person voice in this thesis. I am a mediator undertaking doctoral studies in order to contribute to the development of the discipline. The idea of reflective practice (Schön, 1983; Lang and Taylor, 2000) is influential in mediation, as a means through which practitioners draw on personal experience to deepen both theoretical and self-awareness. In common with social work and other helping professions, mediators must pursue "life-long learning often through writing ourselves into practice" (Graham, 2017, p. 3). Reflective writing, invariably in the first person, is encouraged.

Marshall and Hurworth (2009) notice the commonalities between mediation and qualitative research. Here too the researcher is at the heart of the endeavour. Credibility and authority are enhanced by "the ability of writers to construct a credible representation of themselves and their work" (Hyland, 2002, p. 1091). While objectivity, in the sense of absence of deliberate bias, is desirable, qualitative research relies on the researcher as subjective agent, interacting with participants and interpreting their responses. Nagel famously noticed this problem: "how to

combine the perspective of a particular person inside the world with an objective view of that same world, the person and his viewpoint" (Nagel, 1986, p.3).

It is thus congruent with my values both as a mediator and qualitative researcher to resolve the tension between objectivity and subjectivity by choosing to acknowledge my own agency in forming the views expressed. As a mediation practitioner I am also, in a sense, an insider interviewer, although my interviews are about rather than with fellow professionals. Coar and Sim identify the risk of "conceptual blindness" for those who interview members of the same profession: "the interviewer's own feelings and opinion about the field [may] govern the dialogue and interpretation" (2006, p. 254, citing Andersson *et al.,* 2001). This added a further incentive to be transparent in reporting the results and at points I include my questions and responses where they provide context.

While the use of the first person has been discouraged in academic writing, at least in some disciplines, its use is becoming more common (Hyland and Jiang, 2017). A recent review of US style guides found that first person writing is now encouraged and even prescribed in social sciences, arts and humanities, and science, engineering and technology (Shelton, 2015). Agaogu (2013) argues that first person writing reduces reliance on the passive voice, seen as a poor stylistic choice in creative writing pedagogy.

A.2. Methods

It became clear that addressing all three research questions would require a mix of quantitative and qualitative methods. The first question (comparing mediation and litigation outcomes) would lend itself to a quantitative approach: these are measurable effects; the researcher needs no or little interaction with the research subjects; and a sizeable sample is possible (Grix, 2010, p. 118).

The second question (concerning parties' views on outcomes) appeared more suitable for a qualitative approach. Qualitative methods allow for exploration via "an in-depth and interpreted understanding of the social world of research participants" (Ritchie et al., 2014, p. 4). A question such as "how do parties view…?" requires the researcher to be open to new categories and ways of understanding the data at the stage of analysis (Pearce, 2006; Marshall and Hurworth, 2009; Miles, Huberman and Saldana, 2014).

The third question (the justice of mediation outcomes) raised methodological difficulties. How might outcome justice be evaluated and by whom? Here again comparison with litigation outcomes is implied, but the range of variables could include measurable factors such as financial award and more subjective factors such as parties' perceptions. A mixed methods approach may be most appropriate (Davies and Hughes, 2014, p. 33). A particular hope for this approach would be as a "means to get at subjugated knowledge" (Hesse-Biber, 2010, p. 9). Non-lawyers' views on justice could be considered subjugated knowledge, particularly in the light of Bourdieu's observation cited at A.1 above.

A.3. Questions

At this early stage I was not yet in a position to create a topic guide. However, an early discussion with supervisors considered possible interview questions. Recalling the impulse to bring to light the neglected voices of lay people in the justice system (Menkel-Meadow, 1995) my starting questions were:

- Was the outcome just?
- How would you know whether it was just?

Recognising that non-lawyers may not at first sight consider themselves qualified to discuss justice, the term "fairness" could be substituted:

- Was this fair?

- How do you decide if something is fair?

The slightly different question forms for fairness and justice revealed implicit assumptions on my part. Justice is unconsciously framed inductively as something to be discovered from an external source, while fairness is framed deductively as a matter on which an individual can decide (Wilson and Wilson, 2006). Given the importance of expectations in lay people's assessment of justice (O'Barr and Conley, 1988; Moorhead, Sefton and Scanlan, 2008) the following questions also seem likely to elicit illuminating responses:

- What were you expecting to get from the court/mediation?
- What were you hoping to get from the court/mediation?
- How did what you got compare to what you expected/hoped?

A.4. Sample

Another issue emerging early in the research journey was sample size. The limited numbers of people using the two projects under study (fewer than 100 cases per annum in one; fewer than 50 in the other) presented a challenge for the quantitative approach, which needs sizeable samples to achieve representativeness and statistical power (Davies and Hughes, 2014, p. 55). Qualitative research, on the other hand, can deliver valuable results with a modest sample: "qualitative research can be generalised in terms of the nature and diversity of phenomena, though not in in relation to their prevalence" (Ritchie *et al.*, 2014, p. 23). Some suggest that the notion of sample size is inappropriate in qualitative research and data should be collected only until "saturation" is achieved (Kumar, 2014, p. 248; King, 2004; Guest, Bunce and Johnson, 2006).

There are dangers in muddling qualitative and quantitative concerns. While larger numbers may enhance the representativeness of the sample, "The rules of probability apply equally to a qualitative research sample as they do in any other

methodological approach." (Davies and Hughes, 2014, p. 176). Thus the researcher should avoid reading significance into insignificant effects. What qualitative research does well is probe for the meaning of events as seen by the participants: "a concern with 'what' 'why' and 'how' questions rather than 'how many'" (Ritchie *et al.,* 2014, p. 3).

A.5. Refinement

Having considered these options I chose to focus the study on question 2 alone. Question 1, comparing mediated and litigated outcomes in Scottish small claims actions, was rejected because of the challenges of obtaining comparable data from mediation and litigation sample. I also rejected question 3, whether mediation can claim to bring about just outcomes to legal disputes, because of the difficulty in making meaningful judgments about how "just" a particular outcome is. Question 2 was refined to allow for a more open exploration of the data. The final research question became: "What is the place of justice in the thinking of small claims mediation participants?"

When it came to research method, a qualitative approach appeared most likely to provide meaningful data. Semi-structured interviews permit in-depth exploration of individuals' views on the fairness and justice of their encounter with the justice system. They also enable discussion of sensitive, confidential questions such as motivations and mixed feelings (Ritchie *et al.,* 2014, p. 59). As an initial aim, a sample size of forty seemed achievable.

**B. Ontological and epistemological considerations**

Any research project requires the researcher to acknowledge their ontological and epistemological positions; in simple terms what exists and what can be known about what exists (Scotland, 2012). These positions can be viewed as dictating the research methods employed. Some question that approach as purist, and claim that

researchers mostly choose the method most appropriate to their question and then adopt the ontological and epistemological positions underpinning their choice (Whittemore, Chase and Mandle, 2001, citing Stew, 1996).

Mediation's multidisciplinary foundations make clarity about research values particularly important. One prolific scholar claims mediation lacks a "meta-theory" to resolve its "conflicting meanings in different disciplinary domains" (Menkel-Meadow, 2001, p. xv). Disciplines tend to take their own, at times contradictory, approaches to research. My own background is in law, whose principal methodology is doctrinal research involving analysing and synthesising texts (Hutchinson and Duncan, 2012). Much of the critical scholarship on mediation described in the literature review has emanated from the legal academy (Roberts and Palmer, 2005).

Other disciplines have made their mark on mediation theory including economics, philosophy and psychotherapy. Those bringing an empirical tradition to bear include psychology, sociology and anthropology (Deutsch, Coleman and Marcus, 2014). The present research can be located within empirical legal studies (Menkel-Meadow 2006; Hillyard 2007; Webley 2010; Epstein and Martin 2014), defined as "the study through direct methods of the operation and impact of law and legal processes in society" (Genn, Partington and Wheeler, 2006, p. 3). Empirical legal studies is nested within socio-legal studies, a broader tradition also embracing purely theoretical literature (for example Silbey and Sarat, 1989; Korobkin and Doherty 2009; Kressel and Wall 2012).

While the research topic, justice, has been a source of fascination to thinkers for millennia (Aristotle; Aquinas) it is implausible to assert that the concept exists in an objective sense. It has neither location nor physical properties and is not readily measurable in the manner of atoms, populations or votes. Yet, while fairness and justice are abstract ideas, their presence or absence have observable consequences (executions; riots) and courts and small claims are real-world social processes. The

absence of justice can be perceived more keenly than its presence (Judge and Colquitt, 2004; Stets and Osborn, 2008; Deutsch, 2014b).

B.1. Ontology

Ontology is concerned with what exists: "what is there?" (Taylor 1959, p. 125) A key ontological issue for researchers is social reality. Can this be likened to material reality and thus be said to exist independently of human interpretation? And if it does, is it universal or does it vary from context to context? (Ritchie *et al.,* 2014, p. 4). A realist position would answer yes to the first question (Engle, 2009). Turning to the subject of this study, that would mean seeing justice as a social fact. While our interpretations and observations may vary across individuals and cultures, the phenomenon would be seen as existing independently of our view of it.

An opposing pole in ontology is idealism, holding that reality can only be known through human perception, with its inevitable distortions (Rolfe, 2006, p. 306). A logical development within idealism is relativism, the view that there is no unified reality but rather a range of attempts to socially construct the world (Ritchie and Lewis, 2003). This clearly resonates with qualitative researchers, whose work is generally concerned with the world as constructed and interpreted by those under study (Ajjawi and Higgs, 2007). This position requires the humility to recognise that it is not only researchers who are interested in interpreting the world: "social scientific accounts have to treat social actors as conscious beings whose activities have meaning for them and others" (Hughes and Sharrock, 1997, p. 1)

The task is complicated by the relationship between justice and law. Although clearly socially constructed, legal phenomena such as contracts and court decrees are treated by the legal system as if they exist independently of intellectual activity; described as "logical objecthood" (Pavlakos, 2004, p. 16). Law appears to have a realist ontology (Engle, 2009). Justice straddles social and legal reality. It can be apprehended inductively, using social science methods such as surveys and

interviews to build general principles from individual instances. At the same time the legal system approaches justice deductively, arguing from principles to instances.

Furthermore, law aspires to normativity. Law's ontology can be traced to its roots in divine law. Its purpose was to bring the world into conformity with an ideal provided by God; latterly with an ideal provided by the state. Law seeks to provide a normative system applicable to everyday life. Thus, while justice may be viewed both as a psychological and legal concern, insofar as courts and other legal actors seek binding rules from justice events they engage in a form of ontological transformation (Teubner, 1989). Subjective judgements about justice become sources, applicable across whole societies and in the process acquiring objectivity. The doctrine of legal precedent crystallises this transformation, providing a public good argument for dispute resolution via courts: "from the moment a body of precedents is formed, an unlimited number of individuals can make use of this legal corpus and derive from it the entire diversity of attendant utilities" (Bilsky and Fisher, 2014, p. 82). D'Amato provides a concise distinction:

> 'LAW' - officially promulgated rules of conduct, backed by state-enforced penalties for their transgression.
> 'JUSTICE' - rendering to each person what he or she deserves (1993, p. 532)

This may account for some of the principled critiques of mediated outcomes, particularly the "loss of law" argument (Chapter 2.B.4. above). While these critics concede that justice between the parties may be achieved in mediation (this might be termed subjective justice) their sense of loss seems to be triggered by the absence of a normative dimension in these settlements (see in particular Mulcahy, 2013). In a sense it is the loss of "legality" (Gardner, 2018) they mourn. This reveals the realist ontology at the heart of law, supported and expanded in the doctrine of legal positivism (Dwyer, 2008). Some question the applicability of legal thinking in other domains (Teubner, 1989; Samuel, 2009).

Having said this, the present study seeks the perspective of non-legal actors, albeit operating with the legal system. Its concern is substantive or distributive justice as they view it. Much social research, particularly where qualitative interviews are used, adopts an interpretivist approach, viewing reality as subjective and variable, and mediated by senses and consciousness. Language does not simply describe the world but shapes our view of reality. In this paradigm meaning is not discovered; it is constructed by "interaction between consciousness and the world… truth is a consensus formed by co-constructors" (Scotland, 2012, p.12). Interpretivism has a relativist ontology.

“Critical realism” or “subtle realism” (Deakin, 2014, Ritchie *et al.,* 2014, p. 5), on the other hand, holds that while there is an external reality it can only be known through human perception. Individuals or institutions may agree, but that merely proves coherence (Young, 2015), not objective truth. “Social phenomena and their meanings are continually being accomplished by social actors” (Grix, 2010, p. 61). This is the most appropriate position for the present study. It accepts that individuals’ perceptions of justice are a “real” phenomenon; however, these perceptions can only be known via a social process in which they will be made and re-made and in which the researcher undeniably plays a part.

B.2. Epistemology

Epistemology is the study of knowledge, or what can be known. The issue for researchers is well-expressed by Bertrand Russell: “How comes it that human beings, whose contacts with the world are brief and personal and limited, are nevertheless able to know as much as they do know?” (Russell, 1948, p. 5). In other words, how do we extrapolate from even a generous sample of finite instances to general principles? On what grounds does a researcher reach conclusions?

Epistemology has been described as a “negative discipline, mostly devoted to saying what you shouldn’t do if you want your activity to merit the title of science” (Becker 1996, p. 54). In Becker’s view there are three key questions for social research:

> - must we take account of the viewpoint of the social actor and, if we must, how do we do it?
> - how do we deal with the embeddedness of all social action in the world of everyday life?
> - how thick can we and should we make our descriptions? (1996, p. 57).

From an epistemological perspective, knowledge about justice has historically been built on foundations provided by theology, philosophy and jurisprudence, not disciplines with an empirical tradition. All tend to employ deductive logic (Farrell, 2006a). Law is prescriptive and its epistemology is deductive, enabling those skilled in its methods to deduce what is just in particular situations.

On the other hand social science, whether realist or idealist, tends to reject normativity in favour of description. Its epistemology is inductive. First phenomena need to be observed; then theory and principles can be propounded. The constructivist turn sees the social world as being constantly produced by social interaction, and subject to revision (Pearce, 2006; Scotland, 2012). Thus the empirical study of legal matters faces a challenge that is both principled and practical: how to avoid ditching either law’s deductive, normative approach or the inductive, descriptive tradition of the social sciences. Those embedded in a legal approach to justice run the risks of a closed system, uncorrected by empirical data. Social scientists risk discounting legal ontology, missing law’s normative intentions and impact.

The application of empirical, inductive, thinking to justice within the legal system is a relatively recent innovation (Genn, Partington and Wheeler, 2006). On the other hand, questions of justice have been studied by social researchers in domains distinct

from (even if connected to) law (for example Lerner, 1977; Deutsch, 1990; Tyler, 2006; Colquitt, 2012). Much of this work takes an interpretivist approach.

Personal inclination suggests a position that is more constructivist than objectivist: that is, seeing the social world as being constantly produced by human interaction, and subject to revision. This may derive from my background in mediation, where outputs are co-constructed in a three-way discourse between parties and mediator (Irvine, 2017). Fixed or “objective” truths tend to provoke additional contention within the process and success often involves individuals reviewing their starting positions in the light of the mediated discourse. Marshall and Hurworth (2009) assert that both mediation and qualitative interviewing developed in reaction to logical positivism and share a belief in the social construction of reality. King claims: “Social constructionists see the text of an interview not as a means of gaining insight into the ‘real’ experience of the interviewee, but as an interaction constructed in the particular context of the interview” (2004, p. 11).

Pearce characterises approaches sharing this approach (including social constructionism, symbolic interactionism, ethnomethodology and pragmatism) as taking the communication perspective. Researchers in this tradition attend to the form of communication as much as its content, believing “the world is made, not found” (Pearce 2006, p. 7). Their research should aim to be “descriptive, interpretive, critical and practical” (Pearce 2006, p. 10). This suggests an order of events, which the current research follows: first, describe the data and its context; second, start the process of interpretation, noting what stands out or appears incongruous; third, apply the critical lenses suggested by the literature to the initial interpretation; fourth, develop the implications of the research in the real world.

Socio-legal studies have also embraced interpretivist approaches (Faulkner et al 2012, p. 8) requiring the researcher “to grasp the subjective meaning of social action” (Grix 2010, p. 65, citing Bryman). The current research project could be

characterised as belonging to that tradition, although it could more simply be described as social research. It adopts both a substantive approach (what respondents are saying) and a structural approach (the work respondents' language is doing) (2014, p. 272). Combining substantive and structural understandings expands the range of ways of interpreting data, enhancing the credibility of the study through "theory triangulation" (Patton 1999, p. 1196).

One cautionary note on interpretation. Becker cautions researchers against being too quick to attribute ideas to those they study:

> Epistemologically, then, qualitative methods insist that we should not invent the viewpoint of the actor, and should only attribute to actors ideas about the world that they actually hold, if we want to understand their actions, reasons, and motives (1996, p. 60).

## C. Methodological Choices

All of this is relevant to the choice of research methods. The study broadly follows the social research methodology set out by Ritchie et al (2014). The attempt to answer the research question "What is the place of justice in the thinking of small claims mediation participants?" lends itself to in-depth interviews, sometimes known as semi-structured interviews (Edwards and Holland 2013). Participants' thinking is at the heart of the investigation. Qualitative interviews enable the researcher to probe and question participants' understanding in order to "see the research topic from the perspective of the interviewee, and to understand how and why they come to have this particular perspective" (King, 2004, p. 11; Miles, Huberman and Saldana, 2014, p. 11).

The initial aim of the study was to investigate forty cases via qualitative interviews. In the event I conducted twenty-four interviews. The setting was Sheriff Courts in Scotland's Central Belt. Participants were small claimants and respondents. The

events being investigated were disputes of modest financial value. The process under investigation was court-annexed mediation (Miles, Huberman and Saldana, 2014, p. 35).

Feminist researchers have claimed that interviews can give voice to marginalised participants whose perspectives have not previously been heard or noticed (Edwards and Holland, 2013; Sprague, 2016). Thomson asserts that only in-depth interviews can enable the researcher to access such “hidden worlds” (Adam *et al.*, 2008, p. 21). As noted in Chapter 3.C.2. (above) “lay” people’s opinions on matters of substantive justice are rarely sought. The present study acts as a useful corrective to the dominance of legal voices in debates about the justice system.

C.1. Research population/sampling frame

In qualitative research the aim of a sampling strategy is to ensure that the sample from which data are to be generated is capable of replicating salient characteristics of the population to be studied. This helps to achieve “analytical significance” (Hesse-Biber, 2010, p. 249). The current study adopted a purposive approach (Webley, 2010; Ritchie *et al.*, 2014). In purposive sampling “participants are selected according to predetermined criteria relevant to a particular research objective” (Guest, Bunce and Johnson, 2006, p. 61).

The sample size of 40 was chosen because it seemed achievable given the particular sample population and the limited timeframe of doctoral research while also providing rich data for analysis. While some suggest that the sample size should be generated inductively, continually adding participants until “theoretical saturation” is achieved, Guest, Bunce and Johnson (2005, p. 61) acknowledge that researchers are often required to estimate numbers in advance. In the event I began to notice theoretical saturation after interviewing around twenty people and chose to end the data gathering phase at 24 interviews. At this stage the sample contained an almost equal number of male and female participants.

The study population consisted of small claimants in Glasgow and Edinburgh Sheriff Courts who had used the court-annexed mediation services. This is a relatively limited population. At the time of the initial research proposal the Edinburgh service mediated approximately two cases per week (conversation with Heloise Murdoch, manager Edinburgh Sheriff Court Mediation Service, 19 May 2016); the Glasgow service approximately one case per fortnight (University of Strathclyde Mediation Clinic [USMC] Annual Report 2015, on file with author). However, in November 2016 the new Simple Procedure rules came into force (Scottish Statutory Instruments, 2016a). As well as increasing the upper claim limit from £3,000 to £5,000 the new rules required Sheriffs to encourage alternative dispute resolution (*ibid*, p. 16, 1.2 (4)) In 2017 the number of cases mediated by USMC more than doubled to 76, with similar increases for the Edinburgh Sheriff Court Mediation Service.

The sample frame was generated through gatekeepers: the mediation services in each Sheriff court (see Study Procedures below for details of the recruitment strategy). An earlier Scottish study of small claims mediation pilots in Glasgow and Aberdeen Sheriff Courts provided the following demographic information: 65% male/35% female; 39% aged 25-44/50% aged 45-64/9% aged 65 and above; 97% white British; 93% no disability (Ross and Bain 2010, p. 125). No information on income, employment or social class was provided. While that study provides some useful benchmarks there is no reason to believe it is a representative sample. It seemed preferable to attempt to replicate the demographic characteristics of the general population. In the 2011 census 12% of Glasgow's and 8% of Edinburgh's population identified themselves as coming from an ethnic minority and the overall gender balance of the Scottish population was 51% female, 49% male (Scottish Government, 2011).

Given the relatively small sample size it was important to prioritise selection criteria and minimise the number of people excluded on the grounds of their experience or

circumstances (Ritchie *et al.*, 2014, pp. 120, 132). Starting with demographic factors, gender and ethnicity were chosen as primary criteria because the proportions in the population of each city are readily discoverable and both are likely to have an impact on justice judgements (Leung and Lind, 1986; Morris, Ames and Lickel, 1999; Brockner *et al.*, 2001). Also important for this study was the selection of a representative sample of case types, and so “dispute type” has been chosen as a secondary criterion along with whether the case settled at mediation. Tertiary criteria include age and household income. The goal is to “achieve symbolic representation and diversity” (Ritchie *et al.*, p. 135), in this case gender diversity, ethnic diversity and problem diversity. At the same time the practical limitations of doctoral research place limits on the number of criteria that can be taken into account. If recruitment is proving difficult it can become necessary to relax some quotas.

The following sample matrix was produced using dispute type data from the first two years of the Glasgow small claims mediation project. Quotas for settled/did not settle, gender, ethnicity and dispute type are set out in the table below:

Table 6 Sample Matrix

| **Sample matrix** | | **Settled** | **Did not settle** |
|---|---|---|---|
| **Gender** | Female | 10-14 | 6-10 |
| | Male | 10- | 6-10 |
| **Ethnicity** | White | 21-25 | 13-17 |
| | Ethnic minority | 1-3 | 1-3 |
| **Dispute type** | Landlord/tenant | 4-5 | 3-4 |
| | Vehicle related | 3-4 | 2-3 |
| | Unpaid bills | 2-3 | 1-2 |
| | Building work | 2-3 | 1-2 |
| | Personal property | 1-3 | 1-2 |
| | Other | 4-10 | 2-6 |
| **TOTAL** | | 24 | 16 |

Recruitment took place as soon as possible following mediation to optimise recollection. While a later interview might give respondents more time to reflect, Gosling's (2006) study found no significant difference in satisfaction levels between those interviewed 2 or 6 weeks after small-claim litigation. In the event the final sample was somewhat modified (see F.5.a. below for more detail).

## C.2. Study Procedures

### C.2.a. Procedure

The study employed in-depth interviews, recorded and transcribed to ensure accuracy (Braun and Clarke, 2006, p. 17). In-depth interviews have the following features (Ritchie *et al.*, 2014):

- They combine structure with flexibility.
- They are interactive – the interviewer can respond to what has already been said.

- They can get below the surface – participants may not have reflected on questions of fairness or justice and the interviewer can "explore the factors that underpin participants' answers: their values, past experiences, circumstances, reasoning, feelings, opinions and beliefs" (Ritchie *et al.*, 2014, p. 184).
- They are generative – both interviewer and interviewee may be surprised at the new knowledge that is created.
- Language is important – interviews are communicative acts, intended to convey meaning to the listener, and the precise wording should be recorded.

The interview topic guide is set out in Appendix 2. While this provided structure and ensured that matters were not missed I was also able to pursue novel or unforeseen issues that emerged from the responses.

#### C.2.b. Practicalities

Following consultation with the manager of the Edinburgh Mediation Service an opt-out approach (Ritchie *et al.*, 2014, p. 123) was agreed. The mediation service sent an information sheet and consent form (Appendices 3 and 4, below) to its clients along with its own information, telling them about the study and offering them the opportunity to opt not to be contacted by the researcher. Where participants did not opt out, the service passed on an email or home address to enable me to make direct contact. The same approach was adopted by USMC in Glasgow.

Participants were invited to respond to a request to be interviewed about their experience in the small claims court. They were offered a contribution of up to £10 towards their travel expenses (although only one took up the offer). Interviews took place in a convenient and private location: University of Strathclyde in Glasgow; the offices of the Mediation Service at Edinburgh Sheriff Court or Queen Margaret University in Edinburgh. I offered participants flexibility regarding the time of the

interviews, including evenings and weekends where necessary, and four took part by telephone. Prior to interview participants were asked to complete a set of demographic questions (Appendix 7, below).

### C.2.c. Pilot Phase

In consultation with my supervisors I began with a pilot phase of five interviews. Pilot studies are encouraged by experienced empirical legal researchers (Genn, Partington and Wheeler, 2006, p. 41). In particular they enable the researcher to:

- find out how recruitment and the sampling strategy are working in practice
- road-test the interview topic guide and make any necessary amendments
- critically examine transcriptions for accuracy
- start the process of data analysis, allowing preliminary findings to inform the remainder of the study
- practise using NVivo data management software
- practise writing up results in a coherent form.

[See separate section on the pilot phase at E below]

### C.2.d. Data Management

Interviews were recorded on a digital recorder and transcribed by a third party. I also made contemporaneous notes during and immediately following the interviews, which were then typed up and saved as separate documents on NVivo.

Data is stored in two separate locations on Dropbox, a password protected cloud storage system. One folder contains any identifying data on participants: names and personal contact details. Data in this folder will be destroyed when the study has concluded, unless participants requested a copy of the research when their details will be retained until a final copy is available for circulation. This folder has not been shared with anyone.

A separate folder contains data generated by the research in anonymised form, with participants only identified by a number; e.g. Glasgow 01, Edinburgh 02, etc. This folder is also password protected and was shared only with the supervision team. These data were then transferred for further analysis to a password protected folder on NVivo, using the University's licence. Again the supervision team were provided with access.

C.3. Analysis

In-depth interviews produce large amounts of data and a key task for the researcher is managing and making sense of them. There are numerous possible approaches to this task (Ritchie *et al.,* 2014, pp. 270-271; Patton, 1999; Braun and Clarke, 2013; Miles, Huberman and Saldana, 2014). The present study employed thematic analysis, which involves "discovering, interpreting and reporting patterns and clusters of meaning within the data" (Ritchie *et al.,* 2014, p. 271). It was chosen because it is simple, achievable and credible (Guest, Bunce and Johnson, 2006; Webley, 2010; Scotland, 2012).

This form of analysis looks right across the data set for patterns and themes as opposed to taking each data item on its own (Braun and Clarke, 2006). Miles, Huberman and Saldana suggest the interpretive task is best achieved by developing "codes" in two cycles (2014, p. 73). Ritchie *et al* prefer to speak of "indexing and sorting" (2014, p. 278) followed by a more interpretive process of labelling in which categories are developed to explain the data and address the research question. Bryman describes thematic analysis more holistically as:

> reviewing transcripts and... giving labels... to component parts that seem to be of potential theoretical significance and/or that appear to be particularly salient within the social worlds of those being studied (2008, p. 542).

The present study adopted Miles, Huberman and Saldana's (2014) approach and started the first cycle of coding as data started to be gathered. This was carried out for the pilot phase and again throughout the study. The analysis employed *in vivo*

coding (reflecting participants' own words) and values coding (reflecting attitudes, values and beliefs). Braun and Clarke (2006) also suggest that writing forms a key part of the act of interpretation and should begin as soon as data are generated.

One means of enhancing the credibility of qualitative research is to consider alternative explanations and examine the data from more than one perspective. A common approach is triangulation. Patton (1999) suggests four types: comparing qualitative and quantitative data; comparing different sources of qualitative data; involving additional analysts; and applying different theories. The first two were not available in this study because of its simplicity, employing a single qualitative data source – semi-structured interviews with individual respondents. I considered comparing the two geographical locations but ruled it out given the small sample size. The fourth option, adopting a different theoretical frame, was achieved in part by considering the data from both substantive and structural perspectives (see 'Epistemology' B.2. above).

The third option, involving additional analysts, emerged as the most practical approach and my supervisors agreed to code an interview transcript independently. This acted as "an important check on selective perception and blind interpretive bias" (Patton 1999, p. 1995) and improved reliability. Some have questioned the appropriateness of this approach for qualitative research, suggesting it confuses quantitative and qualitative approaches (Ritchie et al 2014, p. 278). Credibility and trust (Marshall and Hurworth, 2013) may be more helpful aspirations. The supervisors identified some of the same themes as my own and suggested some novel ones.

The second cycle of coding involves a further act of interpretation, as the researcher condenses the codes and identifies emerging patterns such as themes, causes, relationships and theoretical constructs (Miles, Huberman and Saldana, 2014, p. 87; Ritchie *et al.,* 2014, p. 279). The goal is to achieve coherence and parsimony, and

the results (Chapters 5 and 6, below) reflect this second cycle. I used NVivo data analysis software to assist with organising, analysing and displaying the data.

C.4. Limitations and reflexivity

It is implausible for any researcher to claim objectivity, and I must acknowledge approaching this research from a particular position. The study was independently funded by a doctoral research grant from Queen Margaret University, Edinburgh. At the same time I teach a Master's programme in Mediation and Conflict Resolution at another Scottish university and am the Director of USMC, which provides the mediation service for Glasgow Sheriff Court. This background provides much of the motivation for investigating these phenomena but also presents two significant risks. One is that participants may, consciously or unconsciously, seek to manage the impression they give in a bid to appear agreeable; the other is that my existing views influence data interpretation and resultant conclusions (Ritchie *et al.,* 2014).

The former, a form of response bias, is inherent in all qualitative research where the researcher, of necessity, forms a temporary relationship with participants. It can be reduced by attending to the quality of the information provided; ensuring that the research description does not imply a preference for a particular result; and by good interview practice (Marshall and Hurworth, 2009, p. 152). Participants were informed that the study is not an evaluation of the mediation services or of the mediators; its aim is to learn more about participants' own thinking about their dispute. I rarely mediate within USMC and did not interview participants in any cases in which I was personally involved. However, the idea that the research relationship is problematic flows from a positivist tradition in which the goal of enquiry is to produce so-called objective results, tainted as little as possible by the researcher's imprint. Qualitative interviews in the interpretive tradition take an opposite view, that "the relationship is part of the research process, not a distraction from it" (King 2004, p. 11).

The second problem is known as experimenter bias and has a bearing on research integrity (Miles, Huberman and Saldana, 2014, p. 64). The phenomenological practice of "bracketing" (King 2004, p. 13) may be helpful, where the researcher attempts to articulate their presuppositions and assumptions before putting them to one side. Good practice requires a reflexive approach (Ritchie et al 2014, p. 22), in particular the following practices: listing presuppositions at the start of the project; maintaining a research diary; reviewing my interview technique in recordings; consulting my supervisors (King, 2004, p. 20). In this manner it is possible to reduce, but not eliminate, the risk of bias.

## D. Ethical Considerations

The study adhered to the core ethical principles of respect for people's autonomy, non-maleficence (doing no harm), beneficence (doing good) and justice (Queen Margaret University, 2023, pp. 2-8)

### D.1. Respect for autonomy

a) Dignified treatment: it is important to treat participants in a dignified manner. The information provided in advance, the location of the interviews (university and court premises) and the development of a coherent topic guide all contributed to ensuring that the interviews treated participants as autonomous individuals.

b) Informed consent: potential participants need to be provided with clear, comprehensible information about the research project. This allows them to make an informed decision about whether or not to take part. The participant information sheet (Appendix 3) and participant consent form (Appendix 4) made it clear that they could withdraw their consent to participate at any time. The right to withdraw was reiterated at the start of each interview. No interviews took place with vulnerable individuals or those who lacked capacity. Participants were not remunerated for taking part in the study. They were, however, offered a payment of up to £10

towards any travel expenses (and one took up this offer). This cost was included in the research bursary.

D.2. Non-maleficence

a) Competence: I undertook doctoral studies at Queen Margaret University (QMU) supported by a team of three supervisors, all of whom contributed to methodology training and induction. I submitted an expanded research proposal (including a detailed methodology section) which passed a probationary assessment in July 2016. I had previous experience of face-to-face interviewing, having worked as a family mediation intake worker for over ten years and a family mediator for over twenty. I conducted two independent qualitative research studies in 2013-15. This background assisted with the key skill in qualitative interviewing of tracking salient threads while being able to form supplementary questions to follow up novel or unexpected issues (Raingruber, 2009, p. 1754).

b) Risk assessment and risk management: I did not anticipate that this research would expose participants to significant risk. Most small claims involve monetary disputes between relative strangers over unpaid bills, outstanding debts and poor products and services. I asked participants to talk about the "life history" (Olive, 2014) of their dispute (its inception, fruition and resolution) in a confidential setting. For most this appeared to be a welcome opportunity to share their experience. There was a possibility that some participants would experience distress when describing their dispute and attempts at resolution. As an experienced mediator I had the competence to listen and discuss such distress, and signpost appropriate sources of support including the original mediation provider. In the event none of the participants displayed signs of significant distress.

D.3. Beneficence

The intention to do good, and the contribution which the research will make, are addressed in the literature review and introduction to the study. Most important is

that the research is necessary, in that it fills a gap in existing knowledge, and useful, in that it will contribute to both academic literature and government policy. At the time of writing I have published one article in a peer-reviewed journal drawing on material drafted for this chapter that summarises the pilot phase of the research (Irvine, 2020b). This has been added at the end of the thesis.

D.4. Justice

a) Sampling criteria: while this was a relatively small study originally intending to conduct forty in-depth interviews, care was taken to develop sampling criteria that reflect the diversity of the sample population. For more detail see research population/sampling frame (C.1. above).

b) Confidentiality: this is of great importance in qualitative interviewing and participants must be assured that they are not identifiable (King, 2004, Ritchie and Lewis, 2003). Mediation is itself a confidential process and parties sign an "agreement to mediate" containing a commitment to confidentiality on their part and on the part of the mediators. The study dovetailed with that approach by assuring research participants of confidentiality in two respects: first, that their details would be electronically stored with all identifying data removed; second, that I would protect their anonymity by ensuring that what they said could not be attributed to them by readers of the thesis and any publications derived from it. Names have been changed and identifying features removed so that points of view and direct quotations cannot be attributed to particular individuals.

## E. Pilot phase and Lessons Learned

I chose to conduct a pilot phase of five interviews (see C.2.c. above). These took place during October and November 2016. Then external changes intervened and on 28 November 2016 the Scottish Government introduced new rules, known as Simple Procedure, for civil actions with a value of up to £5,000 (Scottish Statutory

Instruments, 2016a). This led to a temporary drop in the number of cases coming to the two courts in question. The route into mediation was somewhat altered as a result of the new rules, meaning that the five interviews in the pilot phase can usefully be viewed as a distinct subset within the eventual sample. All but one of the remaining interviews were with participants whose cases were referred to mediation under the new Simple Procedure rules.

E.1. First five interviews

Below is a detailed breakdown of demographic factors:

Table 7 Demographic Factors

| | **Date** | **Court** | **Pursuer/ defender** | **Gender** | **Settled?** | **Subject matter** | **Age** | **Household income** |
|---|---|---|---|---|---|---|---|---|
| **1** | 12/10/16 | Edinburgh | Pursuer | M | S | Goods and services | 56-65 | <£20,000 |
| **2** | 7/11/16 | Glasgow | Defender | F | DNS | Landlord/ tenant | DND | DND* (Company) |
| **3** | 21/11/16 | Edinburgh | Pursuer | M | DNS | Unpaid bills | 66+ | DND* (Company) |
| **4** | 22/11/16 | Glasgow | Pursuer | F | S | Unpaid bills | 56-65 | <£20,000 |
| **5** | 30/11/16 | Edinburgh | Pursuer | M | S | Unpaid bills | 66+ | >£50,000 |

* Did not disclose

All interviews took place in person. They were digitally recorded and professionally transcribed before being checked and anonymised, and they lasted from 29 to 70 minutes with a mean duration of 44 minutes. The interviews took place an average of 12 days after the invitation was sent out; for the three where this is known, they took place an average of 46 days after the mediation in question.

E.2. Approach to analysis

The primary purpose of gathering the data was to answer the research question: "What is the place of justice in the thinking of small claims mediation participants?" At first sight, then, analysis was concerned with what respondents were saying; a substantive approach. Categories are not pure, however, and from time to time it appeared more apt to take a structural approach and consider the work being accomplished by the responses; what the respondents' language was doing (Pearce, 2006; Ritchie *et al.,* 2014, p. 272).

The approach to analysis was cross-sectional (Ritchie *et al.* 2014, p. 272/3) rather than case based. While each case concerns a rich human story, of greatest interest are themes that emerge in several or all cases. And while coding is a useful way of conceptualising such themes, I did not view codes as variables subject to numerical analysis. They were simply convenient ways of grouping data to aid comprehension and comparison.

The overall intention behind this research was to build theory rather than test it. The literature review contends that the current academic accounts of mediation do not take sufficient notice of non-lawyers' thinking about substantive justice. During the pilot the data were analysed with a view to discerning emerging patterns in the light of which theory could be constructed or adapted.

The pilot phase also allowed me to hold the research question up for re-examination. On reviewing the five interviews a second, related, question emerged: "How might we account for lay people's answers to questions about justice in mediation?" This has implications for the question of how mediation might best be conceptualised in terms of legal theory or jurisprudence. Other disciplines may offer useful insights (Cotterrell, 1998), although as noted above law has shown resistance to other ontological and epistemological perspectives (Samuel, 2009).

E.3. Initial analysis

The five interview transcripts were first coded using NVivo data management software. This initial analytical phase involved assigning descriptive labels, known as "nodes", to sections of the text that appeared particularly salient. This is characterised by Ritchie *et al* as "indexing and sorting" (2014, p. 278) and roughly corresponds to Miles, Huberman and Saldana's "first cycle coding" (2014, p. 73) or the first of Morse and Field's four cognitive processes of research, "comprehending", in which the researcher seeks to gain a broad idea of what is emerging before "synthesizing, theorizing and recontextualizing" (1996, p. 103). Ritchie *et al* counsel against moving directly from the data to more abstract accounts, proposing an order that involves organising, then describing, then explaining (2014, p.279).

Nine principal nodes emerged, ultimately subdivided into 49 categories. The principal nodes are listed below along with the number of occurrences:

Table 8 Principal Nodes

| | |
|---|---|
| Prior to mediation | 56 |
| Mediation | 47 |
| Fairness and justice | 42 |
| Mediators | 39 |
| Justice system | 21 |
| Participants | 17 |
| Non fairness and justice factors | 11 |
| Alternatives to mediation | 2 |
| Compliance, enforcement | 2 |

The subcategories are listed at Appendix 1 below.

E.4. Some preliminary themes to emerge from pilot interviews

One of the goals of the pilot phase was to inform the next phase of data collection by taking account of preliminary themes arising from analysis. This iterative approach enhances credibility by ensuring that the researcher allows the data to inform the subsequent direction of the study (Edwards and Holland, 2013). It also provides an opportunity to note early theoretical insights: “the researcher remains open to questions that emerge from studying the phenomenon” (Ajjawi and Higgs, 2007, p. 623). I list below the first themes to be developed from the analysis.

E.4.a. The suggestion of mediation

One area of interest was the significance participants attached to the Sheriff’s suggestion of this alternative to a hearing, in particular whether they would see it as a sign of the Sheriff’s views on the merits of the case. In fact none appeared to have considered this possibility, instead attributing the mediation suggestion to efficiency factors like court costs or a well-intentioned concern to save them the time and trouble of further court appearances.

E.4.b. Procedural justice

As set out in the literature review to the article (Irvine, 2020b; and see Chapter 3.B.3. above) scholars have seen mediation as having the potential to deliver procedural justice (Welsh, 2001a; Ross and Bain, 2010; Deutsch, 2014b). The key traits of procedurally fair processes are “voice” (the opportunity to state one’s views); being heard; and treatment that is dignified and even-handed (MacCoun, 2005; Tyler, 2006). In fact participants welcomed the opportunity to be heard by the other litigant, but made no mention of being heard by mediators. Given that the decision makers in mediation are the parties, this is perhaps not surprising. It raises the possibility that procedural fairness in mediation depends less on being heard by the third-party, who is managing the process, than by their adversary, who will jointly make any decisions. This theme is explored in greater detail in the Discussion (see Chapter 7.B. below.)

E.4.c. Fairness and justice – goals

A concern often expressed by legal professionals is that lay people are only concerned with the financial dimension of lawsuits: "it's all about the money" (see Relis, 2007). When asked about their goals for raising or defending a small claim participants revealed a wider range of considerations, balancing pragmatism, principle, good complaints handling, risk, cost, precedent and even the public interest. One participant reflected a principle embedded in Scots law, that of *restitutio in integrum*, where a person who has breached a contract must restore the other to the position they would have enjoyed but for the breach. This may be because some legal doctrines have entered the popular consciousness, or alternatively because some legal principles accord with common sense, in keeping with the natural law view of law as the "dictate of reason" (Stair, 1681, I, 1, 1).

E.4.d. Fairness and justice – evaluation

At the heart of this research lies the question of substantive justice: did lay people see the mediation outcome as fair and/or just? The interview protocol deliberately used both terms, given their different meanings in English (Wilson and Wilson, 2006).

While financial recompense mattered in all cases, for some its purpose seemed less to enrich themselves than to penalise the other, echoing a finding that Canadian medical negligence claimants sought a large monetary award less because of a desire to be enriched than from the urge to punish and deter errant doctors (Relis, 2007). Another concern expressed by legal professionals is that lay people will allow their natural sympathies to cloud their judgement, potentially leading them to settle for less than they may be due. There was some evidence of empathy, but the first five responses indicate a careful weighing up of competing factors rather than a simple emotional reaction.

E.4.e. Fairness and justice – the "presentation of self"

(Goffman, 1959)

A constructionist view of qualitative research emphasises the work language is doing (Ceci, Limacher and McLeod, 2002; Pearce, 2006; Ritchie *et al.*, 2014). Rather than simply describing their thoughts or opinions, participants are seen as constructing the social world afresh in their discourse with the researcher: "When they talk, people are not only expressing what lies within but they are also producing their world" (Burr 1995, p. 40). It is thus important for the researcher to pay attention to what participants seek to construct in these conversations.

Sociologist Erving Goffman (1959) described the efforts people make to manage the way they present themselves: their public performance. The audience plays a vital role in going along with and complementing the performance. A qualitative interviewer is in effect such an audience. And in addressing that audience, respondents indicated an urge to present themselves as fair. For example: *"I didn't chase them for the 5 hours delay. I chased them for the extra cost beyond that which I'd been… which had been incurred."*

This respondent demonstrates his own fairness by describing what he could have sued for but didn't. Mediators often hear this sort of self-justification. It speaks of the need to be seen as fair, not only by others but also in one's self-image, which may be a factor in the eventual negotiation of the outcome. It gives the lie to the idea that mediation is a simple matter of horse-trading between two financial positions; a more satisfactory image may be of a complex negotiation involving a matrix of factors and participants. Goffman described some audience members as "discrepants", including the "mediator" or "go-between" who "learns the secrets of each side and gives each side the true impression that he will keep its secrets" (1959, p. 148). The sense from these interviews was of people balancing instrumental goals (getting satisfaction; defending themselves against inflated claims) with other factors such as the amount of time and effort they were prepared to expend and how fair they needed the outcome to be.

In this negotiation process, as in real-world litigation (Schauer, 2006; Finnis, 2011), fairness is not fixed; rather it is a social construction, continually refined through the interaction provided by the mediation setting. In the most significant court actions judges often disagree, and minority reports present plausible counter-arguments for the opposite decision (Seul, 2004). As Seul argues, in some instances a negotiated settlement may provide an equally just outcome from a societal viewpoint.

E.4.f. Limits of mediation

One respondent, who was quite positive the mediation outcome, nonetheless spoke of wishing for a more public setting like an ombudsman scheme. The point of this would be to ensure that companies are publicly named and shamed so as to discourage them from repeating the offending behaviour. Here he echoed academic concerns about the privacy of ADR processes (Nader, 1979; Fiss, 1984, and see Chapter 3.A. above). From one perspective this person underlines a troubling issue for mediation: its apparent inability to effect wider system change. On the other hand, however, his response demonstrates that lay people's justice reasoning extends beyond simple self-interest to the societal implications of the dispute.

All of the above themes were expanded further in the peer-reviewed article (Irvine, 2020b). This was a significant step in developing my analysis and the resultant discussion.

E.5. Review

It is useful to review the pilot phase against the hopes set out for it at C.2.c. (above):

E.5.a. Find out how recruitment and the sampling strategy are working in practice

Recruitment was reasonably straightforward during the pilot phase. Participants were willing to meet face-to-face and all but one rejected the offer of expenses. Without attempting to recruit people with particular characteristics most of the sampling criteria were fulfilled. There were 3 males and 2 females; 3 from Edinburgh

and 2 from Glasgow; and incomes ranged from less than £20,000 per annum to more than £50,000 per annum. None, however, was from an ethnic minority. Three cases concerned unpaid bills, one goods and services and one landlord/tenant. The relative proportions of case types may need to be revised in the light of recent reforms transferring landlord/tenant matters to the First Tier Tribunal (Housing).

Three cases had settled and two had not, close to what was foreseen in the sampling strategy. However, those whose cases did not settle had less to say about the core question for this study. Their views about justice and fairness seem to have been little altered by the mediation. Most significantly they have not had the experience of exercising their own judgement in arriving at a settlement. In the light of this I sought more participants whose cases had settled for the remaining interviews, eventually interviewing another 14 who had settled and 5 who had not. This provided a total of 17 who settled and 7 who had not, from a sample of 24. More detail on the outcomes is provided in the results chapters, 5 and 6.

The final sample is set out below.

Table 9 Final Sample

| Final Sample - 24 | | Settled | Did not settle |
|---|---|---|---|
| **Gender** | Female | 10 | 3 |
| | Male | 7 | 4 |
| **Ethnicity** | White British | 16 | 6 |
| | Asian or Asian British | 1 | 0 |
| | Other European/White | 0 | 1 |
| **Dispute type** | Housing - landlord/tenant | 1 | 1 |
| | Housing – factors/owners | 3 | 1 |
| | Vehicle related | 1 | 1 |
| | Unpaid bills | 4 | 3 |
| | Employment (wages) | 1 | 0 |
| | Goods and services | 7 | 1 |
| | Personal property | 0 | 0 |
| **TOTAL** | | 17 | 7 |

Across the whole sample, the interviews took place an average of 14 days after the invitation. For the 11 participants where the information is available, the interviews took place an average of 48 days after the mediation in question.

E.5.b. Road-test the interview topic guide and make any necessary amendments

By and large the topic guide was helpful and assisted in structuring the interviews and in organising my thoughts. It also acted as an aide-mémoire. However, during the pilot phase it became clear that once I had heard participants' responses to questions about fairness and justice it was logical to follow up by asking about the role of legal norms in their thinking. I therefore added two questions:

- Relevance of legal norms in their thinking?

- Other sources of norms?

See the revised interview topic guide at Appendix 4.

E.5.c. Critically examine transcriptions for accuracy

I went through all five transcriptions, removing any identifying features and checking any ambiguous sections against the digital recordings. I found that the transcriber was very accurate and required only occasional alterations.

E.5.d. Start the process of data analysis, allowing preliminary findings to inform the remainder of the study

As described at b) and c) above, the preliminary findings led to the minor amendments to the sampling strategy and interview topic guide. They also provided sufficiently rich data to confirm the hopes for this study set out in the introduction. The responses illustrated that non-lawyer participants draw on a wide range of considerations in deciding whether and on what basis to settle their cases. The notion of self-presentation (E.4.e. above) emerged from the data and provided a useful frame for conceptualising participants' motivations.

E.5.e. Practise using NVivo data management software

By the end of the pilot I had become familiar with the process of uploading transcripts, creating nodes and developing themes. The nine principal nodes and 49 categories set out in Appendix 3 provide a detailed matrix of participants' responses. Some themes were predicted by the literature and others were novel. They provided the thematic framework underpinning the remainder of the study.

E.5.f. Practise writing up results in a coherent form

Following the pilot phase I was invited to present on my doctoral thesis at two international conferences. I was then invited to submit the pilot phase results, initially as a chapter in an edited collection and finally as a contribution to special symposium for the International Journal of Law in Context (Irvine, 2020b). The

process of writing up preliminary results and receiving editorial feedback was invaluable and was further enhanced by the experience of responding to two anonymous reviewers.

## F. Conclusion

This methodology chapter was first drafted before the completion of the study and has been subject to revision. Nonetheless most of what it set out remains: the initial research journey and the refinement process; the underlying research philosophy; the methodological discussion and justification of methods chosen; the pilot phase and preliminary findings. I moved from “naïve researcher” (Gokah 2006) to the position of doctoral student. Further refinement was necessary but this chapter faithfully sets out the foundations on which the following results were built.

# Chapter 5 Results (i): Fairness, Justice and Legal Norms

## Introduction

Thematic analysis requires the researcher to attribute codes to participants' statements, reflecting their content and significance. This is a way of managing the large volume of data in interview transcripts and is the first step in interpretation (Braun and Clarke, 2006; Miles, Huberman and Saldana, 2014; Ritchie *et al.*, 2014). For more detail on the initial codes and sub-codes employed see Chapter 4 (Methodology) and Appendix 3. The demographic details of the 24 interviewees are included at Appendix 1. As this is a qualitative study I have attempted to avoid the use of quantifying language, as far as possible, although some figures are relevant in providing context. The purpose of qualitive study is in-depth exploration of participants' views and experiences rather than estimating prevalence.

Some codes overlapped or could easily be subsumed into others, leading to a second phase of refinement (Miles, Huberman and Saldana, 2014). For example, the single statement coded as "Explanation", could also be seen as an example of a pragmatic solution, covered by other codes. "Pressure to settle" could also be folded into other codes describing aspects of mediator practice. The resultant codes or categories provide the themes which follow.

Pearce (2006) suggests interpretation ought to follow an order of events: describe (data and context); interpret (what stands out or appears incongruous); critique (initial interpretation in the light of the literature); implications (in the real world). I have chosen to combine the first three on a theme by theme basis. For each theme I provide examples from the interviews (description) to illustrate the interpretation (interpret), while also drawing on the literature to critique and develop that interpretation (critique). This helps to locate the data within the wider debates discussed in the literature review. From time to time implications also suggest

themselves, and where they flow from the immediately preceding text they are included in this chapter. They are also recapped and discussed further in the Discussion (Chapter 7.C. below).

Given the thematic approach to data analysis I have included four case studies across the two chapters of results. The longer narratives illustrate the life history of the disputes and provide a richer glimpse of the context from which the themes emerged.

Case study 1 – Lizzie and Sean

Lizzie raised a small claim against Sean (names changed to preserve anonymity) under the old Small Claims Rules.[3] Lizzie is a woman in late middle-age who had lived alone in a "four in a block." This form of housing is common in the West of Scotland and contains two flats on the ground floor and two on the first floor. Lizzie lived on the first floor directly above Sean, a younger man with a partner and baby.

The dispute arose following the discovery of dry rot between the flats. Lizzie was planning to move, and had already bought another flat, so she wanted the remedial work to be carried out as soon as possible. She was aware that the flat wouldn't sell until this was done. They obtained various estimates and initially Sean wanted to use the cheapest. However, when he learned this involved accessing the ceiling from his flat he rejected it. Lizzie then offered to pay the whole cost, but even on this basis Sean wouldn't agree to grant access.

Lizzie was *"in a hurry"* so she found another company who were more expensive but willing to access the dry rot from the floor of her own flat. Because she believed Sean was stalling she instructed this company to proceed and then told him he would have to pay half the cost. The work was completed without any disruption to the

[3] Applicable until the Simple Procedure Rules came into force on 1 January 2017.

downstairs and Lizzie was able to sell her flat. Sean then refused to pay anything towards the work. Lizzie tried approaching him over a period of several months, mostly via email, and on occasion going to his door. Sometimes he mentioned paying a smaller share, but mostly he said he ought to pay nothing. She suspected he was taking advantage of her having moved, thinking *"the ball's in her court."* A year later she raised the action, having reached the conclusion that Sean was never going to pay.

Lizzie first gave him notice. She had read somewhere that it would cost very little to take someone to court via the small claims rules but first you had to give notice. Then she went to the court building to have the action served on Sean. Her claim was *"straightforward… half the money"* (just under £1,000) but she had a few difficulties with the court administration. Apparently they lost a letter she sent asking to reschedule a hearing and her case was dismissed, though she was later able to have this recalled. When it came to actually attending court she was fairly confident, having done so a few times in the course of her work. She could tell, however, that Sean was really nervous.

On the day the Sheriff was *"extremely helpful… she made you feel at ease."* She spoke first to Sean because he had not lodged a written defence, and asked him to explain his case on the spot. She did not ask Lizzie anything about her case, however, suggesting mediation straight away. Lizzie asked if she would get her say; the Sheriff told her that the mediators were in the court so she should try it. This seemed to satisfy her and she agreed to take part; Sean also said yes. Lizzie explained she thought it would be better than going back to court because *"I might not win."* She could also imagine more inconvenience organising a date. She assumed the Sheriff suggested mediation because it might *"save her time, save the taxpayer time or money."* Lizzie had few preconceptions about the process, never having experienced it before.

The mediators were present in the court. Once both parties had agreed to take part they stepped out into the hall and spoke individually to each. They explained to Lizzie

that they would be impartial and give Sean and her a chance to resolve things. In her words: *"they would oversee it, basically."* The mediation started straight away in another courtroom. The mediators invited each person to tell their story, initially taking a light touch: *"they just let us rabbit on, to be quite honest."* Yet when things got stuck they *"kinda jumped in."* Lizzie singled out a particular move for comment: *"they listened and at the end of what we both said; they – as I said – did the, you know, what did <u>you</u> gain out of it, what did <u>you</u> gain out of it?"* One of the mediators wrote out a list of each party's gains. Lizzie spoke approvingly of its impact on Sean: *"then he realised – I don't think he had before that – well, I have gained something out of it."*

When asked how the mediators managed to highlight Sean's gain while remaining impartial, Lizzie explained that they were *"very subtle… they put it to him in a way that he didn't feel he was being unfairly treated."* On further probing she revealed that, when Sean couldn't answer their question about what he gained, they answered it for him. In fact they went further and laid out the situation as Lizzie saw it: she'd had to get the quotes, deal with the mess and pay for the job. Turning to Sean they said, *"you didn't have to lift your ceiling or lift your carpets or have any mess or have anybody coming into your house, you didn't have – you didn't pay for anything."*

Sean's response to this was to point out that Lizzie had offered to pay for the earlier quote in full, when she would have had a bill for £1600. The difference between the two quotes was £200 and Sean began by offering that. Lizzie countered that it had been a lot of hassle to find someone else to do it but she would accept £500. Sean came back with an offer of £300. She said *"Fine, that's fine."*

When asked why she settled for a third of her original claim Lizzie mentioned three things. First, she felt Sean was a little vulnerable. He was a lot younger than her and had never been in court before. She was reasonably familiar with the court building and knew it could be *"quite intimidating… if a Sheriff's calling you up it's very formal."* Second, Lizzie mentioned victory. *"I had achieved something… Basically I had*

*probably won because he had to pay out so much money."* Surprisingly, she focused less on the discount of £600 for Sean (a loss for her) than on the gain she had achieved by taking some of his money. Finally, she believed Sean had been taught a lesson. The precise amount of money didn't matter; it was the fact that he'd had to pay. *"He needed to learn that he can't just get away with things."* She concluded that she had got *"more than justice."*

As soon as the deal was concluded the mediators wrote a settlement agreement. Sean then paid Lizzie on the spot via his phone. She wished him well and they shook hands. The whole experience has made Lizzie feel *"as if I'm quite a nice person… I'm fair."*

## A. Fairness and justice statements: evaluation

The primary motivation for this thesis, reflected in the title, is to investigate the justice thinking of non-lawyers. I therefore start with one of the first codes to emerge from the data: "Fairness and justice statements: evaluation." This was attributed to sections of the transcripts where participants expressed a view or passed a judgement on the fairness or justice of their mediation outcome. Some were coded with no further categorisation; others were attributed to one of three sub-codes: "Did you get justice?" "Explanation" and "Pressure to settle".

During the second cycle of coding (see Chapter 4.D.3. above) it became clear that the sub-code, "Did you get justice?" needed no further refinement, and this is dealt with in Chapter 6, below. In this chapter I set out the six themes to emerge from the initial code, "Fairness and justice statements: evaluation" and the two sub-codes, "Explanation" and "Pressure to settle." They are:

1. Proportionality

2. Compromise
3. Balance of risk
4. Philosophy of justice
5. Point of principle
6. Shouldn't happen to anyone else

A.1. Proportionality

One idea a number of participants touched on was the sense that the amounts at stake in small claims are not large and so there is almost a moral responsibility to mediate. The interviews took place after several years of political and economic policies in the UK known as "austerity" (Bramall, Gilbert and Meadway, 2016) during which the public became accustomed to reductions in public expenditure. The justice system was a noted target of these "cuts" given the competing priorities of issues like health or education (Justice, 2015; Giabardo, 2017). This may explain participants' willingness to consider a pragmatic approach to their disputes, leaving the state to devote its resources to matters more proportionate to judicial skills and time:

*P1*[4] *If it was going to be mediation, I should make some offer, otherwise really, em, some slight offer… otherwise, you know, we're gonna take up court time… A little bit in the back of my mind that this was – we could go to court and then that's gonna be another appearance and another load of expense and so on. Em, does society need it?*

*P7* *You're thinking, you know, I mean, I'm talking about a few hundred pounds here, you know, is it the sort of thing you should be going to court to?*

[4] Participants are numbered in the order in which they were interviewed.

These Scottish small claimants contrast sharply with some reported in earlier US studies, where the suggestion of mediation seems to have been viewed as patronising or belittling (see Chapter 2.B.1. above). Engle-Merry's study of small claimants in low-income Boston neighbourhoods found it was those in the juridical field, "judges, lawyers, clerk-magistrates, and mediation-program staff," (1990, p. 1) who regarded these disputes as too minor to warrant legal intervention. Litigants in that study did not display a comparable sense of proportionality, preferring their day in court: "an authority who could determine who was right and who was wrong" (Engle-Merry, 1990, p. 176). Despite calling them "little injustices," Nader too argued for adjudication in low-value consumer claims (1979, p. 1000). The distinct approach of participants in the current study may represent cultural differences between the UK and the US or, just as plausibly, between public discourse in the 1980s and 2010s, as the perceived role of the state was steadily eroded in both settings (Cohen, 2009; see MacLeod and Emejulu, 2014 for a Scottish perspective on similar developments in relation to Asset Based Community Development).

One respondent from a UK-wide business seemed to reflect post-austerity debates about the cost of the justice system:

*P14* *I think we're seeing a very interesting situation with regard to sort of civil claims and it's almost like – I mean, this is my personal view and this is very anecdotal – is that the courts do not have the resources for me and the other party to argue the toss over a reclining chair.*

This principle of proportionality cuts two ways. It is not just the state but parties, particularly businesses, who might ask themselves if their resources could be applied to other more important matters.

*P14* *But what we tend to do is before we all get sort of entrenched, so we just pull ourselves to one side and go – right, what are we actually arguing over here?*

*Can we make a sound commercial decision to resolve this in a way that means you don't have to go to a hearing?*

*P21* *And short of us then moving forward and getting the… getting expert witnesses in for all the various facets of the job at our cost and then still no guarantee of winning…*

*P13* *The telephone mediation was fine cos – for the amount of time that it – it depends what, you know, the amount of time that's taken up of your time*

Scotland's last review of civil justice expressed a similar concern. One of its principles declared that the civil justice system: "should make effective and efficient use of its resources, allocating them to cases *proportionately* to the importance and value of the issues at stake [my italics]" (Scottish Civil Courts Review, 2009b, p. 2). In England and Wales the same principle underpins the "overriding objective" for civil justice: "to deal with cases justly and at proportionate cost" (Ministry of Justice, 2019, 1.1 (2)). Proportionality is one instance of a phenomenon that emerged repeatedly in the data: when given the opportunity to discuss in depth the thinking behind their choices in mediation, lay people expressed concerns ranging far beyond simply maximising financial gain.

Proportionality could be characterised as a public policy issue. Lower courts are slow to name public policy as a criterion in judicial reasoning, regarding it as complex, even "elusive" (Ghodoosi, 2016, p. 687). However, the influence of proportionality as a public policy is readily seen in the secondary legislation underpinning Simple Procedure; for example in the use of Summary Sheriffs (a new, cheaper, third tier of Scottish judiciary) and their wide discretion to dispose of cases as they think fit even without an evidential hearing (Scottish Statutory Instruments 2016, No.200, Rule 1.8).

It is striking to see such an idea manifesting itself in participants' thinking. Yet litigants are also citizens. Why should they not be concerned with the issues with which courts and policymakers wrestle? Most are also taxpayers, and the cost of civil justice has been a regular trope in news and political debate for at least the past decade (Doughty, 2010; Full Fact, 2013; Gazette reporters, 2018). However, the statements above also suggest an element of personal responsibility, with individuals applying the principle of proportionality in their own cause. This runs counter to the sceptical view that mediation settlements are solely motivated by self-interest (Montada and Maes, 2016); or indeed that those with greater endowments of wealth or education will inevitably use the process to dominate the weaker party (see Chapter 2.B.3. above). A number of these respondents represented businesses and the relatively low value of the dispute seems to have been a factor both in agreeing to mediate and in settling.

On the other hand any of these statements could be examples of the "self-presentation" I noted in the pilot phase (Chapter 4.F.4.e. above). Participants may wish to appear as good citizens, the sort of people who take account of wider society as well as their own interests. Here I pose the question: might this be one source of mediation's effectiveness? If participants want an interviewer to see them as fair-minded citizens, it is at least plausible that they equally seek the mediator's approval of their behaviour. That may apply even more forcefully when the court suggests mediation, transforming it into a "justice ritual" (see Chapter 7.D. below).

<u>A.2. Compromise</u>

Some of the examples of proportionality hint at a related idea: compromise. A number of participants spoke about compromise but appeared to employ the term to mean different things. This range of meanings may explain their ambivalence. I explain below how the word can be both positive and negative, and the implications for our understanding of mediation.

Some participants expressed dismay at "having" to compromise:

P23 *We felt that we… we had to make a lot of compromises.*

Others approved of mediators' moves to encourage it:

P2 *I think they were very fair and they gave each of us an opportunity to speak and they tried to encourage compromise and I suppose that's what their job was.*

At the same time participants could be critical of the other party's failure to compromise:

P14 *So that's basically the full amount of his claim less the extra bit that he's added in to the claim. So he wasn't really mediating, as such, it wasn't a compromise.*

P5 *[Sheriff] asked [defender] are you prepared to compromise? And he said no. He was as categoric as that. He simply said no.*

Some took a businesslike stance, presenting compromise as a rational way to resolve disputes:

P19 *So I didn't get all I wanted, but I wasn't particularly out of pocket. So I'm reasonably happy that we've reached an adequate place.*

Some linked compromise to fairness, as illustrated by the following responses to my question about criteria for evaluating fairness:

P7 *Well, I suppose both parties have got to be in agreement, haven't they? They've got to – they've got to compromise.*

*P8* *I think it's just a case of seeing whether the other side is willing to compromise... If we're meeting halfway and they're saying, yes, we do agree that charges are legitimate and they're agreeing to a certain extent, then yes, I would say it's fair enough to waive off certain charges.*

Its prevalence among this sample suggests that compromise plays a central role in people's thinking about mediation. However, the frame placed on the term can dramatically alter its meaning. I detected at least five shades of meaning:

- agreeing to compromise (demonstrating my reasonableness)
- refusal to compromise (demonstrating the other party's unreasonableness)
- having to compromise (removing my choice)
- [my] refusal to compromise (demonstrating my moral rectitude)
- encouraging compromise (demonstrating the mediator's or the Sheriff's commitment to settlement, and perhaps to fairness).

Another potential category was less visible in the data: the idea of the "shoddy compromise" in which pragmatism triumphs over principle and justice is left undone. This interpretation could be placed on statements suggesting compromise for pragmatic reasons such as the balance of risk (A.3. below). However, those who chose to compromise appear to have regarded it as logical and required by the situation. Once again I cannot rule out the impact of self-presentation in the interviews. Participants may have viewed it as socially desirable to be the sort of person who is willing to compromise, particularly when prompted by the mediator and/or the Sheriff.

These multiple meanings of compromise present important implications for mediation, both in terms of the way it is practised and the way it is perceived. I develop this theme further in the Discussion (see Chapter 7.C.2. below).

<u>A.3. Balance of risk</u>

The category entitled "balance of risk" emerged from statements about the calculus participants employed when deciding to accept some form of compromise. I start with some examples.

One aspect of risk is simple uncertainty about an unfamiliar process.

*P11* *There's always a risk going into court. There's always a definite risk going into court. You can never tell and certainly my wife thinks it's a superb solution.*

*P12* *But I decided to accept it to avoid taking it to court, not knowing what the outcome would be.*

Some participants focused on the worst case scenario, expressing the thought that all their efforts could be in vain, particularly in the hands of an unpredictable Sheriff:

I So why – what led you to accept it? What were the factors in your thinking?
*P13* *Because I was scared I was gonna end up with nothing.*

*P19* *I'd been to court a number of times and certain Sheriffs take different things, the mediation seemed a lower risk option.*

*P16* *you know, you hear about cases where you go to court and you don't get justice. So it's always a risk (LAUGHS).*

These reports run counter to the common portrayal of unrepresented people as unduly optimistic and vulnerable to "normal cognitive overconfidences" (Keet 2018, p. 69). One of the two solicitors in the sample provided a more practised evaluation of risk:

*P22* *…an assessment of – well, trying to see what's the ultimate best case scenario for everyone. In this case, it's for the case to be over and for everyone to – for the matter to be resolved. How are we going to get to that? They want money, we don't want to give them any money. Is there a sum of money you would be prepared to give to effectively negate the risk of having to pay more at a later date if the Sheriff disagrees with you? If you go down the line to the logical conclusion which is a substantial hearing and the Sheriff just is not on board with you and gives them the whole £4000… you want to avoid that.*

This solicitor later spoke of "buying off that risk".

The overall impression from the sizeable proportion of participants in this category is that the term "settlement" carried a similar resonance to that expressed by Fiss, meaning "to accept less than some ideal" (1984, p. 1086). To parody somewhat, if asked "Did you win?" they might reply "No, I settled." This may explain why so many accepted settlements they regarded as unfair or representing less than 100% justice (for further discussion of this see Chapter 6.C and Chapter 7.B. below). At the same time they tended not to display the dissatisfaction usually associated with unfairness. This final extract illustrates the sort of calculus that appears to link risk, effort and fairness:

*P6* *…my lawyer had told me that charges such as the ones they had raised was at the discretion of the Sheriff. It was up to him to say who should pay it, if I was liable or if I wasn't liable. And for the sake of £250 and coming back to court*

> *and the costs and the time and the hassle involved in doing that, I thought (PAUSE) a 50/50 split was a fair settlement, which they accepted.*

In one sense this category, balance of risk, has little to do with justice. It is pragmatic and rationalistic, with participants often enumerating actual sums in assessing an acceptable discount, or attempting to place a value on predictable pain today against unpredictable pain tomorrow. As Kahneman and Tversky (1979; see also Tversky and Kahneman, 1992) have set out, this is an inexact science for most individuals.

And yet balance of risk thinking is woven into the justice system. Its functionaries in the "juridical field" (Bourdieu, 1987), such as lawyers and advice workers, will be familiar with such a calculus. Indeed, the capacity to advise clients about potential risks is one of the legal profession's key claims to expertise (Molot, 2009; Keet, Heavin and Lande, 2020). Keet maintains that such a risk assessment ought to take account of factors such as stress, time and reduced productivity: "It is difficult for clients to predict the impact of legal process (as distinct from legal outcomes) on their individual lives" (2018, p. 71). To hear that such thinking contributes to mediation settlements neither resolves nor undermines the claim that it delivers justice. It does, however, illustrate mediation's similarities to other aspects of the justice system, and offers us a glimpse of unrepresented people behaving much like legal professionals.

A.4. Philosophy of Justice

During the pilot phase I began to notice participants answering a question I had not asked: "what kind of person are you?" (see Chapter 4.E.4.e. above). This was no less pronounced in the full study, enriching the analysis. It was as if when participants heard the question "did you get justice?" they answered the question "did you do justice?" More broadly, when answering enquiries about the fairness and justice of the outcome, many respondents spoke about themselves, describing their thinking, perspective, motivation and, for some, business philosophy. See Chapter 7.C.3. (below) for more on the distinction between receiving and doing justice.

The term "philosophy of justice" attempts to capture this set of responses. As with all qualitative data analysis, there is a degree of subjectivity to my selection; some responses plausibly belong to more than one category. Nonetheless these statements provide a glimpse of how lay people invoke aspects of justice in attempting to explain their decisions to an interviewer.

A.4.a. Personal philosophy

Some participants described a personal standard, not dissimilar to the "Golden Rule" (Swidler, 2019), by which one ought to treat others as one would wish to be treated. This could refer to personal or business morality or both.

*P14* *The thing is, I expect people to (PAUSE) – do as you would be done by.*

*P18* *Well, for me, it's – well, you, you – someone's produced work for you, you were happy with the work, you pay for the work and that's it.*

*P11* *And I think things should be done the right way by the book, the honest way.*

Some attempted to put their dispute into perspective by comparing its gravity with other, more serious, problems.

*P5* *So justice is the process that gives an answer or a solution or a resolution to an issue, be it a financial matter, whether it be a criminal matter… I've given two of my own examples which is trivial by comparison with these major issues that I think other people are facing.*

*P11* *It turned out that he had plenty money and I could have gone for the full amount; he could have paid the full amount on the spot. But that's what happened. That's just one of those things.*

I (LAUGHS)

*P11 That's just life.*

This may be an instance of the "winner's curse" (Bazerman and Shonk, 2005, p. 59), where the other party's acceptance immediately raises the prospect that greater gains could have been obtained by pushing harder, tingeing successful negotiations with disappointment.

A.4.b. Doing justice: the self in action

Some participants expressed the justice of the outcome in terms of what it said about them. Ideas expressed here include being the sort of person who tackles injustice so it doesn't happen to anyone else, or simply the sort of person who behaves fairly.

*P13 In many ways, I was pleased that I had actually taken it – like, I had taken the steps to try to get my money back and that I'd gotten something because I think – well, looking back – well, there have been a lot of cars damaged.*

*P23 Well, we kinda backed down on the percentage of the sofa. It was us, cos they weren't willing to budge at all, so we made the decision that – OK, em, we will come down a little bit… to be fair, you know.*

*But as for the – when it came to the court cost side of it and everything, no. I stood my ground there. There was no – I wasn't having any flexibility with that part at all because I had sent a letter to the company over a year previous to that saying, listen, if you give me 50% back of the sofa price, we can walk away now and that's it done. And they said no, take us to court. So in my eyes there, I was like, well you forced us here.*

Note the second half of this excerpt, where the participant describes digging in her heels over legal expenses. While fairness required that she and her partner "backed down" on the substantive amount, something about the claimants' conduct led to the

opposite approach to legal expenses. This behaviour is reminiscent of participants in ultimatum games who tend to reject economically rational gains when they believe the other party behaved unfairly (Güth, Schmittberger and Schwarze, 1982; Schuster, 2017).

Business people also sought to demonstrate how fair or reasonable they were, some portraying this as part of their way of doing business. For example:

*P14* *But what we tend to do is before we all get sort of entrenched, we just pull ourselves to one side and go – right, what are we actually arguing over here? Can we make a sound commercial decision to resolve this in a way that means you don't have to go to a hearing? … What difference would it make to you as a business if you climb down a little bit and you give them what it is that they're after?*

On the other hand commercial realities could constrain small businesses' options, making personal ethics seem like an unaffordable luxury.

*P20* *But there's also a different expectation when you're a business owner. So there's, there's you and I … where it's all about fairness and then there's where you've got ten employees and you're responsible for them and if you don't pay those wages, there's no jobs for ten people. So one person jeopardises that. That means that you then are short to run the business for the next month.*

This participant appeared to feel the need to explain her departure from personal values – "there's you and I… where it's all about fairness" – attributing a more instrumental approach to business pressures. I develop this theme further in the discussion (Chapter 7.A.3. below).

A.4.c. Legally qualified people

I start with the two legally qualified interviewees as they provide a useful reference point: the perspective of justice professionals. Both manifested a degree of puzzlement over the question, “Did you get justice?”, suggesting that those actually operating the justice system tend to focus on law as Ewick and Silbey characterised it: “a game, a terrain for tactical encounters through which people marshal a variety of social resources to achieve strategic goals” (1998, p. 28).

*P10* *That is more a claimant/pursuer question because she’s brought the claim and she wants justice.*

I Mm hmm.

*P10* *OK? Where, as a defendant, we’re not looking for justice.*

*P22* *Justice? (LAUGHS) Justice for who?*

It is not the purpose of the present study to consider lawyers’ relationship to justice. That vexed question has long troubled onlookers (Dickens, 1853; Pound, 1944). The two practitioners in my sample do appear, however, to manifest what Simon called the “dominant conception” of the contemporary lawyer’s role, with its weakened connection between practical lawyering and “the values of justice” (1998, p. 2). In this conception, “the only ethical duty distinctive to the lawyer's role is loyalty to the client” (Simon 1998, p. 8; see also Cohen, Helzer and Creo, 2022).

And yet while possessing expertise in the justice system lawyers are also individuals with their own ethical and moral codes. The first described having to draw a clear distinction between her own morality and what was “commercial,” appearing to view it as axiomatic that the courts would take the commercial approach. The personal, therefore, had to be damped down, much like the business person described above (A.4.b).

*P10* *I can’t think whether it’s fair that she should get some money back.*

I Right.

*P10 Because (PAUSE), commercially, she shouldn't. So I can't think, ah, that's really unfair that she's had such a bad time, I'll give her some money and I feel happy about it.*

There are echoes in this statement by a pragmatic, jobbing lawyer of legal positivism's endeavour to keep law and morality separate (Kelsen, 1934).

A.4.d. Legality: the role of legal norms

When asked about the fairness or justice of their settlement few participants mentioned the law (for their responses to more direct probing about legal norms, see B, below). Unprompted replies tended to present their thinking in terms of wider social norms such as reciprocity, the Golden Rule (see A.4.a. above) and holding wrongdoing to account. One participant was explicit that, for him, common sense and reasonableness trump legal norms:

*P6 So in this type of situation, you have to have a – go by gut feel and basically gut feel in what is fair and reasonable.*

I And does the law come into that at all?

*P6 To my mind, no. It's common sense. I think a lot of this has got to do with common sense and what is reasonable.*

In contrast another participant, a claims officer for a property factor, placed the law at the heart of her response:

*P8 If it's in a legal document, your title deeds, it's not – we haven't made up your title deeds.*

She also expressed frustration at the apparent absence of legal norms in her experience of small claims mediation:

P8 *I think the disadvantage of coming to mediation is that you can't argue points of law.*

Commercial mediators in higher value cases almost certainly take a different tack from some of these small claims mediators (Wade, 2012; Wall and Chan-Serafin, 2014). The "evaluative" mediation style in which mediators are prepared to offer guidance on legal norms (Riskin, 1996, 2003, and Chapter 4.A.1, above) is common in such cases and is considered further at B. below.

A.4.e. The lack of a relational dimension

One striking omission from these responses is any mention of participants' relationship to the other party. This runs counter to a significant tradition, calling itself the "relational" approach, holding that mediation's key focus ought to be less on solving problems than on the interaction between the parties (Winslade and Monk, 2002; Bush and Folger, 2005). This needs to be distinguished from two similar but distinct claims sometimes made by mediation's proponents: 1) that the process is particularly suited for those with an ongoing relationship (Sander, 1976); 2) that participating in mediation can enhance disputants' relationship (Lederach and Kraybill, 1993; Shonholtz, 1993).

The data provided little evidence to support either. Participants rarely spoke about their relationship to the other party in positive, far less affectionate, terms. This may reflect the subject matter of small claims, most of which centre around a trading or business relationship which is, by its nature, temporary and instrumental. One thought the solicitor for the other party had apologised but when I probed further could not remember much about it, adding:

P7 *Maybe she didn't (LAUGHS). Maybe I wanted her to (LAUGHS).*

She then explained that she attached little value to the solicitor's responses. She had already concluded this company was operating an unfair model where it could take a commission on customers' online bookings yet deny legal responsibility if anything went wrong. As far as she was concerned the lawyer was simply doing her job and would accept the company's version of events.

*P7 So she's obviously taking their side and what their side is gospel. And I'm saying, well I'm sorry, that's not true.*

This participant provides a salutary reminder to mediation idealists that consumers may not share some of their higher aspirations. These include reconciliation (Cloke, 1993; Poitras and Le Tareau, 2009); preserved relationships (ABA Section of Dispute Resolution 2008, though Charkoudian *et al*. 2017 found some evidence of this) and Welsh's desiderata of "the potential power of mediation to foster dialogue, procedural justice, and self-determination" (2017, p. 725).

Another relational phenomenon for which mediation may be particularly suitable is delivering an apology (Irvine, Clark and Robertson, 2011; Carroll, Allan and Halsmith, 2017; Afrassiab, 2019), perhaps in part because it wrests control of the discourse away from legal professionals. For Relis mediation provides: "opportunities for litigants to articulate their extra-legal realities and needs," including the desire for an apology (2007, p. 709), while the majority of lawyers in her research saw money as the sole aim of litigation. And yet an apology delivered by one of those legal professionals may not mean a great deal. Participants in a US study rated attorney apologies less positively and as less sincere than those offered by the person causing the harm (Robbennolt, 2013). They were instead seen instrumental, a way of avoiding litigation (*ibid*, p. 132).

A.4.f. Conclusion

This section has attempted to summarise statements in which participants revealed their personal approach to justice. Some spoke about their criteria for evaluating the

result, mostly in terms of broad ethical principles like the Golden Rule or fair dealing. Others seemed to evaluate themselves, their approach to the mediation illustrating what kind of people they were: fair, scrupulous, reasonable. The legal professionals demonstrated a capacity to bracket off the work from justice; not only their personal philosophy but wider notions of what justice requires. This seems ironic if they are viewed as officers of the court; yet entirely proper in their role as zealous advocates for their clients.

Personal relationships played little part in any of the interviews, suggesting that small claims mediation is seen as a site for applying abstract principles or simply for financial negotiation, rather than for mending relationships. This does not mean, however, that participants were "all about the money."

A.5."Non-economic goals" (Relis, 2007, p. 708)

It is tempting, given the "limited remedial imagination of courts" (Menkel-Meadow 1984, p. 791), to assume that justice is most accurately assessed financially. Money is after all the remedy most frequently sought and granted in legal disputes and by its nature is readily measurable. If a party seeks X and receives Y, the percentage Y/X appears to denote the degree of success (although a high X may simply indicate over-optimism). It is conceivable that the quality of justice obtained in mediation could be calculated by comparing Y/X for a sample of litigated and mediated disputes. Put simply, did people 'get' more in mediation or in litigation?

However, it is a central contention of this thesis that justice is more complex than that. While medical negligence attorneys in Relis's (2007) study thought their clients were largely or exclusively interested in a financial award, claimants themselves placed money halfway down a long list of goals for litigation or mediation. That list included explanation, apology, remedial action and punishment. A Scandinavian study of court-annexed mediation settlements found that 65% contained at least one item in addition to cash (Adrian and Mykland, 2014). The equivalent figure for the

Mediation Clinic in 2022-23 was 35% (University of Strathclyde Mediation Clinic, 2023, p. 5).

This is not to suggest that money is unimportant. The act of spending £104 to raise a Simple Procedure action then specifying the sum sought seems likely to place claimants on tramlines leading inescapably to a financial award. But a monetary award does not mean exclusively monetary thinking. Decrees for payment symbolise justice throughout the court system, yet we expect judicial reasoning to go beyond simple arithmetical calculation. Similarly, in describing their thinking about a settlement figure, participants helped answer the question: what did money symbolise for them?

#### A.5.a. Point of principle

The term "point of principle" is familiar. An English legal website cautions: "The general rule of thumb on 'points of principle' is that they are very, very, expensive" (Zikking, 2019). This received legal wisdom is tempered by Simple Procedure's cap on expenses (a maximum of 10% of the sum awarded in actions below £3,000) but it underlines the legal profession's scepticism about non-pecuniary goals for litigation. Two participants used the term itself. A number of other responses revealed a similar motivation for proceeding with court action. The responses can be roughly divided into three groups: i) reaction to opponent's behaviour during the dispute; ii) reaction to opponent's behaviour in the mediation; and iii) repeat players concerned with precedent as much as outcome.

i) Some described raising an action as a direct response to the other party's behaviour, rather than to seek recompense for financial loss:

I So what triggered you making a claim in court?

*P18 Eh, the fact that he was, eh (PAUSE) excuse my French (LAUGHS) but he was taking the piss.*

*P7* *At that point, it became principled. I thought – no, you know what, you're not getting away with it, I'm not walking away from this.*

*P14* *And sometimes some people get so entrenched and you can end up in a situation where you think, do you know what, if it means that much, then we'll go to a hearing.*

ii) Others described a hardening of their attitude during the mediation itself, again in reaction to the other party's behaviour:

*P5* *If he'd not changed and if he'd been pleasant all the way through, you know, we may have been able to have some of a dialogue and say, look ..., kinda let's get this sorted, what can we do? But we finished up poles apart. He just moved into a position of, I'm simply paying you nothing, you know, go whistle for it and if you're gonna sue me, off you go. I was kind of – OK [Defender], well if that's what I have to do, I will do it.*

*P18* *It was (PAUSE) his chance to do the right thing and he didn't take it. So – it was his second chance actually… At the same time, it increased my willingness not to compromise anymore.*

Macfarlane suggests that conflicts often start as disputes over resources but then "mutate into ethical and value conflicts" (2001, p. 689). Once this transformation has taken place settlement seems like "unacceptable moral capitulation" (ibid, p. 690).

iii) A distinct set of responses came from business people for whom the principle lay not in a visceral response to the other's actions but a calculation that pursuing litigation may deter future behaviour.

*P8* *After all, I think what the company is trying to do is set an example to everybody.*

*P19* *It's a regular occurrence in this kinda business, so I thought I would pursue it and see where it got to.*

The first two categories illustrate a familiar phenomenon to mediators and litigators, where parties appear to act against economic self-interest by refusing to accommodate or compromise. For these people the other's actions placed them beyond the pale. P9 (the only participant who declined my request to record the interview) described his refusal to pay £110 to a tradesman whom he felt had carried out shoddy work. This man's hourly rate was considerably more than double the amount in dispute, yet he devoted hours to the court action and in the mediation scuppered any prospect of settlement by offering £1. That can only be seen as an insulting offer.

The term *insult* provides a useful window onto the "point of principle". With the exception of the business parties, all respondents above felt they had been in some way insulted by the other person. That insult became a more significant driver of their actions in mediation than economic rationality or convenience. Beersma, Harinck and Gerts (2003) found that insults tended to trigger greater conflict, more negative emotions and the use of distributive rather than integrative bargaining. Writing about non-Western cultures, Bleiker *et al* describe insults as "a challenge to an individual's very existence, including their integrity as a social being," while fighting back helps to reclaim a sense of "sociality and harmony" (2003, p. 291). Despite their Western heritage, Scotland's litigants did not appear so very different.

A.5.b. Shouldn't happen to anyone else

Another non-economic goal is deterrence: preventing future wrongdoing. Some participants portrayed themselves as relatively powerless consumers up against well-

resourced and badly-behaved companies. Among their motives for raising a court action they listed a desire to hold the company to account. Given mediation's privacy it is unclear how they might achieve that goal once referred away from court, but these comments demonstrate its continuing importance to some participants.

*P17 I'm sorta determined to follow it through in terms of, you know, hopefully it won't happen to other people*

*P21 We cannot be the only people who've experienced this*

This theme contains a challenge for mediation. Even those who accepted a settlement could express significant unhappiness if the element of holding to account was absent.

*P23 So you kinda feel that another big company – and the big company's just kinda got away…*

*P21 I said, I'm really not comfortable (CLEARS THROAT) about the sort of gagging thing at all. I, I said that to my husband cos he knows I can't… you know, I think there's an injustice and I found it really hard not to, want to challenge that. But, you know, we just had to move on but I still feel really angry.*

Early critics of mediation highlighted the problem of settling cases in private (Nader, 1979; Fiss, 1984, and see Chapter 2.B.1.). Without the glare of publicity, runs the argument, big bad companies will continue to misbehave. The cost of buying off unhappy consumers case by case is outweighed by large and continuing profits. Only the bad publicity generated by public courts can inflict the sort of reputational damage such perpetrators take seriously. This may continue to be a problem for Scottish consumers, particularly given that class actions are a recent phenomenon and remain challenging for smaller matters.

The picture is probably more nuanced, however. Not all companies are huge, not all claimants powerless (see Chapter 7.C.1. below). One participant stated:

*P13* *Having a business myself, I would not want – I wouldn't do anything to aggravate – to further aggravate anybody.*

Furthermore the rise of social media has placed additional weapons in the hands of disgruntled consumers. Another participant, whose case had not settled and who intended not to pursue the matter in court, still reserved the right to take action in the form of "self-help" (Genn and Paterson, 2001, p. 89):

*P17* *I would still (LAUGHS), I would still go through with the police and the reviews and things like that.*

This raises the possibility of justice outside the law. The rise of social media and ratings websites seems to have reintroduced into large, urban societies the possibility of holding companies to account and deterring future wrongdoing through a form of public naming and shaming (Greaves *et al.*, 2013; Lăzăroiu *et al.*, 2020; Wilantika and Wibisono, 2021).

A.6. Conclusion

The theme of "fairness and justice statements" embraced a broad sweep of participants' discourse. Some were responses to direct questions about fairness while others emerged from conversations ranging across topics like their reasons for settling, thoughts about the process and views of mediators. Participant responses touch on both the operation of the justice system (proportionality, balance of risk, shouldn't happen to anyone else) and their own values (compromise, philosophy of justice, point of principle). They are considered further in the Discussion (Chapter 7, below). The next section turns to the theme of legal norms and their role in a non-adjudicative setting.

**B. Legal norms and legal advice**

The interviews provide some support for an idea touched on in the critical literature on mediation (see Chapter 2, B, above). This is the notion that mediation is reasonably useful for reasonable people, but ineffectual when faced with stubborn, oppressive or "difficult" characters (Deutsch 2014, p. 24; and see Bryan, 1992; Rogers and Gee, 2003). This includes those who are: unprincipled (unlikely to be influenced by shared morality); angry (beyond caring about legal norms); or ignorant (unaware of how the law might work against them). It is a variant on an old theme: "nice guys finish last" (Durocher, cited in Deutsch, 1990, p. 247), fuelled by legal practitioners' scepticism about any approach stressing interpersonal factors over legal rules (Condlin, 1995).

That scepticism may have been reinforced by social media and the rise of "conflict spectacles" (Reynolds, 2019, p. 2359). These are high-profile disputes played out in the public realm, often accompanied by extreme online reactions. Such "morality plays … tend to reduce people to caricatures, overemphasize the benefits of 'strong' responses like anger, and devalue efforts to validate opposing perspectives, admit mistakes, apologize, and forgive" (*ibid*, p. 2379).

Whatever the twist introduced by social media this approach to conflict is nothing new. Scholars have long suggested that mediation should deal with the unprincipled, angry and ignorant by introducing normative guidance in the interests of informed decision-making (Nolan-Haley, 1999; Hyman and Love, 2002; Coben, 2004; Colatrella, 2014; Noone and Ojelabi, 2014; Waldman and Ojelabi, 2016, and see Chapter 3.B. above). Condlin presents this as an essential mooring for dispute negotiation:

> I assume only that, whether described as rights, claims, interests, rules, principles, tradition, conventions, practices, or whatever, parties to a dispute must share a set of authoritative background norms of some kind, no matter how rudimentary or limited, for principled conversation about differences to be possible (2011, p. 299).

In contrast to Section A, above, considering participants' non-legal reasoning about fairness and justice, this section focuses on the law and its place in that thinking (if any). One of the study's original questions was "Can mediation claim to bring about just outcomes to legal disputes?" (see Chapter 4.B. above). This was eventually changed in favour of a single question: "What is the place of justice in the thinking of small claims mediation participants?" During the pilot phase, however, participant responses re-ignited my interest in the role of the law and legal norms in that thinking. At that stage I amended the interview topic guide, inserting two new prompts for the remainder of the study: "relevance of legal norms in their thinking" and "other sources of norms" (see Chapter 4.F.5.b. above). The themes reported in this section reflect that additional probing.[5]

Participants revealed wide variation in both legal understanding and their confidence in that understanding, although there was no automatic correlation between the two. When asked about the sources of their legal knowledge they described four:

a) their own understanding

b) mediator input on the law

c) the court

d) legal advice.

B.1. Parties' own understanding: "the law is on my side"

When I probed about the role of legal norms, some participants clearly derived confidence from the law and their understanding of it. Repeat players like legal practitioners and claims managers from large organisations had a sufficiently nuanced grasp to apply legal rules to their particular case:

[5] The later addition of the two new prompts to the topic guide accounts for the small number of responses from pilot phase participants (1-5) in this section.

*P10 (legal practitioner)* *We've also got a Court of Appeal decision to back it all up… Which of course, the smaller court, the small claims court, has to follow.*

*P14 (claims manager)* *It's a basic understanding of the Sale of Goods Act Section 35 that you're not gonna be able to claim for that because you're deemed to have accepted the goods.*

Those without previous experience of the courts, "one-shotters" (Galanter, 1974, p. 97), were less precise, though it would be wrong to suggest that legal rules played no part in their thinking. One claimant in a common repairs dispute seemed to have a clear understanding of the law of common property:

*P16* *You know, actually, this is nothing to do with the fact that you know as a builder that maybe that was a bit expensive but that's not the issue. The issue is that, actually, you're legally responsible for the roof.*

Another expressed her understanding of the way Scots law treats unfair contract terms:

*P13* *Her terms and conditions, she did keep on going on about them. But I was just saying, you know, anybody can, anybody can have terms and conditions, you can put – but it doesn't – I'm losing my words here. It doesn't make you not liable if you're legally liable.*

And another drew on a general understanding of contract:

*P24* *I just knew that, em, I had – I, I didn't have a, a product that I'd paid for.*

However, such a partial understanding could be problematic, illustrating Pope's adage that "a little learning is a dang'rous thing" (1711, Part 2). This claimant had consulted two advice agencies and a solicitor and had formed a definite view on the law, favourable to his claim:

*P23* *You have rights on your goods for 6 years. It doesn't matter what a company says. When they say, oh you get a year's warranty or a year's guarantee, you're covered for 6 years under the Sale of Goods Act.*

He had been greatly deflated when the Sheriff gave a strong hint that the age of the goods (a 5-year-old sofa) would influence the potential value of his claim. Yet the Sheriff's remarks did not shake his belief. He regarded the Sheriff as simply taking a personal dislike to him rather than offering a necessary corrective to his (over-optimistic) view of the law. This is reminiscent of "The Critique of Legal Officials" in a study of US divorce lawyers, who often prepared their clients by depicting judges as "capable of making decisions on grounds that have nothing to do with facts or rules" (Sarat and Felstiner, 1989, p. 1676).

It is possible that none of his three advisors had mentioned the complexity of applying general rules to specific situations. Alternatively this man exemplifies the risk of confirmation bias for those less experienced in the law, leading to overemphasis on factors supporting their view and neglect of those disconfirming it (Klayman, 1995; Hoffman and Wolman, 2013; Colatrella, 2014). He may equally be an example of a phenomenon Felstiner and Sarat identified in a later study of lawyer/client interaction: "Clients, of course, have greater difficulty than lawyers in becoming oriented to the world of the legally possible" (1992, p. 1460). The existence of biases and the complexity of the legally possible suggests a potential role for mediators in providing guidance on the application of legal norms to the particular case, not in advance, but as the details start to emerge from the unfolding discussion.

B.2. Mediator input on the law

The participants described a spectrum of mediator moves. In attempting to categorise them I have inevitably imposed my own interpretation on their meaning. The task of the qualitative interviewer is to interpret an interpretation (Ceci, Limacher and McLeod, 2002). Lacking direct access to the events being described we rely on our interviewees' accounts to construct a plausible view of social phenomena. A single conversational gambit such as a mediator's question could be viewed in a number of ways: a request for information, an attempt to highlight weaknesses in their case, an attempt to highlight weaknesses in the other party's case, a way of embedding a suggestion (e.g. have you obtained an expert report?), a rhetorical opening (e.g. are you familiar with the rules on expenses?) and an indication of the mediator's thinking. Any or all of these meanings may accurately reflect the mediator's intention.

As a mediator myself I am inevitably curious about fellow professionals' work, having more "skin in the game" than a researcher from a different discipline. I share some of the characteristics of an "insider interviewer" (see Chapter 4.A.1. above), although I was not actually interviewing other mediators. Nonetheless it was important to be alert to the risk that this would influence my interpretation and so I consciously attempted to remain open to novel or even disapproved approaches from those whose work was described to me (see Chapter 4.B. and D. above, for a description of my efforts at reflexivity on my role as researcher). I have accordingly attempted to stick as closely as possible to the categories provided by interviewees.

Participants' recollections fell into three categories:

a) no comment by the mediators, either through omission or conscious refusal;

b) general mediator comment about legal or procedural norms;

c) mediator comment about the application of substantive OR procedural norms to the particular circumstances of the case.

B.2.a. No comment by the mediators

Sometimes legal norms appeared to play no part in a participant's thinking. Semi-structured interviews are a two-way street, and supplementary questions arose out of responses that sparked my curiosity. This led to exchanges like those below:

I Did the mediators, in your experience, provide any kind of substantive input about the law, what the courts might do?

*P19 No.*

I How the courts might behave?

*P19 No. None. No.*

I But from your own experience, was there any discussion by the mediators, for example, of the law?

*P17 No.*

I So I guess you might assume not with the garage either?

*P17 I would assume so, yeah. I mean, I did – I know I got something on email, so there's maybe something about confidentiality there but there was certainly nothing about, you know, consumer law or anything like that discussed with me.*

It is conceivable that mediators adapt their approach depending on parties' level of legal knowledge. One of the solicitor participants described the mediator explaining her reasons for saying little on the law:

*P22 She did say right at the beginning that this was a slightly different situation for her because, quite often, it's the individuals themselves at the mediation, rather than two solicitors. So that, I think, was slightly different to what she was used to. So she didn't really go into the legal points.*

One claimant described going through an entire failed mediation without envisaging a role for the law in the resolution of his dispute. It was only later, when he consulted a solicitor, that:

*P18* *To be honest, I realised yesterday when I was meeting the solicitor that he said, well, you know, it's a legal case and legally there was a contract and there's a breach of contract and that's what you need to prove… it was just not like – oh, you know, if the Sheriff is nice, he'll see the things the way I see them myself.*

Through his eyes the mediation had been a moral conversation that failed because the respondent did not share his business morality. He seems to have picked up from the mediators a prohibition on providing normative input:

I Did you feel like you got any form of justice by being sent to mediation?

*P18* *No… I would have liked some kind of guidance… that they surely were not allowed to produce, and I think it's, eh, a bit of a shame. Personally, it's just an opinion that they should voice, em, something.*

One business representative (a claims manager) was quite critical of mediators on this count:

*P8* *I don't think the mediators are quite polished up with the legislation whereas you would think they would be.*

The lack of normative input takes on a more troubling light where one party looks to have employed misinformation as a negotiation tactic. An unrepresented claimant described how the respondent company had contacted her between mediation

sessions.[6] They boasted that they had just won a similar case and the losing party had been ordered to pay legal expenses in excess of £50,000. This clearly frightened and intimidated the claimant:

*P21 I felt sick, absolutely sick.*

She went on to accept a lower offer than the company had made at the first mediation.

This case raised uncomfortable issues for me as insider interviewer. My questions revealed what looked like sharp practice by a "repeat-player" (Galanter, 1974, p. 97) in that the company seem to have omitted important contextual information.[7] I asked if the mediators had attempted to correct this impression:

I Did they provide you with any input on the law, you know, the rules, the norms that might apply to the case?

*P21 Hmm. No, I don't – not that I recall.*

As I probed the extent of the claimant's understanding I struggled not to show my dismay. This is further discussed in Chapter 7 (C.2.b. below).

Returning to the question of mediator input, this case illustrates that mediator silence may, in some circumstances, contribute to injustice. And yet mediators trained in the facilitative tradition would be operating in a perfectly ethical manner by choosing not to draw attention to legal norms. It falls squarely within Waldman's "norm generating" approach (Chapter 3.A.1. above) with mediators operating in a "normative tabula rasa [where] the only relevant norms are those the parties identify and agree upon" (1997,

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[6] This was the only instance where a participant described a mediation in two sessions. The standard model is a single session.

[7] More detail on this case is provided in Chapter 6, Case Study 4

p. 718). Waldman and Ojelabi (2016) later acknowledge this approach could deprive the vulnerable of their legal entitlements.

The present study did not set out to investigate mediator models and styles, yet the data do provide insight into their impact. They seemed to warrant further investigation, accepting Braun and Clark's view that themes do not simply "emerge" from the data but rather the researcher takes an active role in "identifying patterns/themes, selecting which are of interest, and reporting them to the readers" (2006, p. 7). As the evidence of mediators' interventions (or their absence) accumulated it became difficult to ignore. In Chapter 7 I consider the implications of mediator styles when non-lawyers are decision makers in justice events.

The remaining two categories show mediators taking an opposite tack and offering their own perspective on legal matters.

B.2.b. General comment by the mediators about legal or procedural norms

One way to ensure informed decision-making would be to set out applicable legal rules in general terms; legal information rather than legal advice. Mediators might also provide information about the court process. This category was triggered in part by my own interest in how mediators work with unrepresented people and partly by the following exchange:

*P18* *The mediators, yes. Yeah. They were, they were really good.*

I So they gave you in effect legal information or process information?

*P18* *Yes, exactly, yeah. More about the processes.*

Mediator advice about legal rules and their application remains controversial within mediation scholarship (Waldman 1998; Levin 2001; Zariski 2011; Mironi 2014). Kovach and Love (1996) dismiss evaluative mediation as "an oxymoron" while Wade (2012) maintains "all mediators give advice" (see Chapter 3, A.1, above). There is a half-way

house, however, between full-blown prediction of the legal result and mediator silence. Unrepresented parties, most of them one-shotters, may know little of the court process. Mediators could be a useful source of additional information without straying into evaluating the likely outcome of the case.

At times this was subtle. One participant described a rather delicate move where the mediators seem to have disentangled legal rules from general fairness:

*P12* *They said, look, we can't tell you what we think might happen, cos we don't know, it depends on the judge you get, they might think, oh you've got a fair case there. But they might, they might not agree… if I took it to court, it wouldn't be fairness that would decide, it would be the legal aspects of it which would decide whether I would win my case or lose my case.*

This looks like an example of what is sometimes known as "reality testing" (Noone and Ojelabi, 2014a; Keet, Heavin and Sparrow, 2018) or, more unkindly, "hashing, bashing and trashing" (Alfini, 1991). The effect was to influence the participant's estimation of his risks in litigation while maintaining his belief in the mediators' neutrality.

Another participant learned about the court's likely approach to disputes requiring technical knowledge:

*P15* *The mediator then said the Sheriff would probably need an expert report which will cost you £500.*

The procedural concept of the burden or onus of proof is unlikely to be familiar to most one-shot litigants. Mediators seem to have provided guidance here:

*P12* *It's actually you've got – things have got to be proved.*

*P17 I mean, one useful thing I picked up on was that it's up to me to prove things.*

However, even procedural information relies on a degree of expertise. Kovach and Love (1996) highlight the risk that a mediator's evaluation of the legal outcome may be wrong. The same applies to process guidance, particularly where local practice varies from court to court. This participant was responding to questions about the status of a settlement agreement:

*P11 The mediators told me that the court, well the Sheriff, will not look at the settlement agreement. That's what I was told.*

This may seem simply informative, but as an insider interviewer I was aware that other courts can take a different approach in certain circumstances, such as where one party has defaulted. Perhaps this is unimportant: as long as the mediators are familiar with local practice their guidance will help parties make informed choices.

<u>B.2.c. Mediator comments about the application of substantive OR procedural norms to the particular circumstances of the case</u>

This final variant comes closest to evaluative mediation. Riskin set out four activities characteristic of this mediator style:

> i) assess strengths and weaknesses of each side's case
> ii) predict outcomes of court or other processes
> iii) propose position-based compromise agreements
> iv) urge or push the parties to settle or to accept a particular settlement proposal or range (1996, pp. 27/28).

I consider each category in turn, even when the mediators appear to have eschewed it.

<u>B.2.c.i. Strengths and weaknesses</u>

*P14* *I think the mediator – one of the things that I thought was really helpful and I don't know whether this was her place to do it or not – was that she did point out to the claimant that that part of your claim isn't going to work.*

In some instances the mediators listened to both sides before enumerating each side's strengths and weaknesses:

*P16* *The mediators helped bring out the point that, actually, I was – I thought – cos I didn't know about the roof access – that I was saving them like £800 for future repairs for the cost of the cherry picker to come back out and it was only just painting the gutter.*

*P4* *When they could see that we weren't really – getting anywhere to a certain extent, then they kinda jumped in and that's when she said, you know, the kinda pros and cons.*

One participant faced a more abrasive move:

*P20* *And the woman said to me, what made you think you could withhold her salary?*

Most of these mediators seem to have strayed from a strict application of neutrality, offering what looks like support for one party's position in the manner of Greatbatch and Dingwall's (1989) "selective facilitation." When this favoured their case participants viewed it positively. Participant 20, however, was dismayed:

*P20* *Which really put my back up… if you make comments like that, then you're showing your hand right away.*

I Did you get the impression that the mediators would have done the same with her or that they were simply on her side?

*P20* *On her side.*

B.2.c.ii. Predict outcomes of court or other processes

Participants rarely described a direct prediction of the result. However, one mediator appears to have offered quite detailed information on the court's probable approach:

*P14* *the mediator had pointed out to him that, actually, rightly or wrongly, that that claim itself wouldn't stand, i.e. claiming for a full refund after nearly 5 years and then some more money because the measure of the damages is to put you into a position you would have been before the contract was entered into and therefore, at the most, that person would get a full refund.*

This can be described as an evaluative move. The mediator offers a general evaluation of the claimant's chances of success at an evidential hearing, though stopping short of predicting "the likely outcome at trial and appeal, and the associated costs" (Riskin, 1996, p. 27).

Rather than direct evaluations, interviewees more often spoke of mediators' describing the courts as unpredictable and daunting. In this respect they resembled US divorce lawyers portraying courts as "idiosyncratic and personalistic" (Sarat and Felstiner, 1989, p. 1662). That approach helped forge a separate analytical category, balance of risk (see A.3. above.)

B.2.c.iii. Propose position-based compromise agreements

The idea of a "mediator's proposal" (Hochman, 2012) runs counter to the facilitative mediation training most UK mediators receive, and participants were less likely to describe particular proposals than general pressure to settle. A number of interviewees spoke of mediator statements or questions that contain a clear encouragement to compromise:

*P8* *And the mediators do ask my director and myself like, OK, well, are you willing to put forward any offers? Are you willing to take off anything from the outstanding debt to encourage the respondent to actually settle the matter?*

*P13* *I spoke to the mediator to start and he said, you know, you're not going to get your full claim doing it this way, you know, if you're wanting – if I'm wanting everything – so if I'm wanting the full claim, then it wasn't for mediation. Mediation would be a reduced amount – how low was I willing to go?*

*P5* *I think from memory now, what they asked us was, are you prepared to move?*

These moves seem akin to what one veteran mediator called "conditioning" the parties (Kolb, 1993). The mediators were not evaluating the legal case but rather setting out a process norm: that compromise is essential if the matter is to settle. Grillo called such norms "the informal law of mediation" (Grillo, 1991, p. 1555), though the mediators' approach in the current study seems to have been gentler than the criticism and instruction she observed.

<u>B.2.c.iv. Urge or push the parties to settle or to accept a particular settlement proposal or range</u>

There was little evidence of this component of Riskin's evaluative style. Only one participant spoke of what he perceived as mediator pressure to settle in a particular range, though the exact figure does not seem to have been spelt out:

*P15* *So we felt the mediators were steering us towards the settlement of 250.*

It seems, then, as if most participants were not on the receiving end of the evaluative approach as Riskin defined it. There were no examples of mediators' naming specific figures and only one prediction of the likely outcome. While there was some pressure to settle and some general comment on strengths and weaknesses, it would be more

accurate to characterise the mediators as "assertive" (Wall and Chan-Serafin, 2014, p. 299) or "norm educating" (see Chapter 3.A.1.c. above). Their input seems to have touched less on particular legal norms than on the likely approach of the courts; an "informative" rather than evaluative role (Hare, 2020, p. 157).

B.3. The Court

All participants were referred to mediation by the court. It might therefore be assumed that the Sheriff would provide normative guidance in advance. The Simple Procedure Rules contain a mandate:

> The Sheriff must ensure that parties who are not represented, or parties who do not have legal representation, are not unfairly disadvantaged" (Scottish Statutory Instruments 2016, Rule 1, 4 (2)).

Among this sample, however, the provision of guidance was patchy. Much depended on the timing of the referral to mediation.

In some cases the Sheriff had suggested mediation at a Case Management Discussion, a form of preliminary hearing set out in the Simple Procedure Rules. One of its functions is to discuss negotiation and alternative dispute resolution (Scottish Statutory Instruments 2016, No.200, Rule 7.7 (2) (b)). However, another function is to "discuss the claim and response with the parties and clarify any concerns the Sheriff has" (*ibid*, Rule 7, 7 (2) (a)). A small number of participants did receive preliminary indications of the approach the Sheriff might take should the matter not settle in mediation:

*P23: As I say, when we were in the judge, em, the judge did the same. Made us feel small and said, well you've had it five years.*

Another found this helpful:

*P17 It has, I feel, now, looking back, it's focused it down to the two main issues.*

Such guidance can cut both ways. The claimant who felt intimidated when the respondents boasted about winning a similar case took no comfort at all from the Sheriff's words:

*P21* *Well, I guess felt that, especially when the Sheriff said, well, it might be an idea to get the same… you know… if we go on with this to get the same judge. And when I saw the, this Sheriff's judgment, I thought, absolutely not. What if he takes a gee*[8] *against me?*

Apart from these rather mixed findings judicial opinion seems to have played little part in participants' thinking about the law. Given that the courts are the source of these referrals to mediation this may be a gap in current practice, and particularly disappointing for those who advocate informed decision-making as a key protection for unrepresented parties (Stulberg, 2012; Colatrella, 2014; Keet, 2018, and see Chapter 3.A. above).

I turn now to one final, and traditional, source of guidance on legal norms: lawyers.

B.4. Legal Advice

Lawyers are sometimes portrayed as a key pillar of democratic society, providing protection against the unscrupulous or powerful litigant (McEwen, Rogers and Maiman, 1995; Zuckerman, 2014). They featured little in these interviews, however, reflecting the reality that legal representation is rarely a viable option in court actions for modest sums. The Simple Procedure rules underline this in their first sentence: "Simple Procedure is a court process designed to provide a speedy, inexpensive and informal way to resolve disputes" (Scottish Statutory Instruments 2016 No.200, Rule 1.1 (1)). Yet more cases are disposed of under Simple Procedure

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[8] Gee is an old Scots term meaning: "A whim, notion, mood, fancy, caprice; a fit (gen. of sulkiness or obstinacy)." See https://www.dsl.ac.uk/entry/snd/gee

(20,293 in 2020-21) than under either of the other two procedures available in Scotland: Ordinary Cause (12,286) or Summary Cause (3,731) (Scottish Government, 2022). Summary Cause actions, largely used for evictions, will shortly be added to Simple Procedure, meaning that some two thirds of Scottish civil actions will be heard under a process designed to be speedy, inexpensive and informal. This is not promising territory for lawyers. None of the participants was legally represented in the mediation itself, though two were themselves legal representatives. Some had, however, obtained earlier advice from solicitors or advice agencies.

It would be risky to attempt to evaluate the quality of that advice. I was glimpsing, not the advice itself, but participants' presentation of their understanding of that advice. Interviews need to be understood as a post-hoc construction (Haidt, 2001). Participants were discussing their views about legal norms in the context of a conversation about their reasons for settling or not settling. It is unsurprising that they cited legal advice supporting those views and perhaps underemphasised or simply forgot advice pointing in the opposite direction, particularly given that "vague and ambiguous data are fertile ground for confirmation bias" (Klayman, 1995, p. 394). Comments about legal advice can be divided into four categories:

a) Supportive and practical

b) Supportive and confidence boosting

c) Useful but not decisive

d) Not very useful/source of expense

B.4.a. Supportive and practical

The participants with the strongest sense of the value of legal representation were from companies:

*P8* *But the disadvantage to that is we're not lawyers, OK? We don't know what the legal background is. Yes, obviously, I will probably have some background but not in terms of how to represent a case in court. I mean, I would say a*

*lawyer would be probably most best suited to represent a company than anybody else. I think it does have an impact on the Sheriff when making a decision as well whereas, if you're representing yourself, I don't think it's quite – I don't think anybody knows what the rules are and how they should be representing themselves*

Another welcomed the other party's lawyer as a check against legal ignorance:

*P14* *Well, deep down, he knows he would never get awarded in any event because, ultimately, I suppose in those sort of situations, he might not know but his solicitor would definitely know that he wouldn't get…*

B.4.b. Supportive and confidence-boosting

Some of these unrepresented "one-shotters" (Galanter, 1974, p. 97) described legal advice less by reference to its content than its effect, in providing a source of confidence to take into the gladiatorial arena of litigation:

*P18* *I realised, well, yeah, actually, you know, if, if whatever I say doesn't sound like words like contract, breach of contract and things like that, like there's no legal ground. There may be a moral one - but there's no legal ground for me to win.*

*P23* *They [Consumer Helpline] advised me and the Citizens Advice Bureau, I had been to them. I also involved a lawyer and got advice from a lawyer.*

The latter participant represents a troubling subset of consumers whose lack of legal knowledge leads not to under-confidence but its opposite. I described at B.1, above, how three sources of legal advice plus the Sheriff's direct contradiction were insufficient to shake this claimant's optimism.

B.4.c. Useful but not decisive

Some presented their lawyers as optional sources of guidance:

I Had your lawyer given you any sort of guidance? Or is this a small enough amount that the lawyer's just gonna say, you do whatever -

*P6 Yeah. Well, I instruct him… entirely up to me, yeah.*

*P12 To be honest, I was happy to make up my own mind on that one.*

B.4.d. Not very useful/source of expense

One participant had accepted her solicitor's tactical advice to inflate her claim fourfold (from £550 to £2,200), with unhelpful consequences:

*P24 The solicitor decided that, to try and get drawn to the table for settlement, he put in a claim for my compensation which I kind of said, that's a bit over the top. He said, no, no, it's to try and get him to, to sit up and take this seriously… but it had exactly the opposite effect. Because he simply did a reply to the Simple Procedure and it was going to go to court and it went into court.*

She apparently spent the early part of the mediation dissociating herself from the failed tactic, which had clearly irritated the respondent.

One of the participants who expressed most disappointment in mediation for its lack of normative input (P15) had also spent over £3,000 on legal advice, adding to his frustration.

B.5. Conclusion

This section attempted to elucidate participants' thinking about legal norms, emanating from four sources: their own understanding, the mediators, the court and advisors. All seem imperfect and partial and most responses were elicited by direct questions. This may reflect the challenge for interviewees in attempting to recall

external influences on decisions made some time in the past. More than forty years ago Nisbett and Wilson proposed that most of us have “little or no direct introspective access to higher order cognitive processes” (1977, p. 231).

Nonetheless the picture painted by the interviews shows legal norms playing a part in the thinking of most, though not all, participants. Their responses can be grouped into four categories, and it is instructive to compare these to Ewick and Silbey’s “three stories” (1998, p. 30) of law. The first set of responses has law as definitive, governing their choices about whether and for how much to settle. For some legal norms provided a confidence boost; others were dismayed by rules that did not correspond to their own sense of how the world ought to be ordered. Their account resembles Ewick and Silbey’s first story, “before the law” (1998, p. 30) in which law is “majestic, operating by known and fixed rules in carefully delimited spheres” (*ibid*, p. 28).

A second set of statements portrayed the law it as an obstruction to be overcome, describing steps they took to circumvent its effects. They seemed to be telling Ewick and Silbey’s third story, “against the law” (1998, p. 30), portraying law in a negative light as being on the side of the powerful. Like Ewick and Silbey’s respondents they described the “ruses, tricks, and subterfuges” (*ibid*, p. 28) they employed in an attempt, not always successful, to get around it.

A third set of responses portrayed the law as altogether irrelevant. Despite prompting, some participants attributed their decision making and settlements entirely to their own values and priorities. This story does not feature in Ewick and Silbey’s account, perhaps because they were investigating legality rather than justice, or because of a focus on the least resourced members of their sample. An alternative explanation is that the mediation setting really does enable some parties to devise and apply their own normative criteria in a way that does not occur in litigation (Irvine, 2020, p. 147).

A fourth set of responses described a similar approach to Ewick and Silbey's second story, "law as a game" (*ibid*, p. 30), featuring "tactical encounters through which people marshal a variety of social resources to achieve strategic goals" (p. 28). However, participants were answering questions about mediation, not law. This contributes to a view developed in the Discussion (Chapter 7.D. below) that court-referred mediation is a form of justice ritual in which participants at times behave like lawyers in a process of "litigotiation" (Galanter, 1985, p. 1).

By offering lay people decision-making authority in legal disputes, mediation could be seen as demoting law, reducing it to one among many reasons for decision making. This will not please some legal scholars (Genn, 2012b; Gardner, 2018). In this regard, however, it is no different from negotiation, where the threat and risk of litigation is only ever one among many reasons for settling (Menkel-Meadow, 1984; Lax and Sebenius, 2006; Sharma, Bottom and Elfenbein, 2013; Senger, 2017). Court-referred mediation could be understood as a means of putting litigation into reverse, pushing parties back upstream to a point where negotiation is not confined to legal norms (Howard, 2021).

And yet the courts are unlikely to be comfortable in promoting a process that leads to injustice. As one magistrate in an Australian study put it:

> If the outcome itself is unfair ... you would be most concerned if that was happening because you would be forcing people to engage in this process, we would not want it to be that the outcomes were unjust (Ojelabi and Noone, 2013, p. 29).

It must be assumed, then, that those referring parties to mediation believe most are capable of arriving at results that are fair and just. This in turn suggests that judges and others in the justice system implicitly accept that justice can be achieved beyond the strict application of legal rules. In the next chapter I consider participants' responses to the direct question: "Did you get justice?"

# Chapter 6 Results (ii): "Did you get justice?"

## Introduction

"The 'communication perspective' is the knack of looking at communication rather than through it [emphasis in original]" (Pearce, 2005, p. 5)

Repeated human encounters develop their own distinctive pattern. By the end of 24 interviews a researcher cannot help but notice similarities. These are not random. The interviewer, like a conductor, convenes the performance and sets the tempo while the speaker produces the music. The conversations build, through slow movements and dramatic turns, towards a crescendo. This is the crux of the encounter, making sense of what came before and prefiguring the conclusion. In the last chapter I considered the build-up to this moment, participants' comments on fairness and justice as they spoke generally about their mediation. In this chapter I turn to the crescendo itself, the question asked of every participant: "Did you get justice?"

Why is this so central? The literature review rehearses in detail the scholarly debates surrounding justice in mediation (see Chapter 2.B. above). Many of the early critics voiced concerns about potential harms that invited further empirical research. However, as that research has unfolded in the ensuing decades, much of the focus has been on procedural rather than substantive justice (Sivasubramanium and Heuer 2007 note the reverse for studies of party satisfaction). For example, Wissler's summary of 49 US mediation studies found that fewer than half asked parties about the mediator, the process or the outcome (Wissler, 2017, p. 10). Those that did confined their questions about fairness to process; when they touched on outcome it was to ask about satisfaction, not fairness or justice.

This reveals an assumption that non-lawyers are not qualified to make a judgment about the fairness or justice of the outcome. Indeed, one explanation for the persistent effect of procedural justice is that being fairly treated reassures those who do not understand the law that the outcome will be just: “Procedural fairness serves as a heuristic substitute when outcomes are ambiguous or unknown” (MacCoun 2005, p. 186). The “outcomes” that count are those provided by the courts, familiar to specialists with legal training and knowledge but “ambiguous or unknown” to the rest. It seems that efforts to consider justice from within the legal academy inevitably reproduce its hierarchical assumptions: judges at the top, lawyers in the middle and the majority without legal training firmly planted at the bottom (Arthurs, 1985; Irvine, 2020b). Genn *et al.*’s (2007) study did seek consumers’ views on fairness and justice but devotes considerably more space to those of their legal representatives.

There are by now a number of honourable exceptions to this (see Chapter 3.C, above) although even these tend to confine their enquiry to outcome fairness rather than justice. The current study seeks to add to the small number of studies seeking the views of unrepresented mediation participants on the substantive justice of the outcome. It was therefore important to avoid any ambiguity in the interviews. I had already asked about fairness, while the general conversation allowed participants to offer their thoughts on other values affecting their decisions. However, the word “justice” carries a particular weight in the English language (see A.1. below) and so I employed the direct question: “Did you get justice?” It appeared to act as a conversation stopper. A sizeable proportion of participants seemed surprised at the question and many paused before responding. Most treated it as a change of subject and launched into a new set of thoughts about their experience.

This rich array of responses forms the core of the study and is contained in the following chapter under the headings of “positive,” “ambivalent” and “negative.” These correspond to those who answered “Yes,” “Yes, but…” and “No” to the question. As set out in the introduction (Chapter 1, above), there are elements of discussion in

both results chapters, particularly where a theme is best elucidated in context, immediately the remarks to which it relates. The most significant themes are further considered in the Discussion itself (Chapter 7, below).

## A. Did you get justice?

### A.1. Fairness, justice and outcomes

One issue that has troubled scholars of procedural justice is the influence of outcome on people's justice thinking. In numerous domains our evaluation of decisions – as rational, ethical or punishable – is affected by their result (Gino, Moore and Bazerman, 2008). This is known as outcome bias. Applying that idea to the current study, are mediation parties' views on the justice of mediation influenced by the outcome? Are claimants who came closest to receiving the sum they sought (and respondents paying the least) the most likely to view the outcome as fair and just? Sourdin's Australian research found an association between participants' satisfaction with process and outcome following mediation over retail lease disputes (2012, pp. 88-89). Creutzfeldt and Bradford's meta-analysis of a European ombuds scheme survey challenged earlier procedural justice research by identifying an association between outcome favourability and willingness to accept decisions (2016, p. 1006).

Another strand in critiques of court-referred small claims mediation sets out the risks of injustice when those of low status and power, generally "one-shotters," are mandated to negotiate with "repeat players" (Galanter, 1974, p. 97). These repeat players, mostly business people and their representatives, are assumed to benefit from superior resources, knowledge and experience thus placing the one-shotters at a disadvantage (see Chapter 2.B.3. above.) Against this backdrop participants' background takes on greater significance for the present study; not just *what* is said, but *who* said it.

### A.2. Contextual information about participants

In presenting participants' responses to the question "Did you get justice?" I therefore provide three additional forms of contextual information. The first is the type of party, adopting the categories used in Borg's (2000) study of Florida small claimants. Borg divided her participants into: "individual-mediants," "agent-mediants" and "business-mediants" (2000, p. 120). Individual-mediants were named in court papers in their own right. Agent-mediants were representatives, almost all lawyers, acting on behalf of a client. And business-mediants were "individuals who represented the interests of their own businesses or the businesses that employed them" (Borg, 2000, p. 121). In Borg's study agents and business people were more likely to view compromise positively, while individuals tended to associate it with an admission of wrongdoing.

The second form of contextual information is the settlement figure as a percentage of the sum claimed. This outcome could be viewed as an objective measure, although it does not tell the whole story. In answering the direct question about justice participants introduced a wide range of considerations, many of them non-monetary, as discussed in the rest of this chapter and in Chapter 5.A.5.: "Non-economic goals" (Relis, 2007, p. 708). The numbers themselves can also be misleading. One claimant hugely inflated her claim on the advice of her solicitor, then accepted future goods in lieu of cash; another acknowledged receiving part-payment prior to the mediation. Seven participants did not settle in mediation; the sums claimed and eventual outcomes are presented for comparison purposes. One settled at a later date and five were decided by the Sheriff, although one claimant was unable to recover any money despite the decree.

The final piece of background information is whether the participant was claimant or respondent. For claimants, settlement for a higher percentage of the sum claimed is likely to mean the outcome more closely tracks their aspiration. For respondents, it would be reasonable to assume the opposite: the lower the better.

The contextual information on all 24 participants is set out below. For ease of comparison the Simple Procedure terminology of Claimant and Respondent is used throughout. Claimants are arranged in descending order of the sum recovered, with respondents in the opposite, ascending, order:

Table 10 Contextual information on all participants

| Interview number | I (individual) B (business) A (agent) | Sum claimed | Settlement figure | Additional terms (if known) | Settlement as % of sum claimed | Claimant/ Respondent |
|---|---|---|---|---|---|---|
| 16 | I | £268 | £343 | | 128% | C |
| 11 | I | £3,000 | £2,700 | | 90% | C |
| 19 | B | £600 | £400 | | 67% | C |
| 13 | I | £1,500 | £900 | | 60% | C |
| 23 | I | £1,500 | £900 | | 60% | C |
| 8 | B | £800 | £450 | | 56% | C |
| 1 | I | £108 | £60 | Counterclaim dropped | 56% | C |
| 5 | B | £1,000 | £500 | | 50% | C |
| 7 | I | £800 | £300 | | 38% | C |
| 4 | I | £900 | £300 | | 33% | C |
| 12 | I | £770 | £220 | £200 to a cat charity | 29% | C |
| 21 | I | £3,620 | £1,000 | | 28% | C |
| 15 | I | £1,650 | £250 | | 15% | C |
| 24 | B | £2,200 | £0 | Replacement calendars + comp slips worth £200 | 0% | C |
| 6 | B | £1,000 | £250 | | 25% | R |
| 10 | A | £800 | £300 | | 38% | R |
| 20 | B | £970 | £750 | | 77% | R |

| Interview number | I (individual) B (business) A (agent) | Sum claimed | Settlement figure | Additional terms (if known) | Settlement as % of sum claimed | Claimant/ Respondent |
|---|---|---|---|---|---|---|
| **Did not settle (7)** | | | | | | |
| **18** | **B** | £2,500 | [£1,500]* | | [60%] | **C** |
| **3** | **B** | £3,000 | [£1,500]* | | [50% | **C** |
| **17** | **I** | £3,750 | [£3,750]*** | | [0%] | **C** |
| **9** | **I** | £130 | [0]* | | [0%] | **R** |
| **2** | **B** | £2,000 | [0]* | | [0%] | **R** |
| **22** | **A** | £4,500 | [£2,000]** | | [44%][9] | **R** |
| **14** | **B** | £4,981 | [Not known] | | | **R** |
| **TOTALS** | **I** – 12<br>**B** – 10<br>**A** – 2 | | | | | **C** – 17<br>**R** – 7 |

* Sum awarded by Sheriff following proof or evidential hearing

** Settled subsequent to the mediation

*** Sum awarded by Sheriff at evidential hearing.  However, nothing was recovered.

A.3. Responses to the question "Did you get justice?"

When attempting to interpret the social world it can be useful create schema to aid understanding.  The three categories set out below are one such scheme through which I attempt to impose meaning on participant responses that are, by their nature, untidy.  However, despite the figures contained in the preceding table, qualitative research seeks to illuminate "the meaning, not the frequency, of certain more or less naturally occurring phenomena" (Leitch, Hill and Harrison, 2010, p. 72, citing Van Maanen, 1979).  I attach no significance to the number of categories nor the number of participants in each one.  Some responses fall close to the line between

[9] Square brackets indicate cases where no settlement was reached in mediation but where the eventual outcome is known.

categories and some straddle more than one. The responses are grouped simply into "positive," "ambivalent" and "negative."

Some aspects of qualitative interviews never appear in transcripts. All but four were conducted face-to-face, meaning the words were spoken by someone I could see and who could see me. As listener and participant I could not help noticing micro-expressions like dismay, disgruntlement, impatience or self-satisfaction. Even on the telephone pauses and hesitations seemed significant. Furthermore I was the intended audience; so when a participant raised their eyes to the ceiling and tutted before speaking it is reasonable to assume that this conveyed not so much their inner condition as that part of their inner condition they wished to display in support of their narrative (Potworowski and Kopelman, 2008). While writing this section I re-listened to relevant parts of the interview recordings. This brought back some of the tone, nuance, timing and humour. Where possible I have included this information.

**<u>B. "More than justice" – the positive group</u>**

Four of the 24 participants gave an unalloyed affirmative when asked if they got justice:

Table 11 Contextual information on the positive group

| Participant number | Individual/ Business/ Advocate | Claimant/ Respondent | Settlement as % of sum claimed |
|---|---|---|---|
| 4 | I | C | 33%[10] |
| 6 | B | R | 25% |
| 7 | I | C | 38% |
| 24 | B | C | 0 (+9%)[11] |

All had reached a settlement, though none of the three claimants received even one half of the sum they had claimed. The one respondent in this category had agreed to pay 25% of the sum originally claimed, but thanks to a payment to account this represented 50% of what remained outstanding at the mediation. Participants' reasoning did not dwell on legality – justice as defined by the justice system – but rather on intra- and interpersonal factors with a bearing on their sense of justice: the encounter, the money, getting paid ("a bird in the hand"), the good enough result and, for some, attaining "more than justice." The following section covers five themes:

1) The encounter
2) The money
3) Getting paid: "a bird in the hand"
4) The good enough result
5) More than justice.

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[10] For ease of comparison the three forms of contextual information are shown for each participant: I (individual), B (business) or A (agent) mediant; C (claimant) or R (respondent); and XX% (settlement as percentage of sum claimed).

[11] This claimant received no payment but did get complementary calendars and comp slips with a value of 9% of the original claim.

<u>B.1. The encounter</u>

All four spoke positively about the opportunity mediation gave them to speak directly to their counterpart. Some have expressed concern that mediation will deprive litigants of their day in court (see, for example, Kulms, 2013); these responses indicate the presence of at least some aspects of the experience provided by a hearing.

Perhaps most positive of all was participant 7. Her responses to both questions, about fairness and about justice, included comments on the interaction:

*P7:* *I was totally satisfied with the way that it went, that I had – you know, I'd put my points across to her…*
*I got to say what I wanted to say…*
*We both got the chance to speak and I think that was the good thing as well, that she had to listen to what I was – I mean, I had to listen to her as well cos she had to listen to my point of view.*

Some raised another dimension of the day in court: mutual inconvenience.

*P24:* *I dragged him away from his work (LAUGHS) for a couple of hours in the morning (LAUGHS) and made him, made him face me…*
*I'm running a business. I didn't particularly want to… to have to go to court in this really.*

*P7* *I feel as if – yeah, I've totally inconvenienced you, you didn't want to be on Skype…*
*I thought, that's good, I've interfered with your day.*

Some conveyed the impression that a court hearing was a daunting prospect, less through anxiety about speaking than because of the unpredictability of the judge and the cunning of opposing lawyers. Wariness of judicial power extended beyond the

outcome to the way the hearing would be run, who would get to speak and what evidence would be taken into account.

*P4* *If a Sheriff's calling you up it's very formal…*

*P24* *All the dirt of the day gets dragged out, whether it's true or not… slants can be put on things. I used to work in … and I know that Sheriffs can come out with the most odd (LAUGHS) judgments.*

In contrast the mediators seem to have offered space to say what needed to be said without the risk of an authoritative and occasionally high-handed official closing them down.

*P4* *They didn't really interrupt… and when they could see that we weren't really getting anywhere to a certain extent, then they kinda jumped in.*

B.2. The money

The "encounter" dimension identified above could be said to describe procedural rather than substantive justice, though "participation" may also be apt (Williams *et al.*, 2020). At the same time these positive participants spoke instrumentally, conveying the practical and symbolic importance of money changing hands. Benjamin and Irving (2001) describe five patterns of monetary conflict in family mediation:

- money as power
- money as security
- money as painkiller or revenge
- money as compensation
- money as closure

While these small claims generally lacked the intimacy of family disputes, similar themes can be seen in discussions of the mediations' financial dimension. Adapting this scheme to correspond more closely to these themes led to four headings:

a) Bargaining chip
b) Vindication
c) Compensation
d) Closure

B.2.a. Money as bargaining chip

Benjamin and Irving's original phrase "money as power" conjures images of better-off disputants leveraging their wealth to gain an advantage in negotiations. There was no evidence of this in the positive group (though I return to it later for those less convinced they got justice – see D, below). Yet one participant illustrated an opposite source of power, ironically residing in the other party's high hourly rate:

I So there were drawbacks to dealing with a lawyer but there were also maybe advantages…?

*P7 Well, the advantage was that her time was way more valuable than my time.*

She explained with some relish a dawning realisation that the English solicitor on the other side did not want to travel to Scotland for an evidential hearing. Having started the mediation feeling somewhat intimidated she began to realise she might improve on her pre-mediation aspiration:

*P7 Then she said… something like… you will lose if you go to court because of – and I think she obviously quoted maybe another case of the same and she said, but something – something along the lines of – but I really don't want to be getting on that train to come to [Scottish city]. So I thought, oh, you want – this is gonna be settled here today. And I'm thinking, well I suppose your train fare or your*

*air fare plus a whole day of your lawyers' wages – and that was when I seen a wee chink and I thought, oh I'm gonna get something! (LAUGHS)*

This narrative resembles Ewick and Silbey's stories of "resistance" among their participants (1998, pp. 233-244). Their interviewees were also, on the face of it, disadvantaged in relation to law yet were able to exploit quite nuanced understandings of the justice system to achieve their goals: "To state the obvious, those who are most subject to power are most likely to be acutely aware of its operation" (Ewick and Silbey, 1998, p.233; see also Brigg, 2007). Participant 7's act of resistance was to use her knowledge of lawyers' hourly rates to her advantage. She thus obtained more than her target figure despite being told by her legally qualified counterpart that she had no case. She seems to have realised early in the conversation that, despite the reference to formal law (you have a poor case), the negotiation came down to a rather simple calculus of time, money and convenience – a game she could play equally well.

Having already received a partial refund, she had been hoping for £200 for the inconvenience. In the event her counterpart's opening offer was £300, which she accepted. Though she sensed she might have got more, the exchange of cash convinced her that she had achieved one of her goals: being taken seriously by the company.

*P7 I thought, d'you know what, I've made my point and I'm happy with that. It wasn't particularly about the money…*

Despite saying it wasn't about the money, this statement reveals the symbolic importance of the transaction. While not the most vulnerable of consumers, this unrepresented participant found herself dealing with a well-resourced, legally qualified "repeat player" (Galanter, 1974, p. 97). As Brennan *et al* note: "all of us have the potential to be vulnerable when placed in a consumption situation over which one has

little control" (2017, p. 639). She left the mediation process with a sense that the lawyer, and by extension the holiday company, had been forced to take her seriously. Prior to the mediation encounter this consumer had felt dismissed. Her participation in the mediation process, and in particular the transfer of cash, symbolised agency (Williams *et al.*, 2020, p. 294). The balance of power was temporarily flipped and her case became important enough to settle. Adler and Silverstein contend that the more powerful party may actually be at a disadvantage in negotiation because the other may resist more forcefully if they feel bullied or provoked (2000, p. 18).

B.2.b. Money as vindication

Benjamin and Irving's term "revenge" is stronger than anything described by these positive participants. Some did, however, convey a sense of being vindicated by the result:

*P4* *Basically I had probably won because he had to pay out so much money… although it wasn't as much as what it could have been.*

*P7* *I got what I wanted and, you know, I think she apologised and I got the money.*

Here we see the symbolic value of the transaction, providing a sense of payback, even victory. Participants seemed to derive satisfaction as much from the other party's loss as their own gain. It may be that the payment acted as social proof of their rightness, often after months and years of being ignored, thereby vindicating the effort of taking the time and trouble to raise a court action. This could give the mediation an adversarial quality.

*P7* *Obviously it was the process though – but I did feel as if walking here that day I was fighting. I was, you know, thingmying my case. It wasn't just a case of – well, there's all the facts. It was like – right, you need to convince me, you know…*

I There was still a battle to be won?

*P7 Yes. There was a battle.*

This last passage provides further evidence that mediation may more fully replicate the "day in court" than has been recognised in previous research (Condliffe and Zeleznikow, 2014). This offended consumer painted a picture of her strategy for the encounter with distinctly adversarial overtones. Although she said she received justice, there was little sign of the high-minded goals sometimes attributed to mediation, like a conciliatory conversation or improved working relationship. Instead it meant getting paid, saying her piece and, almost as a bonus, costing the company additional money and inconvenience. Mediation delivered tough-minded goals for this small claimant, apparently contributing to her satisfaction.

Brigg's autoethnographic study of mediating with Australian Aboriginal people describes a similar phenomenon, citing Foucault's assertion that: "there are no relations of power without resistances" (1980, cited in Brigg 2007, p. 29). While on the face of it their negotiations with "white-settlers," including Brigg himself (2007, p. 30), were characterised by significant power-imbalance, he noticed these individuals' capacity to subvert the power relationship in their favour:

> … aspects of Aboriginal peoples' disputing behaviour challenge western mediators, mediation processes and accompanying political ontology by clashing with the expectations that *selves should be peaceful rather than combative,* rational rather than emotional, self rather than otherwise oriented, and focused on the task at hand rather than wider issues (p. 40, emphasis added).

Some of the consumers I interviewed showed themselves equally combative as they forged ways to resist the manifest power of large, well-resourced companies and their representatives

B.2.c. Money as compensation

It can be argued that all claimants seek compensation for a perceived harm, transformed by the process of "naming, blaming and claiming" into a monetary figure (Felstiner, Abel and Sarat, 1981, p. 631). This may account for compensation featuring relatively little in this section of the interviews.

Nonetheless, participant 7 typified many small claimants when she explained why she persisted with the daunting task of pursuing court action against an online travel company. Kumar and Shankar note that online companies are particularly vulnerable to providing "bad experiences" to their customers (2023, p. 1). In Case Study 2, below, I set out more detail from the pre-mediation phase of this dispute in the interests of providing a deeper understanding of one disputant's experience of dealing with this online business and the motivation it gave her for pursuing a legal dispute.

*Case Study 2 – Jan and the travel company*

Jan [not her real name] described in detail the trouble she and her daughter experienced when they arrived at the holiday resort to find it was closing down in ten minutes. As well as causing considerable stress, the mistake effectively robbed her of a day's holiday while she spent her time in taxis and on her phone and iPad attempting to find a suitable alternative. She raised her complaint the day she returned home.

The company's response made her feel "dismissed." They answered her points one by one, explaining why they were not legally responsible and informing her the matter was closed. She concluded there was no point wasting more time corresponding with them and thought: "Where do I go now?" When the regulator, ABTA, requested a fee of £150 to consider her case she decided she would be better off in the court system. She was also not convinced that ABTA would be unbiased.

Raising the action was not straightforward. It coincided with the rule change to Simple Procedure (Scottish Statutory Instruments, 2016a) so her first attempt was rejected

and she had to complete a new form. Then she had to persuade the Sheriff that the court had jurisdiction over respondents based in England. Here the Sheriff Clerk was helpful, suggesting what she might say. Finally the Sheriff referred the case to mediation, which was quite new to Jan. It made her question whether the court was the right place to deal with something so "petty." She then explained:

*P7* *Well, it wasn't petty to me and I felt that, you know, it was – it could have been easier – it would have been easier to walk away rather than the hassle, the filling out forms and keeping going with the process. You know yourself, but at that point, it became principled that I thought – no, you know what, you're not getting away with it. I'm not walking away from this.*

When she heard there would be a lawyer on the other side she thought: *"Och no (LAUGHS), oh no, no, no, no. (LAUGHS) I didn't think I was dealing with a lawyer."* Nonetheless she prepared carefully for the mediation, going through the company's response and underlining errors. It sounded like a lot of work, so I asked what gave her the motivation to continue. I conclude this snapshot of the dispute's pre-mediation life history with Jan's response, as it illustrates the well-worked narratives of injustice and indignation often underpinning participants' quest for "money as compensation:"

*P7* *I mean, it really wasn't about the money. Well, I wanted the money back that they shouldn't have thingmied*[12] *me but it really was – you can't do this to people, you know; you've left – basically, that guy knew that the hotel was closing, I'm standing on the side of the road with my daughter on my own in a place I've never been before and you can't contact me? You couldn't phone the hotel's reception and get to speak to me? And why did – you know, nobody ever explained, why did the booking fail? When I then got to this [other] hotel,*

[12] 'Thingmy' is a Scottish term with a catch-all meaning, allowing a speaker who can't remember an exact word to carry on with their sentence and let the listener fill in the blank.

*it was – phew, I mean, not even half empty, it was probably a sixth capacity. So why their booking failed?*

I I see, yeah.

*P7 I genuinely don't know and it was never ever explained. I never got an explanation for that.*

B.2.d. Money as closure

The act of paying appears to have completed the arc of the dispute with a satisfactory ending. Whatever these participants thought about the quality of the deal, the transaction seems to have enabled them to move on. Participant 24 did not receive any cash, yet the settlement fulfilled the same function:

*P24 That [money] was clearly not on the table. So what we ended up doing was getting goods which were more valuable to me than they were to him… So I accepted that and, eh (PAUSE), he got away with not having to part with any money at all.*

Participant 4 mediated at court and had the money in her account before she left the meeting:

*P4 Yeah, I did let it - as soon as I went out - came out of court, I let it go right away.*

Respondents generally pay rather than receive money, yet here too the transaction contributed to the sense of an ending:

*P6 And I thought £250 is worth settling on…*
*Do I think I got justice? (LAUGHS) I suppose I did, yes. Because the justice was very much up to me by the fact that I chose to settle it but I did get it because*

> *the case went away… Cos I've better things to do than argue over matters such as this, a fairly small amount.*

The phrase "better things to do" typifies the approach of business participants, for whom closure often meant being able to get back to profitable activity.

B.3. Getting paid: "A bird in the hand"

There is one respect in which non-lawyers' thinking about justice differs from those familiar with, and conditioned by, the court system: participants drew no distinction between a settlement agreement and its fulfilment. Settlement was synonymous with payment.

Lawyers and other regular court users develop an understanding of litigation as a multi-stage process. First an action is raised; if defended, it passes through various procedural steps; finally the court reaches a decision and awards decree (or not). That is not the end. If the respondent fails to pay, a successful claimant in Scotland must turn to the law of diligence (Maher and Cusine, 2007) which lays out a further set of steps designed to enforce payment. These include arresting earnings, preventing the sale of a house and even forcing the sale of some possessions (Citizens Advice Scotland, 2021). All involve additional cost, raising the spectre of "throwing good money after bad."

It appears that success in mediation is defined differently. Mediation is only seen as successful when the settlement is fulfilled. A litigant, on the other hand, may succeed in obtaining decree yet never receive payment. This occurs daily throughout Scotland, indicated by the use of over 44,000 forms of diligence in non-council tax cases in 2019-20 (Accountant in Bankruptcy, 2021), out of 74,400 civil cases initiated (Scottish Government, 2021). Many ostensibly successful litigants incur a great deal of effort and expense in recovering the sums they are due. In contrast, an unfulfilled mediation is a failed mediation. A 1981 US study of court-referred mediation noted a similar

phenomenon: “Mediators clearly are more concerned than judges about the question of how and when payment will be made” (McEwen and Maiman, 1981, p. 252).

Participant 4 described being paid on the spot. Participant 7 included payment in her response to the question “did you get justice?”

*P7* *And I got my money, yeah.*

IV.. On the day?

*P7* *It was a cheque. They said they would send a cheque and they did.*

Participant 24 received no cash. Nonetheless she described herself as satisfied with the outcome, not least because the respondent had delivered the goods in lieu as promised:

*P24* *He did it properly.*

This section on the bird in the hand underlines a pragmatism inherent in mediation. There is evidence from this sample of mediators highlighting the practicalities of payment, and the rise of online banking may be enhancing the sense of satisfaction derived from receiving immediate payment. Conversely, there seems little prospect of parties evaluating the outcome positively if it is not fulfilled (for more on this see D, below). It appears that mediation is, in this regard at least, held to a higher standard than the courts.

<u>B.4. The good enough result</u>

One theme developed by two of the positive, “Yes”, participants and several in the more ambivalent “Yes, but…” category, is that the outcome was good enough. This speaks of a standard notably distinct from the law yet reminiscent of policy pronouncements about proportionality (Scottish Civil Courts Review, 2009b; Scottish Mediation, 2019; Susskind, 2020, and see Chapter 5.A.1. above). The concept of the

good enough parent derives from the work of D W Winnicott (Bloom, 2016), expressing the idea that perfection is not the most useful standard to apply to complex real-world phenomena like parenting. For those saying "Yes" to receiving justice, it suggests a certain realism, where the effort of attaining the "perfect" outcome, or even the legally correct one, would require more effort than these relatively modest sums warrant.

*P24 I'm glad it went to mediation... it was (PAUSE), em, fair enough.*

In her response to the earlier question about fairness she mentioned pragmatism:

*P24 To be pragmatic (PAUSE), it was fair enough, you know, how - I mean, there's no point wasting any more time.*

Participant 6, the respondent, spoke of having better things to do than go to court. This meant living without a definitive judicial ruling on the dispute. In his response to my enquiry about fairness he gave a yes and no answer:

*P6 Yes, because I was happy enough with the settlement and the matter was put to bed and the court case was ended. No, because I felt I had conceded in paying for something that I still don't think I should have paid for but I'll never know that because only the Sheriff can decide that one (LAUGHS).*

This theme recurs throughout this chapter and again in the Discussion (see Chapter 7, below). It raises a difficult question: can a good enough result ever feel like justice?

<u>B.5. More than justice</u>

Two participants went further than "good enough," with one saying she obtained "more than justice" (see Chapter 5, Case Study 1). Her insistence that the respondent

had learned his lesson echoes an important strand in the hopes expressed for mediation as an alternative to the courts.

This view goes beyond pragmatism – mediation as inexpensive, proportionate, good enough – characterised by Menkel-Meadow as “quantitative-efficiency grounds” (2014, p. 1165). Ever since Sander coined the term “alternative dispute resolution” (Sander 1976, p. 113) a parallel set of “qualitative-fairness grounds” (Menkel-Meadow, 2014, p. 1165) has attracted and inspired commentators and practitioners. These emphasise other aspects of mediation such as the personal, face-to-face encounter, the opportunity to hear and be heard and the capacity to tailor resolutions to the individuals involved. Silbey and Merry identified a “therapeutic” mediator style, characterised by an emphasis on feelings and attitudes, in contrast to the more instrumental “bargaining” style (1986, p. 20). Bush and Folger (1994; 2005) applied the term “transformative” to describe what they saw as mediation’s true promise of offering individual empowerment and interpersonal recognition. A number of other models are similarly aspirational, suggesting that mediation has potential beyond mere settlement (Cobb, 1993; Umbreit, 1997; Picard, 2000; Dana, 2001; Winslade and Monk, 2001, and see Chapter 3.1. above). Later scholars have attempted to integrate both qualitative-fairness and quantitative-efficiency goals into a single model (Alexander, 2008; Jarrett, 2013).

In developing her answer to the question “Did you get justice?” participant 4 revealed her own goals for the mediation, and presumably for raising the court action. Throughout the interview she had demonstrated a keen interest in the respondent’s reactions, noticing, for example, that he was nervous in front of the Sheriff. In explaining why she accepted a third of the sum claimed she provided an insight into her thinking:

*P4* *Och I think, eh, he – I think he was quite – I felt he was quite vulnerable and he was quite, eh, you know, he'd just got a new baby and, you know what I mean, and -*

IV.. Right*.*

*P4* *I just thought, well, he's learned his lesson basically, he'll not do that in a hurry again.*

This middle-aged woman, with considerable life experience and some familiarity with the courts, shows empathy for a young former neighbour while at the same time sticking to her goal of righting a wrong. The term "more than justice" suggests that getting the cash was only part, perhaps the lesser part, of her achievement. She seemed to take more pride in teaching this younger citizen a moral lesson she hoped would affect how he conducts himself in future.

Participant 7 did not go quite as far, using the phrase "justice and satisfaction." Satisfaction speaks of an internal, subjective goal. As set out above (B.2.a) she had already given up on the company and any possibility of influencing its business practice. Satisfaction lay, rather, in three things: taking up the time of an expensive legal representative and, once she had her there, having her say and getting recompense.

*P7* *The mediation allowed – you know, it allowed me to get my point of view across...*

*I got to say what I wanted to say.*

Her counterpart's response did not seem all that important. I set out in Chapter 5 (A.4.e. above) how little value she attached to an apology delivered by a lawyer. However, the lawyer's remarks may have served to increase the relative value of the recompense offered. Later in the interview participant 7 added:

P7 *I don't know that I would have got that had it gone to court because she did seem pretty convinced, but then obviously that's her job, that she would win in court and it would basically be I would walk away with nothing.*

The last passage raises the troubling possibility that a confident and ostensibly well-informed party could reduce their counterpart's aspirations, leading them to accept a lower offer (Sebenius, 2017). One of Cialdini's six principles of influence is scarcity: if we think something is scarce we are more likely to want it (Coggiola, 2008). Yet Participant 7 was determined not to be a pushover, setting her own aspiration in advance and sticking to it even though she achieved it with little effort.

B.6. Conclusion

This relatively small group of positive participants readily assented to the idea that mediation had delivered justice. They went on to share their reasons, some pragmatic, some principled, some unapologetically selfish. These featured payment of money, though there was little talk of how closely the amounts might track "accurate, legally correct outcomes" (Hayncz, 2008, p. 98). These small claimants tended to apply their own standards in evaluating quantum, but it was clear that getting paid, even if not all they sought, compared favourably to the risk and uncertainty of further court hearings. A high proportion of those answering "no" to whether they received justice had not settled in mediation (see D, below).

However, despite some legal practitioners' beliefs to the contrary (Relis, 2007), it would be a mistake to think that receiving justice was only about money. Some appreciated the encounter – the chance to speak, face-to-face, with the person on the other side of a legal case. Most positive of all were those who saw mediation as delivering what the courts could not. This could be for pragmatic reasons (Participant 7's "I would walk away with nothing") or based on more idealistic considerations (Participant 4's "he's learned his lesson basically, he'll not do that in a hurry again.") In

the next section I turn to participants with more equivocal views on the justice of mediation.

**C. "As good a justice as I could have got" – the ambivalent group**

12 of the 24 participants were ambivalent in their response, often using the words "yes" and "no" as they elaborated. In this they resemble academic commentators (for recent examples see Nylund, 2014; Waldman, 2017; Welsh, 2017; Reynolds, 2019; Wong, 2021; Froese, 2022). The following section reports on responses containing both positive and negative elements, drawing out implications for our understanding of how those without legal representation[13] construct their ideas of justice.

Some of the quotations are longer than in the previous section in an effort to reflect the complexity of participants' arguments. It is a common device when speaking of difficult topics to say: "On the one hand X, but on the other hand Y." A proportion of those whose overall response was positive nonetheless offered one or more caveats. Eagleman characterises the human brain as a "team of rivals" within which multiple and at times contradictory beliefs compete for precedence (2011, p. 101). This can take place via an "inner dialogue" (Oleś *et al.*, 2020, p. 2). A number of participants showed signs of such internal debate in lengthy pauses, shrugs, smiles, sighs and nervous laughs. Some seemed taken aback by the question, giving the impression that justice was not something they had considered before.

The ambivalent group included 12 participants.

[13] In fact one of these participants was a solicitor and another had a law degree.

Table 12 Contextual information on the ambivalent group

| Participant number | Individual/ Business/ Advocate | Claimant/ Respondent | Settlement as % of sum claimed |
|---|---|---|---|
| 1 | I | C | 56% + counterclaim dropped |
| 2 | B | R | [0%][14] |
| 5 | I | C | 50% |
| 8 | B | R | 56% |
| 11 | B | C | 90% |
| 12 | I | C | 29% + £200 to a cat charity |
| 13 | I | C | 60% |
| 16 | I | C | 128% |
| 19 | B | C | 67% |
| 20 | B | R | 77% |
| 22 | A | R | [44%] |
| 23 | I | C | 60% |

Eight were claimants and four respondents. Ten had agreed to a settlement, including all the claimants and two of the respondents. Seven of the eight claimants received at least 50% of their claim. The two respondents who settled agreed to pay more than 50% of the amount in dispute (77% and 56%).

[14] Figures in brackets represent cases that did not settle and show the amount subsequently obtained (if any.)

Below I set out four themes and five sub-themes:

1) The good enough result (again)
2) Combatting injustice
3) More positive than negative, including
    a. The settlement amount
    b. My choice
    c. Closure
4) More negative than positive, including
    a. Mediation's privacy
    b. The tension between principals and agents (Mnookin, Peppet and Tulemello, p. 69).

C.1. The good enough result (again)

In the previous section on the positive group (B, 1, above) I noticed that a "good enough" result could contribute to participants' sense of having received justice. "Good enough" is an equally apt label for the following more equivocal responses, which often draw a comparison with the perfect or ideal result in their reasoning.

Among this group long pauses were common, some as long as 10 seconds. To put this in perspective, Sikveland and Stokoe's conversation analytic study of mediation intake calls attaches significance to gaps of 0.7, 1 and 1.5 seconds (2016, pp. 241, 243 and 244). Stokoe earlier concluded that a caller "struggles to continue her account" based on pauses of 0.2 and 0.4 seconds (2013, p. 304). The very long pauses in the current study conveyed the impression that participants were weighing up a number of competing considerations – some in favour, some against – before speaking. In this section, when reporting responses to the question "Did you get justice?", I indicate the precise length of any pause alongside non-verbal reactions.

*Case study 3, Anthony's business dispute over a roof*

Anthony (not his real name) was landlord of two flats in a dispute over roof repairs with a company that owned a shop in the same building. This was thus a commercial, or business-to-business, dispute. The original action was for over £2,000 but prior to the first court appearance the Defender[15] settled one aspect of the claim by paying £1,200. Anthony explained that he might not have bothered raising an action for £800 but having started he would continue. He added his court fee and interest[16] to bring his aspiration figure to just over £1,000.

The Sheriff suggested mediation when the parties first attended court and the mediators were ready to begin immediately. Anthony, like a number of other participants, had come to court believing his case would be heard in full that day. He was disappointed to learn that this was only a procedural hearing. That meant, however, that he was fully prepared to discuss his case on the spot. He saw the suggestion of mediation as a way "to expedite matters, possibly for the Sheriff and the court, but certainly for me to get this out of the way and over and done with."

Anthony portrayed the mediation as wholly focused on the numbers. After spending around ten minutes hearing each party's "position", the mediators brought them back together. They asked: "Are you prepared to move? You know, you're looking for over £1,000. [Defender] is saying he's paying nothing. How far will you move?" Anthony decided to take the initiative, explaining that he had been in business long enough to understand how negotiation worked.

*P5* *"I said, look, I'm not gonna start off with £900 and [Defender]starts off at 100 and we spend the next hour haggling over… I said, this is where I will*

[15] This was a small claim under the old rules, when the parties were known as Pursuer and Defender.

[16] In the absence of a specific contract term, courts will only award interest from the date of raising the action. However, parties often believe they can claim interest from when the sum became due.

*meet and I said, I think this is fair. I said, I will meet in the middle and it's £500. I will accept £500 from [Defender].*

The approach was partially successful because the Defender responded by offering 50% of what he regarded as the correct amount: £860, leading to an offer of £430. Anthony made a further appeal to fairness but the Defender still would not come up to £500. Anthony did not want to spend more time haggling, a reminder that for business parties the hours spent in mediation (and court) represent a cost. Instead he made a surprising proposal: "430… my 500… are you prepared to go on the flip of a coin?" The Defender protested that it was silly but eventually agreed. Anthony won the toss and the mediators wrote up the agreement on the spot. Payment was made that day.

In response to questions about fairness, Anthony presented two sides. On the one hand it didn't seem entirely fair because he believed he could have convinced the Sheriff to find in his favour. On the other, though, the mediators had emphasised the possibility of "a little bit of grey somewhere," and it did "expedite the process."

Returning to the question "Did you get justice?" Anthony approached the result from more than one angle. A longer section of our conversation illustrates how he developed his thinking.

*P5* *(PAUSE – 2 SECONDS) (DEEP INTAKE OF BREATH) There would always be that slight qualification but it's not something that niggles me now, em… I got a reasonable amount from the guy when his answer to the Sheriff was that he wouldn't pay anything. He paid £500. So there was justice. Absolute justice, if there is such a term, would have been that I would have got the full amount… through mediation. But I was prepared to cut out a return trip to the court.*

I So it may not be absolute justice but it was enough not to niggle?

*P5* *Mm hmm. I said that, yeah.*

I	Have you any – when you're thinking about justice, what consideration – when I use that word it's, you know, a heavily weighted word with huge amounts of history to it. What does the word actually mean to you?

*P5	Justice?*

I	Mm hmm.

*P5	I probably should maybe use an example. At the moment, we've got a football coach from the 70s, a paedophile who's been abusing young kids…. There is no justice for those kids as grownups, whose lives have been potentially ruined in many cases.*

I	Yeah, sure.

*P5	So my £500 isn't significant by comparison.*

I	OK.

*P5	So I got on a scale from 1 to 10, I maybe got 9 out of 10 in justice.*

I	Right, yeah.

*P5	For a lot of these kids, they might be zero or 1.*

This participant appeared to be reasoning himself out of a sense of injustice about the result. The theory of relative deprivation predicts that individuals' sense of deprivation depends on who they compare themselves with (Deutsch, 2014; see also Barclay, Bashshur and Fortin, 2017). Here the claimant selects a particularly disadvantaged group, presumably in an effort to put his own case into perspective.

Others too showed signs of careful consideration when asked if they received justice.

*P8	(PAUSE – 4 SECONDS) (LITTLE LAUGH) From this case?*

I	In that one that settled.

*P8	(PAUSE – 4 SECONDS) Yes and no… No, because obviously of the reapportionment. I don't think, em, I don't think, eh, the reapportionment should have been waived off if it was within a legal document because it's points of law we're arguing here. And I think the disadvantage of coming to mediation is that you can't argue points of law. I think that would only be the*

*argument in court. Yes, in a way, because we wanted the matter over and done with. It's been an ongoing issue for years and years – we're no longer the factors for the property.*

*P16 (PAUSE – 4 SECONDS) (SIGHS) Well, probably, yes. I mean, it was my decision to forego the little bit of the costs (PAUSE) but, yes.*

Participant 11's response seemed to manifest deep inner debate. After my question we sat in silence for over 10 seconds, during which he sighed and made two false starts of "em…" Finally, speaking very quietly, he went on:

*P11 (PAUSE – 10 SECONDS) I received a satisfactory outcome. Whether you call that 100% justice or not, I'm not sure. I think that (PAUSE) I probably knew in the back of my mind that the person had a track record of being difficult and I already explained he has had difficult tenants in as well, which is an indication to me of his attitude to things. So I think that it is as good a justice as I could have got. I think, yes. Yes, I think it's reasonable justice. There's always a risk going into court. There's always a definite risk going into court. You can never tell and certainly my wife thinks it's a superb solution.*

Participant 11 provided more clues about his ambivalence. Despite obtaining 90% of the outstanding amount and acknowledging that "it's only money," he added: "but I felt it wrong morally that somebody would not pay it." Expanding on the source of this moral evaluation he attributed it in part to his professional training:

*P11 I think things should be done the right way by the book, the honest way… it's an inherent thing that you're brought up with or your training inculcates into you.*

In attempting to convey his approach to justice this man invoked his personal and professional ethical code. As noted during the pilot phase (Chapter 4.F.4.e. above) a number of participants answered a question about the outcome of mediation with a response about the kind of people they are. Sikveland and Stokoe noticed a similar transformation when mediators ask parties if they are "willing" to mediate: "the focus shifts away from mediation and onto the caller's moral identity" (2016, p. 242). Far from being unimportant, the question of justice appears to go to the heart of these people's moral identity: what it means to be human. I explore this further in the Discussion (Chapter 7.B.2. below).

One participant used what might be called faint praise for his chosen outcome.

*P19* *(PAUSE – 2 SECONDS) I think so. I mean, I think we got to a similar place to where we'd have got to if we'd been stood in front of the Sheriff.*

I Really?

*P19* *I think the only kinda logic with the Sheriff is that they take – they decide to take an issue with one or the other participants… but I think most Sheriffs would have come to a similar place. Sheriffs are unpredictable creatures, so -*

I (LAUGHS)

*P19* *I think the mediation is a safer route.*

These responses echo sentiments expressed by one participant in Blake Stevenson's evaluation of Scottish small claimants: "So basically it was probably, the outcome was probably ok really compared to what it probably would have been" (2016, p. 27). It is hard to resist the conclusion that mediation outcomes, involving compromise and thwarted expectations, will often find themselves damned with faint praise.

C.2. Combatting injustice

Another potential explanation for participants' ambivalence emerged during the interviews: distaste for injustice. This was also evident among some of the positive

group, who regarded their settlement as evidence that unjust behaviour had consequences (see, for example, participant 4's comment: *"he'll not do that in a hurry again,"* B.5. above.) Research into ultimatum games suggests that the justice motive extends beyond simple economic benefit to ensuring that others do not benefit from their unfair actions: "Retaliating against injustice is often more important for people than self-interest" (Montada and Maes, 2016, p. 114).

So, despite settling for well above the average in this study, the thought of not penalising injustice rankled with a participant whose car had been damaged in a car park:

*P13* *(PAUSE - 2 SECONDS) (LAUGHS) Well I got something which was better than nothing.*

[After this claimant described practical considerations for and against accepting 60% of the amount sought, I asked a supplementary question]

I And does that feel like justice?

*P13* *(EM) (PAUSE – 7 SECONDS) Well, I don't know; that's quite a difficult question. I mean, I've still got a hole in my seat which – OK, that's – I've just had to accept that now… hmm, I mean I didn't… let's put it this way – I didn't have strong feelings in either way after it. I was just like – a bit of me thought, that's fine, I'm getting £900. And then another bit of me thought, hmm, she should have had to pay the full lot.*

A property factor seemed irked at the prospect of one owner being treated more favourably than others in a development.

*P8* *We've tried to recover the debt from all other owners and they've paid their proportion of cost, so I don't see why we should favour one man who is just very aggressive in saying, look, I'm not gonna pay the apportionment just because it's not my debt.*

It appears that her personal sense of justice was offended at the thought of other, more cooperative, owners paying the full amount sought while this individual seemed to benefit from his bad behaviour. The inequity lies in severing the connection between what people do and the rewards they receive, echoing Job's ancient cry: "Why do the wicked prosper?" (Holy Bible, no date, Job 21:7) Her response also highlights the emotional component of justice judgments (Barclay, Bashshur and Fortin, 2017), echoing participants whose sense of being insulted led them to see their case as a "point of principle" (Chapter 5.A.5.a. above). Deutsch characterises the equity principle as: "people should receive benefits in proportion to their contribution" (2014, p. 31). Writing about distributive justice he suggests that context will determine which of three principles – equity, equality and need – is most apt. Equity will be the dominant principle "in cooperative relations in which economic productivity is a primary goal" (Deutsch, 1975, 143).

Critics, and even supporters, of mediation tend to write as if self-interest is the sole driver of mediation outcomes (Chapter 2, B, above, and see Ross and Conlon, 2000, p. 418). Such beliefs are associated with cynicism: "a negative appraisal of human nature, a belief that self-interest is the ultimate motive behind all human actions, even the seemingly good ones, and that people will go to any lengths to satisfy it" (Stavrova and Ehlebracht, 2019, p. 254). Montada and Maes (2016) are critical of single motive explanations, given the diversity of individuals and situations, while Fennell and McAdams claim: "Predictions about human behavior *[sic]* will go badly astray if they fail to recognize when individuals will, at a cost to themselves, choose to distribute wealth to others, reward those who contribute to public goods, or *punish those who free-ride* [Italics added]" (2014, p. 1).

The current study points to a range of factors, some conflicting, underpinning lay people's justice choices. Participant 13 provides a clear example, revealing an inner debate between justice from a self-interest perspective ("Well I got something which

is better than nothing") and from the perspective of combatting injustice ("she should have to pay the full lot.")

C.3. More positive than negative

A number of participants seemed to stress the positive in their responses, taking time to enumerate why they did receive justice even if some factors tempered their overall evaluation.

C.3.a. The settlement amount

Despite reservations, a subset of participants placed the financial settlement on the positive side of their personal balance sheet:

*P11* *I mean, it's bound to seem a fair process if you get 90% of your solution that you seek… It's 90% a fair outcome, yes.*

*P19* *I think so. I mean, I think we got to a similar place to where we'd have got to if we'd been stood in front of the Sheriff.*

These excerpts might tend to confirm a common sense assumption about people's assessments of outcome: the closer to the sum claimed (for respondents the closer to zero) the more positive it will be. Those quoted above received 90% and 67% of their claims respectively. The data, however, point to a more complex relationship. In the (admittedly small) sample of 24, the eight claimants whose mediations settled for closest to the sum sought (averaging 71%) all fell into the "Yes, but…" category. Conversely, the three claimants in the "Yes" category settled for an average of 27%, undermining a simple financial explanation for justice thinking.

As if to confirm this, participant 20 was a respondent who settled for more than 75% of the sum claimed. Nonetheless when asked if she received justice she said:

*P20* *(EM…) (PAUSE – 6 SECONDS) 75%*

I (LAUGHS) And you can see what's coming… What would have made for 100%?

*P20* *If it, if I had made a lower offer and it had been accepted. But (PAUSE), you know, for the sake of £250...*

The next section touches on another dimension of participants' thinking: closure.

C.3.b. Closure

A number of people spoke positively about bringing the dispute to an end, and two used the term "closure." The fact that this category straddles both the positive and ambivalent groups suggests that closure, while important, does not in itself lead participants to believe they received justice. Some in the ambivalent category did not settle at all.

*P6* *Closure… cos I've better things to do than argue over matters such as this, a fairly small amount.*

*P20* *Well, you want closure where you're both walking away and thinking, mm hmm, that's probably fair or that's OK.*

Closure seemed important to participant 23, who listed more points against than for a just outcome (and could equally have been described as a "No, but…"):

*P23* *I think because of everything we went through - we were just at the end of the line and we just thought, look, let's just take it and go… They weren't willing to admit on their side that they'd actually sold us something that shouldn't have been sold... They sold us a leather sofa and it wasn't, which is more a Trading Standards thing, isn't it? It's difficult cos we did get justice I suppose. We got our money back.*

Earlier he had said:

*P23* *I think, in reality, you just have to take a step back and go, look let's just – this finishes – this is – this means it's a line drawn under it.*

I Right.

*P23* *Let's go and buy a new sofa (laughs) you know what I mean, rather than wait another year.*

These individuals offer a glimpse of the sort of self-talk that goes on both within and between mediation's consumers: "dialogues with ourselves" (Morin, 1993, p. 223). Participant 23 described discussing the situation with his wife throughout the mediation, continually weighing up the pros and cons of settling until the moment seemed apt.

C.3.c. "My choice"

A number of mediation scholars have stressed the role of self-determination as a backstop against injustice (see Chapter 3, A, above.) The hope is that those with a choice are unlikely to agree to manifestly unjust outcomes, and some even link self-determination to citizenship (for example, Mayer, 2000, p. 19). Relatively few of these Scottish consumers touched on self-determination or, more simply, choice. Those who did tended to offset it against some other less favourable aspect of the outcome (hence the "but").

*P12* *I know I'm aggrieved but I think – yeah, because it was my choice whether to take it further or not and, well, I chose not to take it further, so that was my choice.*

This man elaborated that his decision was based on unfamiliarity with the court, uncertainty about the outcome and anxiety about potential costs. This looks like

another example of the "self-talk" (Morin, 1996) discussed at (ii) above, through which a participant advances arguments to underline the wisdom of his decision. Haidt's research suggested that: "Moral reasoning was mostly just a post-hoc search for reasons to justify the judgments people had already made" (2012, p. 47). I return to Haidt's moral intuition model in Chapter 7 (below).

Participant 20 similarly tempered her sense of self-determination by stressing factors tending to limit rational choice. Alongside her small business she was involved in voluntary work with disadvantaged people. A longer section of dialogue illustrates the complex, even contradictory, web of reasoning in her decision-making.

*P20* *So I, I know fairness and I work with it every day. But there's also a different expectation when you're a business owner. So there's, there's you and I, if we're in a sort of, you know – plain where it's all about fairness. And then there's where you've got 10 employees and you're responsible for them and if you don't pay those wages, there's no jobs for 10 people. So one person jeopardises that. That means that you then are short to run the business for the next month.*

I Sure.

*P20* *That's, that's reality… So the fairness side becomes secondary in that because you're then in fight or flight mode, aren't you? I am. Or I was.*

I Sure. Yeah.

*P20* *It was like, you know, how am I gonna pay for all this extra time? So instead of her salary being paid once the next month, I had to pay it twice.*

Then she revealed another set of more personal criteria:

*P20* *I felt I had been a good sort of mother figure.*

I Yeah.

*P20 So when you get that sort of payback – as I say, she, eh – you know, she was young. That's what I kept thinking.*

A few moments later I asked if all of this had an impact on her offer of settlement:

*P20 Yes. Because – well, probably, eh (PAUSE) at the end of the day, I'm glad it's resolved and I'm glad that that's what I gave her, and that I was able to go back to the rest of the team and say, we didn't pay her the full amount, but we paid her 3 of the 4 weeks.*

Critics of the self-determination approach have tended to focus on mediation participants' lack of legal knowledge (Grillo, 1991; Ojelabi and Noone, 2013; Waldman and Ojelabi, 2016), though Waldman's earlier piece acknowledges wider limitations: "Darwinian encounters at the negotiating table pose perils for the less-advantaged party, and this is true regardless of whether the terms of debate are primarily legal or non-legal in nature" (2004, p. 261). This participant's responses suggest perils can also lie in wait for the ostensibly more-advantaged negotiator.

A recent examination of the way conflict is depicted in popular culture offers an alternative critique of self-determination, less rooted in the assumption that choice equates with self-interest. Reynolds describes the rise of "conflict spectacles" (2019, p. 2359) fuelled by social media, suggesting they promote public disputing norms that work against cooperative processes like mediation. Drawing on the work of William Davies (2018) she asserts that the:

> desire for justice comes from feeling, not from thinking, and for many people (especially for those who are disenfranchised or disillusioned), these feelings are fed by a confluence of anger, fear, resentment, and sometimes physical pain (Reynolds, 2019, p. 2375).

The above two participants, in attempting to account for their choices, offer support for the idea that self-determination is limited by the particular "self" being referred

to. Different selves may determine their priorities in different ways. Explanations based in self-interest suffer from a similar limitation: significant subjectivity in the interests a particular self may prioritise over others. For some disputants, the fact that they chose the outcome of their mediation sounded as much a confession as a boast.

C.4. More negative than positive

The remaining responses appeared to place the stress on the second half of the phrase "Yes and no", highlighting factors detracting from the justice of the outcome.

C.4.a. Mediation's privacy

Recapping a theme from Chapter 5 on fairness, justice and legal norms, two otherwise satisfied participants expressed regret that their dispute was not in the public domain.

*P1* *Perhaps the one slight regret I've got on that moral issue of somebody challenging their terms and conditions and such like in court.*

This participant had earlier floated the possibility of an ombudsman as a way of delivering a public outcome in relatively minor disputes.

Participant 2, a respondent, attended the mediation as manager of a letting agency. She explained that they would normally encourage dissatisfied clients to go to the Property Ombudsman. Although this client had raised a small claim, she went on to elaborate her thinking about a possible ombudsman finding:

*P2* *If they found against us, then, em, you know, we would go with that.*

I You would?

*P2* *Oh absolutely, yeah… You know, kind of – are we being responsible? Have we been professional? Because sometimes we* <u>*do*</u> *do things wrong and if we do*

> *things wrong, I think that it's fair that we have to offer some form of compensation for it.*

This business person articulates an important facet of adjudicative decisions: elaborating norms. She presented herself as wanting to work for a responsible company, and the Property Ombudsman helped set the parameters by which that could be judged. Mediation appears to lack such a precedent-setting role, echoing Nader's critique of complaints systems set up to deal with "little injustices" (Nader, 1979, p. 1000, and see Chapter 2.B.1). In her view, "Even though companies may tend to believe that people use general complaints as a strategy to solve an individual problem, people often complain in order to encourage the company to change its production policy or improve the quality of its product" (*ibid*, p. 1002). This sentence applies squarely to Participant 1. Participant 2 illustrates an alternative dimension of public judgments: they can also assist well-intentioned companies to gauge how their policies or products would stand up to scrutiny.

The above exchange offers an insight into the self-presentation of businesses (Goffman, 1959). In Chapter 4 (E.4.e. above) I noted participants' desire to be seen as fair people, by me and in their own eyes. The same phenomenon appears to affect businesses. Not only do they comprise individuals, each with their own self-image; businesses generally trade on a reputation for fair dealing. To be able to point to an ombudsman's decision in support of their practice provides both internal and external reassurance. Employees can feel comfortable that they work for a reputable company; clients are assured that this business can be trusted.

C.4.b. "The tension between principals and agents"

(Mnookin, Peppet and Tulumello, 2000, p. 69)

One of the two solicitors in the sample expressed a different concern: that those instructing her (an insurance company) may profit from a decision that works against the interests of those not represented at the mediation (the insured). As well as

highlighting a potential tension between principal and agent her response touches on a variant of moral hazard, where one party has decision-making power while another bears the risks.

I Do you think you got justice? Do you think the outcome was justice?

*P22 For anybody?*

I Yes.

*P22 It probably was cos it was probably – well, I'm trying to think – Justice? (LAUGHS) Justice for who? (EM) (PAUSE – 4 SECONDS)*

I Well, for your clients then.

*R.. Yeah. Well, certainly for our clients, I think they would be happy with that. They certainly got the outcome they wanted. It was no finding of liability against our client. The claim was withdrawn. All that sorta stuff, you know, they got what they wanted and I think at a level they were willing to – well, clearly at a level they were happy to pay.*

However, when it came to the insured:

*P22 The particular individual that we were dealing with felt very strongly that she'd done nothing wrong… She certainly would know that the plan was to go and try and resolve the case and a payment may be made to do that… But I suspect she probably would have felt angry at knowing that some money has been paid over cos she strongly felt it wasn't her fault.*

This professional representative demonstrates a distinct variant on the "Yes, but…" theme. While her insurance company clients may well think the "good enough" result delivered justice, their insured would probably take the opposite view.

Her question, "Justice for who?", highlights a wider challenge for the justice system. Whose interests is it designed to serve? Luban proposes a distinction between

"*justice within the system"* and *"revisionary justice*" (1989, p. 384). The former reflects a pragmatic view, accepting limitations and imperfections (for example, that the insurer pays the solicitor's fee and thus has a greater say in her actions). "Revisionary justice" applies a more "detached or even utopian" (*ibid*, p. 384) standard that seeks to revise the way the world is ordered and bring about a just society. A settlement where those in the room make deals at the expense of those not in the room is likely to fall short of this standard. As a member of the "juridical field" (Bourdieu, 1987, p. 816), this solicitor seemed to be aware of the revisionary justice perspective even if it was not her business to apply it.

C.5. Conclusion

The question "Did you get justice?" seemed to take most participants by surprise. Some laughed. Some said nothing. Some raised their eyes to the ceiling. The hesitations and pauses described above appear to indicate a kind of agonising over the topic, most evident among this ambivalent group. They appeared to be in two minds, and took time to offer glimpses of both. Inevitably a sub-theme with the title "ambivalent" contains a spread of responses from "glass half full" to "glass half empty."

A third group of participants gave a readier response, as if they had given this a lot of thought. This includes most of those in the next section. Even more so than those in the ambivalent group (C.1. above), when asked about justice in mediation many of them had clearly ruminated on its converse: injustice.

**D. "There's no sense of justice" – the negative group**

Eight participants said they did not receive justice from the mediation process. It is tempting to link this view to quantum, the amounts paid or received (see A.1. above). However, getting any settlement at all may be more significant. Five of the eight answering "no" did not reach a resolution, though one settled shortly after. Only three reached an agreement in mediation, two claimants for 28% and 15% of the sum claimed, and one respondent to pay 38%.

Four of those who did not settle responded to my request for further information. All had gone on to an evidential hearing. Of the three claimants, two received 50% of the sum claimed and one was granted decree for the full amount plus expenses. However, she has been unable to recover anything from the company, whom she regards as rogue traders. The one respondent succeeded in having the case against him dismissed.

Table 13 Contextual information on the negative group

| Participant number | Individual/ Business/ Agent | Claimant/ Respondent | Settlement as % of sum claimed |
|---|---|---|---|
| **3** | **B** | **C** | [50%] |
| **9** | **I** | **R** | [0%] |
| **10** | **A** | **R** | 38% |
| **14** | **B** | **R** | [DNS]* |
| **15** | **I** | **C** | 15% |
| **17** | **I** | **C** | [100%]** |
| **18** | **B** | **C** | [50%] |
| **21** | **I** | **C** | 28% |

* Did not settle at mediation and no response received at follow-up so final outcome unknown.

** After not settling in mediation received full sum claimed plus expenses, but has so far recovered nothing.

In the whole sample of 24 only seven did not settle, and five of these said "no" when asked if they received justice. The other two, who gave a "yes, but…" answer, were respondents and professionals, one a solicitor, one a property agent; their expectations of the justice system may have been tempered by experience. The first five responses flag up an important component of justice processes: getting a result. The amount may be less important. At the other end of the spectrum, none of those who gave an unreserved "yes" (the positive group, A, above) received anything close to their aspiration, reinforcing the impression that an imperfect outcome can be better than none at all; something rather than nothing (see Alberts, Heisterkamp and McPhee, 2005, p. 236). Comparing mediation to arbitration, Ross and Conlon claim: "The greatest benefit of binding arbitration is that it always produces a settlement" (2000, p. 417).

Following the pilot phase, during which I interviewed three who settled and two who did not, I decided to prioritise those who had reached agreement (see Chapter 4, F, 5: a). Seven of the next eight participants had in fact agreed a settlement. The settlement amounts varied widely (from 25% to 90%). Nonetheless it was becoming clear that participants who had forged a resolution could shed more light on the type of outcomes unique to mediation, where both parties have a veto over the result. Those who did not settle had a good deal to say about their own thinking but the other party's perspective was either absent or seemed to form an additional provocation.

Those who persisted with mediation through to settlement had little choice but to negotiate with their litigation adversary. The outcome necessarily reflected something of the other party's perspective, rendering them decision recipients as well as decision makers (Sivasubramanium and Heuer, 2007). This seems to occur most forcefully in the later stages of the mediation, during the "endgame" (Irvine, 2021a), when offers are made, rejected and modified. Until the final moment the counterpart stands as a barrier to resolution. "What I want" has to be modified in the light of "what they want" until a deal is reached. This meant that participants whose cases had reached a settlement tended to have a more nuanced view, not only of the other party's thinking, but of their own. In this regard successful mediation outcomes resemble other outcomes from the justice system, whether from adjudication or lawyer negotiation, where both parties' views must be taken into account in the final decision. This theme is developed further in the Discussion (see Chapter 7.C. above).

Turning to those whose answer to the justice question was "No," their responses fell broadly into two themes and four sub-themes:

1) Substantive justice
    a. Low offers
    b. Lack of substantive legal content
2) Subjective justice
    a. The bad opponent
    b. Low expectations.

<u>D.1. Substantive Justice</u>

A great deal of scholarly attention has been paid to procedural justice in mediation (see Chapter 3.B.3. above). Broadly speaking this refers to parties' perceptions of the process rather than its result. A smaller number of studies has considered the justice of the outcome, sometimes described as substantive justice (Sourdin, 2015b; Waldman and Ojelabi, 2016; Quek Anderson, 2020), sometimes as distributive justice

(Stulberg, 2005; Deutsch, 2014b; Hyman, 2014; Elnegahy, 2017). These scholars often devote space to distinguishing their work from procedural justice research. The following section focuses on participants' comments regarding what might be called the substance of legal negotiation. This includes offers and counteroffers as well as the capacity of the process to impose the "shadow of the law" (Mnookin and Kornhauser, 1979; Waldman, 2000; Anderson, 2019) on the outcome.

D.1.a. Poor offers

One source of dissatisfaction for most of these participants was the amount, or in one case the terms, being offered by the other party:

*P15* *Because we didn't get what we considered to be a reasonable offer.*

*P9* *A bit of movement would have helped.*

*P14* *I think it was myself who said that, look, you know, I'd be more comfortable in going to court because, even if I didn't sort of win, as it were, it would never be awarded by a judge what he's asking for.*

*P18* *And then they came back to me saying that, well, actually he's ready to offer £500. And I told them, look £500 is the reason why (PAUSE) I started the whole process in the first place.*

Participant 3 had raised a small claim for £3,000 and once in mediation came down to £2,000. The most the defender would offer was £1,000. He did not accept and continued to a hearing where he was awarded £1,500. When asked about justice he responded:

*P3* *Honestly, throughout, throughout all of this, there's no sense of justice.*
I Right.

*P3* *And even the decision the Sheriff arrived at, there's no sense of justice... All I got was an A4 bit of paper with the decree (£1,500) and I thought, what nonsense.*

Participant 21's mediation was paused to enable the respondents to gather more information. In the second mediation their offer of settlement was lower than the first.

*P21* *I said to them, obviously I was disappointed that it wasn't – comparatively it was less than I'd been offered before.*

To compound her unhappiness the reduced offer included a non-disclosure clause.

*P21* *And I said, I'm really not comfortable about the sort of gagging thing at all. I, I said that to my husband cos he knows I can't… you know, I think there's an injustice and I found it really hard not to want to challenge that. But, you know, we just had to move on but I still feel really angry.*

D.1.b. Lack of substantive legal content

Some participants expressed disappointment at the lack of substantive legal content in the mediation. This echoes some of the fears expressed by critics (see Chapter 2.B.c. above).

*P17* *I didn't feel as if I got any guidance or they tried to guide us towards a settlement. It was just basically taking what I said, relaying it to them and then answering… there was certainly nothing about, you know, consumer law or anything like that discussed with me.*

Participant 15 described the mediation as a "hearing," adding:

*P15* *I think the mediation service is useful but it's got flaws cos you're not under oath and it's got no legal bearing.*

I include two case studies to illustrate this issue in more detail.

Case study 4: Eric and his non-paying client

Eric (not his real name) is an interior designer. He is not from this country but has lived and worked here for more than ten years. A client paid him only part of his fee for a sizeable job. The disputed balance was quite substantial (£2,500) and after some correspondence and rejecting an offer of £500 he raised a Simple Procedure action. Eric found the forms fairly straightforward though he thought the Sheriff Clerk's office a bit sharp with him when he was arranging for service on the respondent.[17]

He was taken aback at the number of people present at court when he attended for a Case Management Discussion. However, the Sheriff was less authoritarian than he expected, and when the Sheriff suggested mediation Eric agreed, thinking the other party "would be of good faith basically." He also viewed the court action as "a huge waste of time and taxpayers' money." The Sheriff made no comment on the substance of the case. Eric believed he was 100% in the right but recognised that concessions would be required in a negotiation: "I was ready to say, well OK, yeah, well £1500, we can shake hands and go."

[17] This action took place before the advent of Civil Online - https://www.scotcourts.gov.uk/taking-action/civil-online-gateway/welcome2 - enabling parties to raise their actions entirely online.

The mediation took place straight away, following a brief conversation with the mediation manager. Eric, as claimant, was invited to speak first and felt he got a good opportunity to explain his perspective. He found the mediators "quite patient, actually." The respondent had brought a supporter who spoke on his behalf. This man said little about the substance of the case but chose instead to attack Eric's credibility and business experience. It made Eric angry but it also reinforced his view that the respondent had a weak case: "From then on I thought, well that guy has no defence."

The personal attacks continued, "provocation after provocation." Finally the mediators suggested meeting in separate rooms. Although one of them expressed optimism that the respondent would settle, the exchange had served to reduce Eric's expectations, "and at the same time, it increased my willingness not to compromise anymore." The other party had just been given a second chance to do the right thing and didn't take it.

After spending 10-15 minutes with Eric, the mediators spoke to the respondent. When they returned with an offer it was a reiteration of £500. As noted above, Eric said he had already received this offer and refused it. The mediators then told Eric he could leave, making no attempt to invite a counter-offer. When I queried this he chuckled; he had heard raised voices through the wall while the mediators were speaking to his former client and the supporter. They had probably realised how far apart the parties were. He added: "I think we left more convinced, him and I, that we were in the right."

I asked if the mediators had done anything helpful in terms of securing a settlement. Eric thought not, but was not critical. The paperwork had used the term "neutral" which he took to mean "they can't give their opinion." As he developed this theme he said it would have been useful for the mediators to let him know if he was unlikely to succeed in court: "if I were you I would

stop here… you have no case or something like that." However, he didn't think they had studied the law so were unlike "a solicitor who can say something quite immediate."

Following the mediation the case returned to the Sheriff, who told them he would fix an evidential hearing. Once again this Sheriff provided no input whatever on law or procedure. Eric only learned about evidential requirements (such as lodging written evidence two weeks before the hearing) from a subsequent meeting with an advice centre solicitor. This gave him pause. The next part of the conversation details a dawning realisation about the nature of legal disputes on the part of a reasonably well-informed business person. I prompted it by attempting to summarise what I had heard so far.

I From everything you've said, it doesn't sound as if anyone in the system, including the Sheriff, has given you any kind of input about the legal norms.

*P18 No (LAUGHS)*

I (LAUGHS)

*P18 No.*

I Why?

*P18 No, no. I – to be honest, I realised yesterday when I was meeting the solicitor that he said, well, you know, it's a legal case and legally, there was a contract and there's a breach of contract and that's what you need to prove.*

I Yeah.

*P18 And I'm like, well, yeah, actually, yeah, yeah. There's, there's a, a book (LAUGHS) with all the law inside and, yes, that's what it should say and – but like it was the first realisation that – it was just not like – oh, you*

*know, if the Sheriff is nice, he'll can see the things the way I see – I see them myself.*

I Yes. I see what you mean, yes.

*P18 So yesterday I realised, well, yeah, actually, you know, if, if whatever I say doesn't sound like words like contract, breach of contract and things like that, like there's no legal ground. There may be a moral one…*

I Yeah.

*P18 But there's no legal ground for me to win.*

The evidential hearing in Eric's case took place a few weeks after our interview and I asked his permission to attend. I have included my case note at Appendix 2 as it provides a useful point of reference when considering mediation as an alternative to formal court processes. In the event Eric was awarded decree for £1,500 plus the cost of raising the action.

Case study 5: Amelia and the threat of expenses

Amelia (not her real name) shed a more troubling light on some mediators' indifference to procedural and substantive legal rules. She and her husband had bought goods for use in a building project, and those goods started to develop defects within a short space of time. They raised a Simple Procedure action for £3,620 and the court referred them to mediation.

Amelia's mediation took place over two sessions, and between the first and second the respondents wrote to say they had been successful in defending another case involving similar products. The Sheriff paused Amelia's case to ensure she and her husband could read that judgment, fuelling a belief that

the Sheriff was sympathetic to the company's position. More alarmingly for her, the respondents told her the Pursuers[18] in that case found themselves liable for legal expenses of between £60,000 and £80,000. The second mediation was dominated by Amelia's belief, unchallenged by the mediators, that she and her husband would face a similar liability if they did not settle and went on to lose at an evidential hearing. In the end she grudgingly accepted a settlement of £1,000, which was £500 less than head been offered at the first mediation.

While not critical of the mediators, she grew increasingly frustrated at the inability of the process to hold the respondents to account. I asked:

I Could mediation deliver justice?

*P21 (PAUSE) Only if it's within the law, is part of the law, I should think…*

I So is it fair to say it's put you off –

*P21 Oh, totally.*

I - raising a small claim?

*P21 Totally, totally. I felt – at the start, I felt (DEEP BREATH) it had been exhausting and I thought I was kind of reduced to having nowhere else to go but to doing this and feeling (PAUSE) feeling – I, I would say fairly – hmm (PAUSE) slightly confident that we – that (PAUSE) we would gain a reason – a, an OK outcome to allow us to sort out our [goods] after all these years. I hadn't – I really hadn't expected we'd be going at this point going, anything, we'll just have to leave, forget £500 and we have to get it because we cannot afford to go to the next stage or whatever.*

[18] The fact that they were called "Pursuers" and not claimants alerted me that this was a different type of action – see below.

Cases like this challenge mediation's claims to promote informed decision-making (see Chapter 3.A.2. above). The mediators do appear to have supported party self-determination but, as critics of mediation have repeatedly pointed out (see Chapter 2.B. above), that principle provides little protection where one party is ill- or mis-informed. In fact the respondents' assertion that the claimants faced a potential liability in judicial expenses of £60,000 to £80,000 is highly questionable. The other case was heard under a different procedure, Ordinary Cause, designed for higher value cases (£5,000 and above with no upper limit). Most parties are legally represented; however, in that case both had chosen to employ counsel, leading to significantly higher expenses.[19]

Simple Procedure, in contrast, is designed for unrepresented parties. Its rules state: "The Sheriff must ensure that parties who are not represented, or parties who do not have legal representation, are not unfairly disadvantaged" (Scottish Statutory Instruments, 2016, Rule 1.4 (2)). Instead of complex written pleadings there is a single claim and response form. Evidential hearings tend to be short, reducing potential costs even where lawyers are employed. While expenses are not capped for cases between £3,000 and £5,000 (like this one) judicial expenses rarely exceed £5,000 and are often considerably less. Anyone wishing to employ an advocate requires special sanction from the Sheriff.

Those familiar with court processes will know that the facts of every case are different, meaning much turns on the Sheriff's assessment of the evidence. That makes it risky to predict that two apparently similar cases will have identical results. Amelia had spent some time reading the earlier judgment and spotted several factual differences from her own case. However, she now believed she could not possibly

[19] I was able to find the written judgment on the Scottish Courts and Tribunals website. I provide no reference to protect this participant's anonymity. The term "counsel" refers to an advocate, Scotland's equivalent of a barrister.

afford the risk of testing her understanding in court. It became clear during our interview that the mediators had taken no steps to correct or even question this belief. It is possible they too were unaware of the technical rules making expenses of £60,000 to £80,000 extremely implausible. Even the respondents, despite being repeat players, may not have been aware of the extent to which they were exaggerating or "puffing" (Mason, 2012; Wolski, 2015) in their negotiation position.

All of this serves to highlight a problem for mediation. There are situations where a detailed understanding of the justice system can shed a dramatically different light on the most apt course of action. If one risks a loss of £80,000 for a potential gain of £3,500 it will seem rational to settle for less, particularly given human susceptibility to loss aversion (Tversky and Kahneman, 1992; Gächter, Johnson and Herrmann, 2010; Galin, 2014). If that risk is in reality significantly lower, say one-tenth of this amount, the equation alters and Amelia may have felt more confident in negotiating.

The principle of self-determination does not protect an unrepresented person in these circumstances. This articulate claimant was fully in control of the choices she made and the mediators made no attempt to constrain her freedom of action. Yet because her counterparts introduced false beliefs about the case (in my opinion) she felt herself coerced into a result she considered deeply unjust. Waldman caricatures the "catechism of the self-determination theorists" as "justice is what the parties decide" (2004, p. 251). This case reveals its limitations in court-referred mediation.

Waldman offers an alternative approach to justice in mediation, offered by the "social norm theorists" (2004, p. 263-270; and see Chapter 2.A. above on the concepts of informed decision-making and informed consent). For these writers the introduction of legal norms enhances the likelihood that mediation will deliver justice, particularly between in-groups (like repeat players) and out-groups (one-shotters and those with fewer social and economic resources). In this case the unwillingness or inability of mediators and the court to provide input on legal norms

left a gap into which unscrupulous or simply opportunistic opponents were able to place their own spin on the rules. This theme is considered again in more detail in the Discussion (Chapter 7.B.2. below).

This section has featured participant statements expressing disappointment at the substantive justice of their mediation. For some this was a simple matter of unrealistic offers, rendering it a waste of time. For others the lack of substantive information about the law and its consequences pushed mediation into the realms of bad faith, where an obdurate or powerful opponent could use its informality to avoid a just result. This falls close to Abel's damning statement: "individual grievants confronting more powerful adversaries want an authority that is sympathetic, predisposed toward their plight - e.g., an administrative agency or jury – mediators… do not help to right the scale" (1982, p. 298). These instances raise important issues for mediation practice, particularly the controversial question of how much or how little a mediator ought to intervene (see Chapter 7.C.2. below).

D.2. Subjective Justice

The remaining statements from participants in the negative group relate to their individual perspective rather than more objective measures such as quantum or, less precisely, legal norms. For most, consumers and unrepresented people, these tended to concern subjective aspects of the other party's behaviour. The two professionals acting in a representative capacity described their own views on disputes and litigation, which were undoubtedly shaped by their role and life experience.

D.2.a. The Bad Opponent

Most of this group spoke about their counterpart in disparaging terms. While mediation can absorb a degree of give and take, there are limits. If the other party goes beyond what participants regard as acceptable norms of negotiating behaviour it appears to affect their sense of justice. Speaking of her individual mediants, Borg

observed: “In one way or another, their adversaries had violated norms of everyday interaction and had treated them in an unacceptable, hurtful, or insulting manner” (2000, p. 122).

*P9* *My impression of the guy was that he is a bully - I have a thing about bullies.*

*P3* *What they have done is despicable. And this woman’s a lawyer; she should know better.*

*P17* *They were just buying more time because what happens is – you know, the research that I’ve done on the company, they change their name all the time and they change their registered address, which they have just done actually… again.*

*P21* *They were evasive and then they were using bullying tactics.*

One participant spoke of the other party’s unwillingness to modify their opening offer:

*P15* *We did budge, we came down 50% and I thought, well that’s OK, let’s try and get 750. We weren’t gonna get that. They came in with 250 and never budged from 250. And that actually was the original offer he put to do the work again with the acid.*

I Yeah.

*P15* *So they hadn’t budged their position at all.*

I Yeah. OK. That’s -

*P15* *My frustration is coming through now.*

In a classic negotiation text Raiffa coined the term "negotiation dance" to depict the back and forth process familiar to most negotiators (1982, p. 47). He added this warning:

> making a reasonable opening and remaining firm works sometimes, but more often than not it antagonizes the other party, and many of the no-agreements resulted from this strategy. Advice: don't embarrass your bargaining partner by forcing him or her to make all the concessions (ibid, p. 48).

Participant 15 seems to have experienced precisely the antagonism Raiffa predicts. Despite agreeing to a settlement, the bad taste left by the other party's obduracy contributed to his feeling that justice had not been done. This confirms a twist on procedural justice: mediation parties' evaluations of the process seem to be influenced more by their counterpart's behaviour than that of the mediators. This suggests it is less the "authority figure" (Welsh, 2001, p. 833) than the decision maker whose attitude is relevant to procedural justice evaluations (see Chapter 7.B.1. below).

D.2.b. Low Expectations

Some participants portrayed mediation primarily as a vehicle for settlement negotiations. These were professionals negotiating in the course of their daily work, and they appeared to find the question about justice perplexing or irrelevant. Borg noticed a similar phenomenon among "agent-mediants" (2000, p. 127), who tended to view cases in terms of legal rules rather than moral responsibility. One solicitor in the current study seemed genuinely surprised that justice might have anything to do with mediation, suggesting that the "lawyer's standard philosophical map" remains a challenge to mediators some forty years after Riskin first coined the term (1982, p. 43; see also Guthrie, 2001). Riskin listed among its consequences: "the duty to represent the client zealously within the bounds of the law discourages concern with both the opponents' situation and the overall social effect of a given result" (1982, p. 44).

One participant was an English solicitor who displayed considerable enthusiasm for mediation in that jurisdiction:

*P10* *I think it's fantastic because I sometimes have claims which are 3 or 400 pounds.*

I Uh huh.

*P10* *And we'd spend that defending it in Penzance or Taunton or wherever, yeah? We sometimes have claims that are £80, £100 or something. And we think, you know, if we go to mediation, cos it's a free mediation service, I – even if I have to settle at half, that's better than me paying it off.*

Her positivity clearly rested on "quantitative-efficiency" grounds rather than on "qualitative-justice" grounds (Menkel-Meadow, 1991, p. 6). The former include cost, speed and the saving of court time; the latter include access to justice, community empowerment and improved outcomes for all participants. Some comentators see mediation offering both effiency and justice (Budd and Colvin, 2008; Condliffe and Zeleznikow, 2014; Baitar, Mol and Rober, 2016; Eisenberg, 2016). Others worry that a concern with efficient case processing driven by economic exigences works against mediation's other benefits, particularly its potential to provide justice (Hayncz, 2008; Grima and Paillé, 2011; Mironi, 2014; Welsh, 2017).

This legal professional portrayed herself as having no choice but to prioritise efficiency over other concerns:

*P10* *But I'm afraid my head has to rule my heart. It's the company's money…*

Her approach was also influenced by a robust confidence that her clients would prevail if the matter proceeded to a hearing:

*P10* *Because of the business model, 99.9% of the time, in fact nearly 100% - well, it is about 100% of the time – we will win because, legally, we can show that we were the agent and not the principal.*

I Right.

*P10* *We've also got a Court of Appeal decision to back it all up*

As a member of the "juridical field" (Bourdieu, 1987), trained in the home of *stare decisis* (Lord Neuberger, 2016), her views on fairness and justice were strongly influenced by judicial precedent. The mediation had settled when she made a modest offer without admission of liability. However, she could not regard this outcome as fair because she could predict that the claimant would have received nothing in court. When asked if she and her clients got justice, she took time to respond:

*P10* *(PAUSE – 4 SECONDS) No. (LAUGHS)*

I Can I ask more about that?

*P10* *Well, I think it still goes back to – I only settled it on the basis that it's gonna cost us too much to defend it.*

I Mm hmm.

*P10* *So that's not justice for us.*

I OK.

*P10* *That is more (PAUSE) a claimant / pursuer question because she's brought the claim and she wants justice – Ok? Where, as a defendant, we're not looking for justice.*

The last sentence is elegantly clear. The attainment of justice in an abstract sense is not one of her goals for mediation; that kind of justice is a matter for the unrepresented consumer, the claimant. And yet at the same time she cheerfully embraced the legal system's offer of a process delivering economically efficient results for her clients: the quantitative-efficiency motivation.

Another repeat player was not legally qualified but was a senior manager for a national furniture retailer. The bulk of his experience was also in England and Wales, but he had been involved in a number of Scottish claims. The particular case against his company involved a faulty sofa. The claimant had the goods for over three years before notifying them of the damage, and the claim itself was raised just before the five year time-bar. In his eyes it had very little merit, and any settlement would be a "nuisance offer."

When asked about justice, we had the following exchange:

*P14* *I suppose it's like what we feel is fair and just kind of is secondary to it in the sense of that before a claim has been raised, you know, I've got very defined views of what I think should happen. But actually, do I think that – do you always get the best outcome? No, you don't. There's been ones where I've settled at mediation cos I know that there's absolutely no way I could justify the expense of going to court.*

I Right.

*P14* *So I don't feel that I've got justice but what I do feel that I've got is that I've saved the business money.*

Like the solicitor above he distinguishes the quantitative-efficiency grounds for his choices from a qualitative-justice evaluation: "I don't feel that I've got justice."

Both these participants highlight an issue with the way mediation is portrayed. Its proponents within the justice system often rest their case primarily on quantitative-efficiency grounds (Susskind, 2015; Clark, 2019; Ross, 2020; Civil Justice Council, 2021). That may help to explain why these two professionals, frequent users and strong supporters, do not expect mediation to deliver justice. It raises further questions: if the justice system diverts cases to a process that does not deliver justice, what does it think it is doing? If justice is a "pursuer/claimant question" (Participant

10) and not a concern of business parties, how do mediators strike a balance between these two distinct motivations?

In Chapter 5 I noted that unrepresented consumers tended to include a range of motivations in their decision to mediate and to settle. These include both quantitative-efficiency and qualitative-justice grounds, sketching out a broader conception of justice than a simple “shadow of the law” (Mnookin and Kornhauser, 1979). It could be argued, based on the responses of legal and business professionals, that induction into the world of legal thinking, both formal and the kind of experience gleaned by “repeat players” (Galanter, 1974, p. 97), serves to limit, or narrow, an individual’s understanding of justice. In this world “quantities are bright and large while qualities appear dimly or not at all” (Riskin, 1982, p. 44). That may explain why mediation can, at the same time, both deliver and fail to deliver justice in the eyes of its users.

The two participants described in this section displayed considerable legal knowledge. One way of understanding legal education is as an extended process of narrowing, as students are taught to sift out what is not legally “relevant” and to replace common-sense ideas of justice with definitions provided by the courts. The creation of contemporary justice systems could be portrayed as a “great narrowing,” when an untidy assortment of local courts and other justice entities was replaced by the Royal Courts of Justice (Arthurs, 1985). In this period modern states like the United Kingdom centralised their justice functions via state-sponsored courts and, in civil law countries, a civil code. In England and Wales the process was complete by 1900, and notions of legal positivism served to reinforce the view that justice resides exclusively in state institutions (see Chapter 2.A.2. above). Froese characterises this view as “liberal justice… a universalizing principle easily translatable into a legal code that can be applied in a court of law” (2022, p. 5).

If there can be multiple conceptions of justice, and multiple sources of societal norms, it could serve to undermine law's state-building function. It is therefore not surprising that mediation has become the battleground on which the contest between different conceptions of justice is played out. On one side is a view that equates justice with law. From this perspective mediation is problematic in the measure in which its outcomes differ from those produced by the courts (for a definitive statement of this position see Fiss, 1984). The opposite view holds formal justice institutions in lower esteem, following a tradition dating back to Aristotle in seeing law and courts as remedial necessities to be used as a last resort: "Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions" (Galanter, 1984, cited in Sourdin, 2015, p. 95).

Mediation with unrepresented people offers a distinctive glimpse of justice outside the law. Like Sourdin and Galanter I am not suggesting this is superior or even preferable to the narrow form of justice law provides. It is clear from the interviews in this section that the absence of legal norms can place mediation parties in a problematic, even oppressive position. Law's "remedial dimension" (Fiss, 1984, p. 1082) remains as important as ever for those who do not settle and, where one party employs questionable tactics to dominate the other, for some who do.

And yet, taking this study as a whole, the majority of participants were able to account for their decisions in terms recognisable to those operating the justice system: the encounter (equivalent to the day in court), the chance to tell their story, compensation, punishment of bad behaviour, closure and, of course, payment. This study problematises the idea that such results undermine the justice system (Genn, 2012b; Bartlet, 2019). They could equally be seen as supplementing it by expanding the range of sources of justice while reserving to state courts their proper remedial function.

D.3 Conclusion

This section has considered the views of the most negative group: those who answered the question "Did you get justice?" with "no." Their responses convey a range of reasons. Some made a relatively straightforward comparison with their aspiration; the figure simply was not high enough (or low enough in the case of respondents). Even this was nuanced, however, with almost all participants acknowledging the need for a degree of compromise in a negotiation.

Some regretted mediation's lack of formality (echoing the critics of informalism, see Chapter 2.B. above.) These participants made a different kind of comparison, between their perception of court proceedings and their experience of mediation. Factors counting against mediation included an inability to hold people to account, the absence of legal norms (substantive and procedural) and in some instances the mediators' general passivity.

Others focused on more subjective issues. Some saw the other party as simply too difficult for mediation, a perception reinforced rather than reduced by the encounter. Some cited their own low expectations. This sub-group was entirely composed of professionals who did not associate mediation with justice, and yet its absence did not prevent them from speaking positively about the process. They seemed to see justice itself as the subjective issue, something for unrepresented, and inexperienced, people to care about. And it should not be overlooked that some in this group equally felt they did not get justice from the court.

In the next section (Chapter 7, Discussion) I consider the implications of these findings for our understanding of mediation and the people who use it.

# Chapter 7 Discussion

## Introduction

As set out in the introduction, (Chapter 1, above) this study was inspired, or perhaps triggered, by a particularly snappy phrase. I listened with dismay as Professor Genn described some rather unsuccessful efforts to make greater use of mediation in two London courts (Genn, 2010). One of her conclusions has become famous, perhaps as much for its play on words as its content: "The outcome of mediation is not about *just* settlement, it is *just about settlement* [italics in original]" (*ibid,* p. 116). I might not have reacted so strongly if she had stopped at the previous sentence: "Success in mediation is a settlement that the parties can live with" (*ibid,* p 116). It was the implication of mediator indifference to justice that rankled. Yet she reinforced the point repeatedly: "Are mediators concerned about substantive justice? Absolutely not" (*ibid,* pp. 115/116); "…it is not about substantive justice. Concern for 'justice' and 'fairness' is not relevant to the goals of mediation" (*ibid,* p. 118).

However, as I noted at the time (Irvine, 2009), Professor Genn's provocation may have been doing mediators, and me, a favour. I found myself thinking that even if I didn't care about fairness and justice my clients certainly did. I thought of, but did not utter, a rhetorical response: "Have you ever tried persuading people to agree to something they think is unfair or unjust?" Sensitivity to unequal and inequitable treatment has been found in children as young as 17 months (Wang and Henderson, 2018).

More constructively, Genn's UK restatement of the largely North American critiques summarised in Chapters 2 and 3 impelled me towards empirical research (Irvine, 2014). How do we know that mediation does not provide substantive justice? How would we investigate? We may know, or think we know, that mediators do not impose legal norms to bring mediation outcomes into conformity with what the

courts would do (though this has been questioned; see for example Greatbatch and Dingwall, 1989; Alfini, 1991; and see Chapter 2.B. above). However, is substantive justice no more and no less than what the courts would do? What about the parties' own sense of justice? Will outcomes inevitably be unjust or unfair simply because they are not devised by judges?

Some empiricists have attempted to answer the question about mediation and substantive justice numerically (see Chapter 3.C. above), comparing litigated and mediated settlements. The current study did not, and the sample is too small to provide statistically significant results. I simply note that the average settlement for the seventeen participants who reached agreement was 45% of the sum claimed (with a range from 0 to 128%) meaning most agreed to a resolution that differed considerably from their opening position. This applied to claimants and respondents alike. The five cases that continued to an evidential hearing resulted in awards averaging 59%, with a range from 0 to 100%.

However, even the most cursory examination reveals missing variables that would invalidate any conclusions drawn from settlement amounts alone. One claimant's solicitor greatly exaggerated her initial claim, leading to an eventual settlement that appears small (9%) but was both realistic and acceptable. Another achieved the dropping of a possibly speculative counterclaim – does this count towards the settlement value, or not? One of those awarded 100% of their claim by the court has yet to receive any payment from the rogue-trader respondent. Two respondents regarded the claims against them as totally unjustified and were later vindicated in court.

Research into mediation and substantive justice is relatively rare (see Chapter 3.C.2. above.) One exception is the study reported by Wissler (2002), who noted that parties found mediation outcomes less fair than their attorneys. Her conclusion provides a partial mandate for the current study: "Future research needs to examine

why parties decide to settle and what norms they apply in determining whether an agreement is fair" (*ibid,* p. 696). The results in the previous two chapters go some way towards answering those questions alongside my own research question: "What is the place of justice in the thinking of small claims mediation participants?" In this discussion I review some of the themes and their implications.

**A. Justice and law in mediation**

Justice appears to be an ancient and universal concern (see Chapter 2.A.1. above). Many of humanity's oldest stories feature the struggle against injustice and there is evidence of sensitivity to unfairness among very young children (Haidt, 2012; Wang and Henderson, 2018; Ting and Baillargeon, 2021). Deutsch drew on social psychology research into injustice to formulate his "concept of justice" (1975, p. 137) with its threefold typology of equity, equality and need. On the face of it, then, the most straightforward way to investigate the justice thinking of mediation participants is to ask them.

It would be naïve, however, to ignore the intimate relationship between justice and law. As Pirie's (2021) history sets out, rulers and states have sought to codify justice for at least four thousand years, offering order and predictability while simultaneously cementing their power and legitimacy. By the modern era, "Justice Without Law" has been relegated to small, coherent communities on the fringes of society (Auerbach, 1983).

As noted in the Introduction (Chapter 1.B. above), the words "justice" and "fairness" have distinct tones of meaning in English. Fairness is a more everyday quality and it is uncontroversial to imagine any individual having a view on the subject of what is fair and what is unfair. Justice, on the other hand, is linked to law and legal rules and administered by legal professionals. This distinction was borne out in participants' responses. Most had little hesitation in offering an opinion about fairness, including

how fair they considered the result to be. People readily expanded on the word by offering their views on issues like the way the other party had treated them, how the outcome compared to what they wanted or their treatment by the mediators. When asked if they got justice their reaction was strikingly different. I described above (Chapter 6.B.2.) their lengthy pauses and apparent agonising before speaking. Participants spoke more fluently about injustice than justice, and a number said they found it difficult to respond.

In Chapter 6 I attributed this to their being in two minds – one the one hand this, on the other hand that. An alternative explanation is to see the hesitation as a sign of surprise at the question. People are unaccustomed to voicing their opinion on justice because that is the court's business. In a developed legal system like Scotland's it requires training and expert knowledge to understand what justice requires. The terms "legal system" and "justice system" can be used interchangeably (though it would be surprising to call the legal profession the "justice profession.") I have previously described first-year law students' dismissive remarks at the thought of non-lawyers' justice thinking: "One of the major drawbacks of mediation is that lay people are in control of justice" (Irvine, 2020, p. 146). The rest of society has almost certainly inhaled the same perspective, reinforced by portrayals in books, films and television of crusading lawyers fighting injustice. Perhaps the participants in the current study did not feel qualified to offer their opinion on justice, particularly given the legal setting in which small claims mediation takes place.

However, while participants may not have seen themselves as qualified to comment on justice, in court-referred mediation the justice system has delegated responsibility to them for the quality of the outcome. When the courts endorse a process like mediation it can be argued that it is thereby transformed into a justice ritual. The idea of the ritual has largely been applied to restorative justice processes, but court-referred mediation shares similar characteristics: "group assembly, a barrier to outsiders, mutual focus, and a shared mood" (Rossner, 2013, p. 31, citing Collins,

2004). And, however facilitated, this ritual can have legal consequences. Its outcome, in the form of settlement agreement, becomes a binding contract.

In some domains law may not be a relevant criterion for assessing the justice of mediation outcomes; for example when international mediators assist in negotiating a ceasefire between warring states, or in a Scottish context when mediators support the relationship between carers and young people at risk of homelessness (Cyrenians, 2023). These processes fall within Waldman's "norm-generating" style (1997, p. 710), where the parties are granted twofold authority: over the outcome and over the criteria by which that outcome is to be evaluated. However, when parties enter the legal system by raising or defending an action that becomes less tenable. It could be argued that any process recommended or mandated by the court becomes a justice ritual and should be evaluated according to legal norms.

The application of legal norms within traditional justice processes has twin audiences and twin goals. The immediate audience is the parties to a dispute; the immediate goal is to produce an outcome that conforms to legal norms. This is probably what Genn had in mind when she referred to a "just settlement" (2010, p. 116). The long-term audience is wider society; the long-term goal is to provide that society with normative standards for future use. This latter idea is held in particular reverence in common law jurisdictions, where the legal system itself is a key beneficiary given that the decisions of higher courts become law (Irvine, 2012). It led Luban to describe "adjudication as a public good" (1995, p. 2622) and underpinned Fiss's (1984) concern when he declared himself "Against Settlement". I now consider the implications for each of these two goals arising from the results of the current study.

A.1. The immediate goal: just settlement

Just settlement seems to be the logic behind a later development in mediation, described by Waldman as a "a norm-based process utilizing mediative techniques" (1997, p. 727). It is portrayed as a defensive reaction to criticism that leaving the

choice of normative criteria to parties will expose some to injustice. Mediators adopting this approach, in its “norm-educating” (*ibid,* p. 723) form, step out from behind the veil of neutrality to offer information about legal (and social) norms. Some, adopting a “norm-advocating” approach (*ibid,* p. 742), go further and insist on certain legal rules being complied with in the settlement. Stulberg and Press address the same issue by proposing “two fundamental norms: first, that the mediation process, suitably conducted, is a 'justice' process; second, that the mediation process, at least in its more 'formal' setting, is a 'public' process” (2016, p. 121).

The risks of injustice, oppression and the domination of the weak by the strong have not diminished in the intervening years. Scholars continue to voice concerns about the impact of identity, particularly race (Bachar and Hensler, 2017; Halperin, 2020; Dukes and Cozart, 2023); inequality (Waldman, no date; Welsh, 2017; Hare, 2020) and lack of legal resources (Gazal-Ayal and Perry, 2014; Reynolds, 2014). I next recap participants’ own evaluations of justice, both during the mediation and in the outcome.

A.1.a Process: fairness and justice thinking during the mediation session

Chapter 5 offers a glimpse of participants’ thinking during the mediation process, with formal legal rules featuring little as an influence on how they behaved and what they agreed to. The idea of compromise came up frequently, its multiple meanings rendering it simultaneously essential to mediation’s success (when criticising the other party’s lack of compromise) and morally unacceptable (when speaking of compromising one’s own deeply held principles) (see C.2. below). This was related to another theme: participants’ assessment of risk when weighing up whether or not to compromise. In Chapter 5 (A.3. above) I noted the parallels between what these “lay” people described and the risk assessment which forms a key part of legal professionals’ offering (Keet, Heavin and Lande, 2020).

A number spoke about their own approach to fairness and justice and took time to explain how they had applied their moral principles in arriving at a settlement. Some referred to an overarching principle like reciprocity or the Golden Rule. Others touched on proportionality, the amount of time and effort they and the state ought to expend on relatively modest sums (a public policy question). A few spoke of a "point of principle," with or without using those precise words, portraying themselves as morally upright individuals or businesses who had been pushed too far by an unreasonable adversary. And some spoke of preventing further harm to others, a prosocial motivation for digging in one's heels.

These responses contribute to one of the study's key findings. In most cases the opportunity mediation provides for participants to apply their own principles leads to settlements that are sufficiently just not to fall outside the range of what the courts might do, with the other party's veto over the result acting as a guarantee against oppression (B.1. above). Frey puts it simply: "the power to control the outcome creates fairness in the outcome" (2001, p. 38). De Girolamo suggests that mediation has the potential to produce substantive justice according to Sen's three principles of: "objective reasoning, rational choice and freedom of choice" (2017, p. 6, citing Sen, 2011), but falls short in one respect. Sen makes "capability" (*ibid,* p. 13) a precondition for freedom of choice and De Girolamo worries that parties' lack of legal knowledge could lead to unjust outcomes. She calls for greater acknowledgement of the need for mediator activism to ensure just results, a point of view supported by this study's negative findings on mediator's silence about the law (see A.2.b. below).

However, in making the mediator solely responsible for providing the "anti-parochial voice" (*ibid,* p. 19), De Girolamo may have overlooked an important protection provided by joint decision-making in most small claims cases, where neither party is a bad actor or remorseless multinational. In the majority of instances two relatively autonomous parties applied their own justice principles. The insight I explore below (C.1), that mediation parties are simultaneously decision makers and decision

recipients, means they can apply their justice principles in two distinct ways: positively, in deciding what to offer, and negatively, in deciding what to accept or reject. The ultimate result may not be either party's absolute preference, but may deliver Sen's hope for justice processes: "the enhancement of substantive justice rather than the search for the unattainable in the form of ideal justice" (*ibid,* p. 18).

However, some of the findings reported in Chapter 6 reinforce De Girolamo's concern about mediations where the mediator does not provide normative input. This may be because of lack of legal knowledge or because their training and theoretical allegiance inhibits them from offering that (or in some cases any) input. In either case they risk exposing participants to precisely the oppression prophesied by early critics of informalism: that better informed and better resourced parties will force or delude those who are less advantaged into unjust settlements (see, for example, Abel, 1982; Garth, 1982; Grillo, 1991 and Chapter 2.B.3. above).

Mediators who offered some normative input appear to be taking the lower risk approach (see B.2. below). If it was not required participants were appreciative or, at worst, indifferent. However, where participants lacked understanding or knowledge it enhanced their capacity to forge informed settlements. Legal norms could then contribute, along with the other moral principles and tactical considerations described above, to the eventual result. This approach, outlined decades ago by Riskin (1996), Waldman (1997) and Kurtzberg and Henikoff (1997), means mediation can fulfil Sen's justice requirement of "freedom of choice" (De Girolamo, 2017, p. 6). Put more simply, the activist mediator supports informed decision-making (see Chapter 3.A.2.a. above). Wissler's summary of a series of studies of court-annexed mediation in Ohio concluded that "settlement tended to be more likely if the mediators were more active and disclosed their views about the case" (Wissler, 2002, p. 700).

It seems then that when mediators calibrate their activism to parties' capacities rather than their preferred theories or "ideology" (Stempel, 2000, p. 247), mediation creates the conditions for a just process. Parties can bring their own values and preferences into play while a sufficient level of legal input ensures informed decision-making (see also Diagram 13, below). I now consider findings concerning the result of that process: the mediation settlement.

A.1.b Outcome: the fairness and justice of settlements

As well as discussing what took place during mediation I asked participants to evaluate the outcome (see Chapter 6, above). The picture is complex. Many seemed unsure about whether they were qualified to talk about justice. They appeared to equate justice with law and some used comparisons with other, legal, processes in organising their response. However, given time, most developed their thinking to reveal non-legal criteria for their evaluation. Personal values and principles came into play; for example, the sense that things ought to be *"done the right way by the book, the honest way"* (Participant 11).

A sizeable group of participants was ambivalent about the justice of the outcome (Chapter 6.C. above). This often appeared to flow from an inner contest between idealism, justice as a virtue, and realism, justice as dispute resolution. For others the contest was between self-interest and another aspect of justice – the urge to penalise bad behaviour (see Chapter 6.B.2a. above). Some described instrumental reasons for deeming the result to be just, such as getting a reasonable proportion of the sum claimed, achieving "closure" or simply having a say in the outcome, echoing participants in Blake Stevenson's (2016) study (see Chapter 3.C.2. above). On the deficit side of the equation, factors counting against a just settlement included concern about mediation's privacy and the lost opportunity to enunciate public norms and set precedent. Others voiced a related concern about mediation's privacy: that behind closed doors parties can agree settlements acceptable to those

in the room at the expense of those outside, a form of "public bad" (Luban, 1995, p. 2626).

Despite these mixed views most of this group agreed to a settlement, underlining the practical importance of the "good enough" result. It should be no surprise to see this form of pragmatism in the way unrepresented people conceive of fairness and justice. The legal system to which they have turned offers small claimants "a court process designed to provide a speedy, inexpensive and informal way to resolve disputes" (Scottish Statutory Instruments, 2016, No. 200, Rule 1.1 (1)). This may be a far cry from "ideal justice" (De Girolamo, p. 18) but that does not make it no justice at all. Future research could investigate the prevalence of the good enough result among decision recipients in other parts of the justice system.

A small number of participants gave a wholly positive evaluation of their mediation outcome in justice terms (Chapter 6.B.1. above). Again this featured getting paid, although this group seemed relatively uninfluenced by how closely the result tracked their expectations. This challenges a purely instrumental explanation such as: "the more I got paid the more justice I received". Instead the money appeared to symbolise vindication or simply getting the better of a more powerful adversary, a form of "resistance" (Ewick and Silbey, 1998, p. 233, and see Chapter 6.B.2.a. above).

Non-economic factors included the encounter itself and a kind of pragmatism encapsulated in the idea of the "good enough" result. This provided another form of closure where these participants could walk away from the dispute in a way that released them from its attendant stress and worry. These participants illustrated the potential of mediation to act as a justice ritual akin to the "day in court" (HM Courts and Tribunals Service, 2023, p. 21). One spoke of teaching the other party a lesson. Another relished the sense that she had stood up for herself against a more powerful adversary. While she seemed uninterested in teaching the respondent's solicitor a lesson, she derived some satisfaction from triumphing over what she saw as injustice.

The least positive participants, who said they did not get justice, also provide important lessons for mediation (Chapter 6.D. above). One is the significance of getting a result. Most of this group did not, increasing their frustration with their opponent and making the time and effort seem wasted. Returning to the idea of mediation as a justice ritual (see A. above), it can hardly provide a just settlement if it does not provide a settlement at all. As a practitioner I am sympathetic to mediators who concede that some cases ought not to settle; this approach seems more likely to honour party self-determination and less likely to lead to directive or pressure tactics. Nonetheless this finding may explain the appeal of arbitration, even though it involves ceding "decision control" (Welsh, 2002; MacCoun, 2005) to a third party, often with little possibility of appeal.

Other sources of negativity included poor offers and poor behaviour by the other party. Both probably contributed to no settlement or settlement on terms participants were unhappy with. They point to a dilemma for mediators: the more empowering their approach and the more they seek to support party self-determination, the greater the risk that some parties will exercise it in ways that the other finds objectionable. As a result many mediators use private sessions or "caucuses," where they can contain the behavioural component and may have an influence on the substantive offers (Galton, Love and Weiss, 2021; Wissler and Hinshaw, 2022).

This section has considered the immediate audience for mediation (the parties) and its immediate goal (a just settlement). The participants in the current study had little difficulty in identifying themselves as mediation's intended audience, rarely mentioning the mediators without prompting. They were more ambivalent about the outcome. For some it clearly did represent justice, its benefits for this group including the encounter, the exchange of money and a sense of satisfaction that amounted to "more than justice" (Chapter 6.b.5. above). For a larger group it

amounted to “good enough” justice (Chapter 6.C.1. above), and these participants placed a strong emphasis on pragmatism and rationality. And for others the result was no settlement or one that they deemed unjust. Greater mediator activism may help address unjust results, but the possibility of not settling seems bound to be an enduring feature of mediation. Mediation that always results in settlement would lose its identity as a process characterised by party decision-making and transform the third party into a kind of adjudicator, either imposing the outcome or severely limiting parties’ self-determination through tactics most mediators would reject (Alfini, 1991). To conclude, mediation offered these participants a process and an outcome in which they applied their own justice principles, even in choosing not to settle, rather than having them imposed by another.

Mediation is less likely, however, to produce a “legal settlement” in the sense of an outcome identical to adjudication (although the resultant contract may be enforceable). In the next section I consider how mediation might serve its long-term audience, wider society, and the long-term goal required by some of its critics (see Chapter 2.B.4. above), of providing society with normative standards for future use.

### A.2. The long-term goal mediation did not wish for: normative standards for wider society

When Fiss extended his critique of settlement to mediators he accused them of being in thrall to “the dispute-resolution story” (1984, p. 1076, and see Chapter 2.B.4. above). He thus turned against mediation one of its central claims to distinctiveness: the capacity to tailor individual solutions to particular circumstances. The goal of law is much broader, at least in a common law system, as it seeks to enlist each individual instance of dispute resolution in the task of setting normative standards for a whole society, its intended audience. Huq dubs this the “conveyor belt model,” in which judges start with existing legal rules from some “authorised source,” apply them to each new dispute, and produce “general benefits beyond the localized good” (2022, p. 3). Legal precedents thus become “public goods” (Luban, 1995, p. 2623).

The goal of the current study was to understand the justice thinking of mediation participants, and its motivation was a sense of indignation at Genn's allegation that mediators have no interest in justice. I hoped it would confirm the view of numerous scholars (for example, Galanter, 1981; Cappelletti, 1993; Sourdin, 2016; Pirie, 2021) that justice can exist beyond the courts. The results set out in Chapters 5 and 6 provide a glimpse of what that looks like in a setting where unrepresented people are the primary decision makers and the "shadow of the law" (Mnookin and Kornhauser, 1979, p. 950) is less likely to be the sole influence on their thinking.

It would be an altogether different proposition, however, to suggest that law can exist beyond the courts. As Huq outlines above, that would require other justice settings such as mediation to produce "general benefits" (2022, p.3), in particular the creation of societal norms for wider consumption. It would necessarily erect a broader edifice of characteristics designed to achieve consistency, such as an appellate system and procedural rules, and remove one of mediation's distinctive features: privacy. Folger and Bush assert that "purpose drives practice" (2014, p. 23) and the attempt to create law would fundamentally alter how mediators conceive their purpose. The resolution of the particular dispute, no matter how fair or just parties believe it to be, would not be sufficient. That resolution would now have to be both consistent with prior precedents and capable of setting a new one.

Other forms of dispute resolution, whether dubbed alternative or not, may come closer to these desiderata (Tamanaha, 2008). Arbitration, particularly international arbitration, has some (procedural rules; the possibility of appeal in some circumstances) and hovers between dispute resolution and norm-creation (Schultz, 2011). It has contributed to a kind of moral panic among legal theorists, encapsulated in the term "The Twilight of Legality" (Gardner, 2018, p. 1). This debate is beyond the remit of the current study, except in one regard: a tendency among some critics to

conflate justice and law. Gardner is at least clear what he is deploring when he employs the term "legality" (*ibid,* p. 1).

Genn achieves this conflation with her title, "Judging Civil Justice" (Genn, 2010), which at first glance narrows the field of enquiry to the output of the civil courts. The term "civil justice" is used consistently throughout. Yet when articulating her critique of mediation the word "civil" is dropped, replaced first by "access to justice" *(ibid,* p. 114) and then, most pointedly, by the expansive term "substantive justice" *(ibid,* p. 116). Had the more apt phrase "civil justice" been applied consistently, some of Genn's most stinging rebukes would read very differently. "Does it [mediation] contribute to substantive justice?" *(ibid,* p. 116) would become "Does it contribute to civil justice?" "Are mediators concerned about substantive justice?" would become "Are mediators concerned about civil justice?" Both are interesting questions, but indifference to civil justice, a form of legality, is quite distinct from indifference to substantive justice. To reframe Genn's famous statement, it would have been more accurate (if less snappy) to say "mediation is not about *legal* settlement; it is about settlement that delivers *justice as judged by the parties*."

Accepting, then, that mediation as currently conceived is not in the business of creating law, does it have any place within civil justice? With one exception, the participants in the current study expressed no interest in creating wider social norms. The one individual who did appeared to recognise that mediation was not the appropriate place to do so, suggesting that an ombudsman might be more appropriate for making the outcome public (see Chapter 6.C.4.a. above).

However, the lack of desire to create legal rules does not mean mediation took no account of them, or that they are unimportant in mediation outcomes. While rarely the only factor influencing their decisions, participants often described the influence of legal norms on their thinking (see Chapter 5.B. above). Some were critical of the mediators for failing to provide information about the law and in the worst case the

absence of normative legal input appears to have led to injustice (see Chapter 6.D. above).

In the article reporting on the pilot phase I speculated that mediation's bottom-up normativity could be accounted for in terms of natural law theory, with its stress on human reason as a foundation for law (Irvine, 2020, pp. 158/159). After analysing all of the data I have come to view that as ill-conceived. Natural law theory, like legal positivism, seeks to explain the phenomenon of law rather than all instances of justice (Rommen, 1998; Finnis, 2010; Crowe, 2016). Mediation may create and invoke norms applicable to each individual instance without intending them to apply to the wider society. It can, therefore, produce justice without producing law.

A.3.Conclusion

In this section I considered mediation's immediate goal – just settlement – and a long term goal whose absence is regretted by some critics – creating normative standards for society. It seems able, though not guaranteed, to deliver the former, outcome justice. The latter, setting wider standards or precedents, seems beyond its capacity. It was clear, however, from these results that mediation can also deliver injustice, and it is to that alarming prospect that I now turn.

## B. Mediation and injustice

The literature review notes a stage in mediation's development when the idea of self-determination was replaced or supplemented by "informed decision-making" (Chapter 3.A.2. above). In this vision, exemplified by mediators who are "evaluative" (Riskin, 1996, p. 24), "norm educating" (Waldman, 1997, p. 723) or who placed a strong emphasis on rights (Kurtzberg and Henikoff, 1997, p. 78), mediators provide input on the law. A strong driver for this approach was a growing concern that parties who lack legal understanding could be exploited by others, particularly "repeat

players" (Galanter, 1974, p. 97) with deep pockets and legal representation (see Chapter 2.B.3. above).

Whether or not they requested it, a number of participants in the current study described receiving legal input from their mediators. In contrast to the apparent indifference of some business participants (B.3. below) most were appreciative. This is an important finding in itself. Commentators have expressed concern that party self-determination is being limited by mediators who go too far in expressing or imposing what they see as the legally correct outcome (Welsh, 2001b; Goldfien and Robbennolt, 2006; Reuben, 2007; Wall and Kressel, 2017). There was little evidence of that in the current study, although one or two were irritated by the mediators' manner of delivery. The following section considers the implications where mediators did and did not comment on the law (Chapter 5.B.2. above).

B.1. Commenting on the law in general, or on its application to the particular case

The most positive group were those who described mediators offering general input on the law (see Chapter 5.B.2.b. above). They tended to view this as helpful and a sign of the mediators' competence. Some explained what they had learned: the onus of proof, the Sheriff's reliance on legal rules, and practicalities like the need for expert witnesses. All seem to exemplify the notion of informed decision-making (Chapter 3.A.2. above) enabling them to conduct the remainder of the negotiation with a clearer picture of what might happen if they were unable to reach agreement. This is also reminiscent of Fisher, Ury and Patton's notion of the "BATNA – Best Alternative to a Negotiated Agreement" (1991, p. 50), which involves developing an understanding of the alternatives to settlement. They frame this as an essential protection against powerful and/or unreasonable counterparts.

Some participants described mediators offering an opinion on their case. This could involve touching on legal strengths and weaknesses (aimed at one or both parties); discussing the approach the courts might take on specific issues; nudging parties

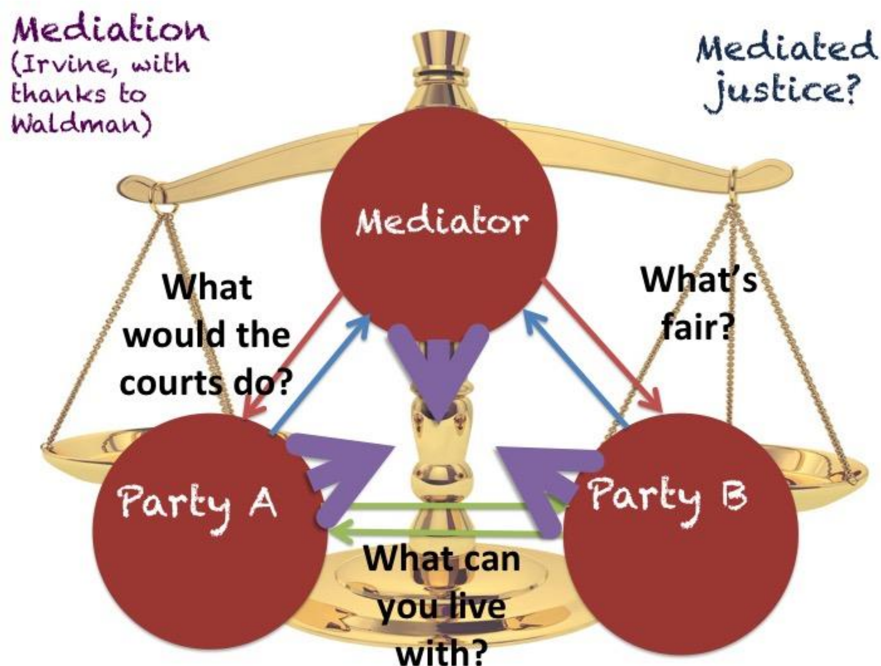
towards specific settlements; and encouraging concessions by stressing how unlikely it was that the other side would cave in entirely. In the results chapter (5.B.2.) I characterised these moves as "assertive" (Wall and Chan-Serafin, 2014, p. 299).

Two participants were less positive about legal input. One claimant, the only person to attribute the final settlement directly to the mediators, described what he saw as pressure to settle for a particular amount (15% of the sum claimed, see Chapter 5.B.2.c. above). He later said he did not receive justice and bemoaned mediation's lack of formality. Another participant was irritated by the mediator's abrupt and challenging tone, although she appears to have accepted what the mediator actually said.

Although participants responded positively to direct questions about the mediators' legal input, in general discussions about the fairness and justice of the outcome they made little reference to the mediators. The other party played a much more prominent role. This underlines a difficulty some mediation theories have in conceptualising the role of legal norms in settlement. Models like evaluative, norm educating or directive mediation focus on the mediator, taking little account of parties' own thinking. They tend to position the parties as passive recipients of mediators' strategies and skills.

A more apt way to recognise party agency would be to view mediation as a site of discourse (Winslade and Monk, 2001, p. 42) where new possibilities are created and the mediator acts as "co-creator" (Irvine, 2017). Law may come into it but does not exclusively determine the outcome. Writing about this previously I created the diagram below.

Diagram 14 Mediated justice (Irvine, 2017).




Robert Benjamin expressed it thus: “In a very real way, the mediator forms a conspiracy with the parties in conflict and says, in effect, here is what the law may be, what do you people want to do?” (1998, p. 7). This approach allows the law to inform parties' decision-making while simultaneously recognising its limitations. One was identified by Pound more than a century ago: “the necessarily mechanical operation of legal rules” (1906, p. 445). Mediation offers people the opportunity to tailor the application of universal legal norms to their particular situation, taking account of the sort of issues identified by participants in the current study.

These include:

- Proportionality: how much time and expense do I wish to spend arguing over this amount?
- Compromise: how much am I willing to compromise for the sake of a result?
- Balance of risk: a constantly evolving assessment of the likelihood of success in court

- Personal philosophy of justice: mostly participants' evaluation of their own fairness
- Point of principle: largely non-economic considerations, in particular a sense of having been insulted by the other party, but could include business reputation
- Resistance to injustice: a sense that others should suffer the consequences of unjust behaviour
- It shouldn't happen to anyone else: a pro-social urge to ensure that the other party makes longer term changes to its practices
- Money: getting paid (making me better off) and making the other party pay (making them worse off) (see Chapters 5 and 6, above).

I discuss at C. below the relevance of these considerations to the central question for this study: "What is the place of justice in the thinking of small claims mediation participants?" (Chapter 4.B.5. above).

B.2. No comment on the law

In 1990s USA Waldman could describe the norm-generating approach to mediation as "traditional" (1997, p. 710), pointing to its origins in employment and community mediation where the primary emphasis is on relationships rather than rules. I noted its overlap with "facilitative" mediation (Riskin, 1996, p. 24), and settings where the mediator emphasises interests rather than rights (Kurtzberg and Henikoff, 1997; and see Chapter 3.A.1.c, above). Despite the growth of the evaluative or directive style in some settings, most notably commercial mediation (Wade, 2012; Wall and Kressel, 2017), it remains respectable, even mainstream, for mediators to describe themselves as facilitative (Trenczek and Loode, 2012; Morris, 2015; Anderson, 2019). Although the term covers a wide spectrum of practice it is generally regarded as risky or even taboo for a facilitative mediator to offer legal information (Kovach and Love, 1996). The findings of the current study challenge this. In small claims mediations

greater risks appear to arise when mediators are unwilling or unable to provide input on the law, especially for unrepresented consumers negotiation with legally advised repeat players . I develop this theme in the paragraphs that follow.

Before turning to the most problematic instances it is important to acknowledge that some participants were untroubled by mediator silence on the law. Participant 19, who ran a small business, was clear that the mediators provided no information about legal norms or processes, but added: *"I mean, we each had our own view of what was right and fair."* One of the solicitor participants accepted the mediator's explanation that she would defer to their legal knowledge.

Participant 17, a consumer, was more critical. She described how the mediators had failed to put an interim agreement in writing before adding: *"I didn't know what to expect of a mediation but I felt they were just message carriers going backwards and forwards."* She later added: *"there was certainly nothing about, you know, consumer law or anything like that discussed with me."* Another participant (18) appeared to have absorbed the facilitative or norm-generating model, perhaps from the mediators' introduction: *"I would have liked some kind of guidance… that they surely were not allowed to produce."*

At its worst, however, a lack of mediator input could contribute to injustice. Chapter 6 (D.1.a. above) provides considerable detail to explain the plight of Amelia (Case Study 4). It became clear that an erroneous understanding of the rules on legal expenses (costs), induced by the respondents, greatly altered the risk/benefit calculus which underlies most legal negotiations. Scotland's courts generally apply a "loser pays" rule, meaning successful parties recover around 60% of their legal fees from the loser. A central feature of the Simple Procedure Rules is the modified expenses regime (Scottish Statutory Instruments, 2016b). This goes some way to limiting the possibility that a large, well-resourced party can simply outspend their counterpart and force them to negotiate disadvantageous terms for fear of

unaffordable cost. The respondents had led Amelia to believe that she ran the risk of being liable for legal fees of between £60,000 and £80,000. Her claim was for £3,620. Unsurprisingly, given the importance of proportionality to many participants (see Chapter 5.A.1. above), she was horrified at this. It weighed heavily in her decision to accept a reduced offer of £1,000.

Re-reading the transcript of her interview, and the case report on the matter with the £60,000 - £80,000 expenses estimate, it is clear that Amelia did run some risks if she had proceeded to a hearing. There were similarities between the two cases, and the company's solicitors would almost certainly cite the previous case as a precedent. Furthermore, because she had raised her action for more than £3,000, Amelia narrowly missed the cap limiting expenses to 10% for claims of £3,000 or less (Scottish Statutory Instruments, 2016b). On the other hand this was still a Simple Procedure case. Even if she were unsuccessful at a hearing it is unlikely that the judicial expenses would reach one-tenth of what the respondents had suggested. The other case was raised under Scotland's Ordinary Cause Rules (Scottish Statutory Instruments, 1993). As an aside, expenses of £60,000 to £80,000 on a claim of £33,000 do point to a significant and underexamined cause of the "vanishing trial" (Galanter, 2004, p. 459).

Returning to the present case, what are its implications for the current study? In one sense the mediation delivered self-determination and enabled the "balance of risk" negotiation which some participants viewed positively (Chapter 5.A.3. above). However, that balance was severely skewed by the respondents' exaggerated estimate of legal expenses. The mediators' approach thus fell short of informed decision-making (see Chapter 3.B.1. above). It is possible that neither they nor the respondents were aware of the nuances of court rules on expenses.

Amelia herself described the outcome as an injustice, saying the mediators were *"very pleasant"* but quite frustrating, adding: *"if they knew something, something of*

*the law that might have been helpful for me to know."* This raises a troubling issue for court-referred mediation: should be mediators be lawyers? Or more narrowly, should those who mediate court-referred cases, even at small claim level, have a sufficient understanding of the legal system to ensure informed consent? Waldman described the requirement for substantive mediator knowledge as "a particularly bedeviling *[sic]* question" (1997, p. 762). Without it mediators risk confirming the concerns forcefully raised in the 1980s that the process will favour the strong over the weak (see Chapter 2.B. above). Genn *et al.,* under the heading "poor mediators," included "insufficient understanding of the subject matter of the case, not being legally qualified and, therefore, lacking experience in the day-to-day realities of litigation" (2007, p. 96). Even a strong proponent of party self-determination could see its limits: "No one wants to applaud or endorse autonomy when it is exercised in the throes of ignorance" (Stulberg, 1998, p. 938).

An alternative explanation for mediator silence is that these mediators were inhibited by their beliefs about practice from offering substantive input. Such behaviour would be perfectly acceptable, even required, if they were trained in the facilitative model (see Chapter 3.A.1.b. above); even more so in the influential "transformative" model (Bush and Folger, 2005). Its authors list among the hallmarks of that approach: "It's ultimately the parties choice" (Folger and Bush, 1996, p. 267) and "The parties have what it takes" (*ibid,* p. 269). Perhaps one implication of Amelia's story is that transformative mediation is unsuitable for court-referred mediation (Hensler, 2002). So too would be the "norm generating" approach (Waldman, 1997, p. 710); a "weak focus on rights" (Kurtzberg and Henikoff, 1997, p. 78); and a purist application of the facilitative style (Riskin, 1996, p. 24).

Recent scholarship has sought to strike a middle way between mediator silence on the law, with the risk of "Darwinian encounters at the bargaining table" (Waldman, 2004, p. 260) and the evaluative, "directive" (Wissler, 2017, p. 17) or "pressing" (Wall and Kressel, 2017, p. 347) approach, with its attendant limitation on party autonomy.

Waldman and Ojelabi (2016) draw on Rawls' (1971) Theory of Justice to suggest that anyone designing a mediation programme from behind a veil of ignorance (i.e. not knowing what privileges or disadvantages they hold) would ensure that minimum standards of fairness were upheld. The resultant "Rawlsian mediator" will act as "a consciousness-raiser and a safety net" (Waldman and Ojelabi, 2016, p. 426), leaving parties free to exercise self-determination – up to a point. If the mediator encounters a proposed agreement that "shocks the conscience" (*ibid,* p. 426) she will step in, acting as a "last backstop against unfairness" (*ibid,* p. 423). This is reminiscent of the "selective facilitation" (Greatbatch and Dingwall, 1989) practised by English family mediators some twenty years earlier.

Other have made similar proposals. De Girolamo, applying the work of Amartya Sen to frame mediation as a process with the capacity to deliver substantive justice, views mediators as "more than mere facilitators" and includes "party advisor" among their roles (2017, p. 19). In her view, however, mediation theory should adapt to recognise that mediators need to step in when power imbalance threatens freedom of choice. Some have named this mediator activism (Susskind, 1981; Weckstein, 1997; Irvine, 2020a).

B.3. Business parties

Empirical research based on real world cases is almost certain to paint a mixed picture. While some participants experienced what in their view amounted to injustice, another group presented a contrary impression. These individuals demonstrated a robust capacity to look after themselves, appearing to confirm that self-determination can act as a guarantee against oppression. These were business parties rather than consumers. Some described the twists and turns of their negotiations and eventual settlement without reference to law. It would be hard to argue that law was entirely insignificant as it provides the backdrop to a functioning society, and some of the mediators referred to what might be called "law in action" (Pound, 1910): the risks and vagaries of courts themselves. Crowe *et al*, noticing a

similar phenomenon in family dispute resolution, called this the "shadow of the folk law" (2018, p. 319). Nonetheless legal norms appeared to play little part in these business participants' thinking.

Anthony (Case Study 3, Chapter 6.B.2.) was a landlord negotiating with another over the cost of repairs. While his claim was clearly underpinned by the Scots law of common property, this did not feature in his narrative. Instead he focused on a commercial calculus: how much could he reasonably get from another business person, and how speedily could he get it? His unorthodox proposal to flip a coin could be seen as creative or impatient, or both, but it allowed him to narrow the parameters of the negotiation and "cut to the chase." The resultant settlement was paid that day. Another commercial landlord, when asked if the law came into his decision-making, replied: *"To my mind, no. It's common sense. I think a lot of this has got to do with common sense and what is reasonable"* (Participant 6, Chapter 5.A.4.d. above).

This emphasis on pragmatism and reasonableness was echoed by a number of repeat players representing businesses. They spoke about taking a commercial view and accepting less than the court might award in the interests of good complaints handling or simply on the basis of a cost/benefit analysis that pursuing success in court would involve more time and money than they were prepared to spend. This group could probably be described as "advantaged." They are a far cry from the disadvantaged, unrepresented people whose plight has consistently troubled critics of mediation (Chapter 2, B: 3, above; and see Waldman, 2017; Welsh, 2017).

And yet they were no more likely than "one shotters" (Galanter, 1974, p. 97) to view the outcome as fair or just. Like the one-shotters they were involved in disputes of modest value where one party had turned to the legal system. Most described hard-fought negotiations in which the other party appeared equally able to argue their case. If they did hope for greater reference to legal norms it was generally to reduce

what they saw as the other party's unrealistic expectations; for example, the property factor who said: *"If it's in a legal document, your title deeds, it's not – we haven't made up your title deeds"* (Participant 8) or the complaints manager who suspected the claimant was ignoring his legal advisor: *"I suppose in those sort of situations, he might not know but his solicitor would definitely know that he wouldn't get…"* (Participant 14).

This group – well-informed, confident and articulate – is often ignored in the debates about mediation and justice. Waldman's (2017) binary portrayal of "disputing for the 1% and the 99%" undoubtedly reflects profound concern about America's rising social inequality, but may not be helpful in understanding how justice is constructed in all mediation settings. The gross disparities of the foreclosure mediations in Waldman's study, pitting major financial institutions against (frequently) unrepresented parties unable to afford their mortgage, are not replicated in every corner of the justice system.

A sizeable proportion of cases coming to small claims courts involve business to business disputes, or disputes between consumers and small businesses. University of Strathclyde Mediation Clinic, one of the providers in the current study, provided 234 mediations between January 2022 and March 2023. 35% of claimants and 63% of respondents were businesses. The commonest case types were disputes over goods and services, building work and unpaid bills, and the average sum claimed was £2,365 (University of Strathclyde Mediation Clinic, 2023). 89% of clients, including a large proportion of business parties, were unrepresented.

It could be argued that business participants are precisely the people mediation's critics worry will take advantage of their counterparts. It may be that the current study has stumbled across representatives of the "1%" rather than the "99%" (Waldman, 2017, p. 24). However, if that is the case they were just as likely to be consumers as business parties. Of the 9 consumers who disclosed their earnings, 6

had annual household incomes of £50,000 or above, significantly greater than the UK average of £29,559 in 2018.[20] One consumer and one business representative had incomes of between £30,000 and £40,000 while two consumers had an annual income of less than £20,000 (see Appendix 1, Demographic information). It is impossible to determine whether this is representative of all those taking part in Simple Procedure actions, because demographic and income data are not available beyond this study. Nonetheless, these figures suggest that the sample contained relatively few economically disadvantaged consumers, although they may be vulnerable for other, less apparent, reasons. In these circumstances mediation's early reliance on self-determination seems realistic (see Chapter 3.A.2. above). The veto offered by mediation may well be an effective guarantee against oppression in most cases.

To recap, some of the business participants in this sample made little reference to the law in discussing their thinking about settlement in mediation. Other considerations seem to have come into play, although the law could provide a useful corrective where the other party had unrealistic aspirations. For much of this group the presence or absence of legal input from the mediators was a matter of indifference; they had exercised mediation's promised self-determination to reach a "good enough" settlement (see Chapter 6.B.1.d. and B.2.a. above).

B.4. Implications

Turning to implications for mediators, it seems clear from the current sample that offering legal information presents the lower risk option most of the time, particularly for unrepresented "one-shotters" (Galanter, 1974, p. 97). Participants were largely appreciative and it led some to review their risk/benefit analysis in a more realistic way. The only exceptions were where a mediator was perceived to be abrasive or to

[20] All interviews took place in 2017 or 2018.

have a preference for a specific settlement, echoing earlier US findings that a majority of legal representatives did not like mediators "telling them what to do" (Wissler, 2017, p. 15). On the other hand, those who said nothing about the law left these participants disappointed. Some simply shrugged and assumed this was one of mediation's limitations but others appear to have been unable to make informed decisions, potentially leading to disadvantageous outcomes. The passive mediator, or "potted plant" (Riskin, 1996, p. 12, citing Ralston, 1994), may be unsuitable, even a danger, in a justice ritual like court-referred mediation (see D. below).

To conclude, this section discusses findings regarding the role of law in contributing to the justice or injustice of mediation settlements. The comments summarised in Chapters 5 and 6 do not suggest a simple answer. For some, it made no contribution at all; for others, its presence or absence was pivotal. For most, law was one of several factors bearing on their decision-making.

This complexity may help explain participants' hesitation when I asked "did you get justice?" (Chapter 6.B.2. above). Perhaps what they heard was: "Thanks for your thoughts on fairness; now let's talk about law." Up until that point in the discussion they were being invited to evaluate the outcome on their own terms (see below for the everyday qualities of fairness). The word "justice" seems to have acted as a turning point in the conversation, changing the basis of evaluation to something external to themselves and often beyond their expertise. The next section moves the focus away from justice within the law, or legality, and onto justice as constructed by parties themselves.

## C. Decision-making in mediation – a neglected dimension

### C.1. Decision makers and decision recipients

In the light of Genn's broadside the current study chose to focus less on people's views about procedural justice (how they are treated) than on their evaluation of substantive

justice (the result.) That choice reflects a particular understanding of mediation as a social process. In this view the key distinction between adjudicative and consensual processes lies less in how they are managed, their formality (Irvine, 2019, and see Chapter 2.B. above), than in who decides the outcome (Roberts, 1993; Weckstein, 1997). McEwen and Maiman call this "the distinction between consent and command" (1984, p. 12).

Some mediations are relatively formal; for example judicial mediation in the UK's Employment Tribunals. Some adjudicative processes are relatively informal, such as Scotland's Children's Hearings or Simple Procedure itself (Scottish Statutory Instruments, 2016a). The more important distinction is that in adjudication the third party responsible for the process is also the decision maker. Thibaut and Walker call this "autocratic decisionmaking" (1978, p. 547). When a decision maker has that level of control it is hardly surprising that her attitude towards them is a source of interest, even fascination, to litigants. We are all inclined to be careful around autocrats. Tyler lists "neutrality, lack of bias, honesty, efforts to be fair, politeness, and respect for citizens' rights" as predictors of compliance (2006, p. 7). These crumbs of procedural information shed light on the attitude of the person who will ultimately determine the outcome. It is not unreasonable for litigants to guess that a person who treats them fairly is more likely to reach a fair decision, a proposition termed "fairness heuristic theory" (Lind, 2001; MacCoun, 2005).

In consensual processes like mediation, however, the decision makers are the parties themselves. Mediators go to great pains to emphasise this, sometimes saying "I am not a judge." The mediator's attitude towards the parties may remain important because she is managing the process, but one key motivation for scanning her behaviour is absent. She is not the decision maker – they are. Party decision makers have intimate, first-hand knowledge of their own reasoning. They know how much weight they gave to factors like the law, or regulations, or social norms (Waldman, 1997; Belhorn, 2005; Crowe and Agnew, 2020). Equally they may be subject to other

influences, consciously or otherwise: uncertainty, risk, irritation, the desire to punish bad behaviour, convenience, the need for closure, the mediator's approach and the other party's manner on the day (see Chapters 5 and 6, above). Any or all may contribute. In one sense they have no-one to blame but themselves (though this is not to minimise the pressure some parties may experience nor the potential of consensual processes to bake in societal injustice; see for example Grillo, 1991; Bachar and Hensler, 2017; Waldman, 2017; Press and Deason, 2021; and Chapter 2.B.3. above).

This simplification omits an important detail: a decision can only be made in mediation when the other party agrees. The participants may be decision makers but they are also decision recipients (Sivasubramanium and Heuer, 2007). In this they differ from the high status decision makers, or "authorities," who Sivasubramanium and Heuer could assume were categorically distinct from "subordinates (the litigants, civilians, and disputants whose outcomes are being decided)" (2007, p. 62). Because of its pervasiveness I use the term *classical* to describe this binary, and taken-for-granted, view of the division of labour in most developed justice systems: authoritative, high-status judges who make decisions and subordinate, low-status litigants who receive them.

Mediation disrupts the classical distinction between decision maker and decision recipient. This has been little commented on. The core mediation value of empowerment (Cobb, 1993; Lederach and Kraybill, 1993; Garcia, Vise and Whitaker, 2002; Bush and Folger, 2005; Bailey and McCarty, 2009; Charkoudian, 2014; Douglas and Hurley, 2017) implicitly positions the participants as decision makers. A similar move is made by the parallel concepts of self-determination (Welsh, 2001b, 2017; Coben, 2004; Coy and Hedeen, 2005; Ojelabi and Noone, 2020), informed decision-making (Roberts, 1993; Coben, 2004; Stulberg, 2005) and informed consent (Nolan-Haley, 1999, 2015; Colatrella, 2014; Waldman and Ojelabi, 2016; and see Chapter 3.A. above). Even accounts of evaluative mediation reserve decision-making to the parties (Riskin, 1996, 2005; Wade, 2012; Hyman, 2014), though some question the empirical

accuracy of such a claim (Kovach and Love, 1996; Welsh, 2001b; Wall and Chan-Serafin, 2014). Waldman's (1997) norm-educating approach and Kurtzberg and Henikoff's (1997) strong emphasis on rights are similarly clear that the parties remain the decision makers.

In the classical view of the justice system, once they reach the door of the court (and move from negotiation to adjudication), decision recipients need take little account of their adversary's perspective. As long as the decision maker is an impartial, authoritative judge, all "subordinates" require is a zealous advocate to present their perspective as effectively as possible (Kruse 2004, p. 390). The decision, once received, either endorses or rejects their thinking. Even if it endorses their opponent's case, that has become the judge's thinking, transforming the decision into an authoritative, binding judgment of a state (or contractually) appointed figure operating within a system of legal norms. Macfarlane noticed apparently obdurate mediation parties saying "if the judge tells me to do it, then I'll do it" (2001, p. 693). Halpin asserts: "the most important characteristic of positive law is its ability to provide authoritative determination of social relations without recourse to further moral argument" (2006, p. 78, citing Raz, 1979). If recipients disagree they can appeal.

However, while decision recipients need only consider their own point of view, decision makers in the classical model are under a powerful obligation to take account of both parties' perspectives. Waldron calls this one of the "elementary features of natural justice" (2008, p. 55). Whether judges succeed or not is an empirical question (see, for example, Yoon, 2009; Kang and Lane, 2010; Sourdin, 2015) but the doctrine of judicial neutrality "establish[es] the speaker as universal subject, at once impartial and objective" (Bourdieu 1987, p. 820). It implies that "authorities" are capable of bracketing off their own point of view in the service of abstract justice principles.

In contrast, mediation participants are hybrid decision makers and decision recipients, with little choice but to take their counterpart's perspective into account. As decision

makers they must consider the other party's views or risk no decision being made at all; as decision recipients the other party's choices will inevitably influence the outcome. Collett predicts a negative emotional impact from such "interdependence," and that this "negative affect would be directed toward the other disputant" (2008, p. 275, and see Chapter 6.D.2.a. The Bad Opponent). Welsh found that participants in special education mediation rejected the idea that they had decision control; the other party's power and influence: "[Meant] I could not dictate to them what I needed" (2002, p. 183). A later study of "anticipatory justice" attributed managers' reluctance to participate in employment mediation to negative beliefs about what the employee might say (Goldman, Shapiro and Pearsall, 2016).

All of this may account for the significant number of participants whose initial response to the question "Did you get justice?" was either ambivalent or negative (Chapter 6, above). Forty years ago McEwen and Maiman puzzled over a similar finding, asking: "why do one-third of the litigants agree to settlements that they later claim to be *un*fair? [italics in original]" (1981, p. 259). It might be assumed that decision makers would award themselves only what they considered just, and it is a central trope of the critical literature on mediation that those with power and autonomy will exploit their position to shape settlements to their own advantage (see Chapter 2.B.3. above). Yet a review of over thirty years of research on the issue found this impossible to verify (Bachar and Hensler, 2017).

Their findings and mine may point to an unexplored cause of dissatisfaction with mediation even from those who are not disadvantaged: taking another person's perspective into account is counterintuitive and often distasteful. The adversarial context of court-referred mediation may also trigger the phenomenon of "reactive devaluation" (Kahneman and Renshon, 2007, p. 3), where the attractiveness of a proposal is reduced when it comes from one's adversary. It is a challenge for mediation if the shine comes off any decision in which the other party plays a part. Macfarlane (2001) suggests that parties would prefer a judge's decision, even if it went against

them, to one where they had had to compromise with the other party. At its worst this felt like “unacceptable moral capitulation” (*ibid,* p. 690).

The findings of the current study highlight the “interdependence” (Collett, 2008, p. 275) between mediation parties, irrespective of whether they are company representatives or unrepresented people with little experience of the law. The other party’s point of view acts as a constraint on each individual’s freedom of action, and may be unwelcome. An important implication, however, is that this constraint is simultaneously a guarantee against injustice. It ensures that neither party can impose a decision on the other in the manner of the high-status authoritative judges of the classical model. The other party can refuse, and there will be no deal. This reflects early optimism about the role self-determination could play in ensuring fair outcomes (see Chapter 3.B.1. above.)

Two factors may constrain that guarantee, however. One is ignorance of the law (B.2. above). The other would be any limit on either party’s willingness and ability to voice their views (see Chapter 2.B.3. above, for concerns that family mediators pay insufficient attention to this issue). I turn now to another finding that may help answer McEwen and Maiman’s (1984) puzzle over why people agree to things they find unfair.

C.2. Compromise

A number of participants discussed compromise (Chapter 5.A.2. above). This may not seem surprising, given the unlikelihood of getting everything they wanted, but their comments highlighted an unexpected difficulty with the word: its multiple meanings. I noted five:

- offer to compromise (demonstrating my reasonableness)
- refusal to compromise (demonstrating the other party’s unreasonableness)
- having to compromise (removing my choice)
- [my] refusal to compromise (demonstrating my moral rectitude)

- encouraging compromise (demonstrating the mediator's or the Sheriff's commitment to settlement and perhaps to fairness).

This ambiguity is reflected in the treatment of compromise in negotiation and mediation literature, where it has been debated and problematised (Hyman and Love, 2002; Seul, 2004; Menkel-Meadow, 2006b, 2010; Hyman, 2014; Alberstein, 2015). From one perspective compromise is a bad thing, much like settlement, highlighting the distinction between adjudication and mediation; the former providing objective, legally based and rationally derived outcomes, the latter leading to subjective and pragmatic deals taking no account of legal rules. In this view compromise helps the "status quo" by damping down the rhetoric of "justice, rights, conflict" (Delgado 1988, p. 147, and see Chapter 2.B.1. and B.3. above). Genn *et al* use the term 61 times in their excoriating (2007) critique of mandatory mediation in London courts, presenting compromise as practically synonymous with mediation, so central to its success that unwillingness to compromise renders the process a waste of time and money. Even pro-mediation scholars Hyman and Love employ the term "crude compromise" to characterise mediation's failure to deliver justice (2002, p. 158).

Yet from another perspective compromise is beneficial, even noble: "a conscious process in which there is a degree of moral acknowledgment of the other party" (Golding 1979, cited in Menkel-meadow 2018, p. 155; and see Menkel-Meadow, 2006). Early 20$^{th}$ Century jurist Roscoe Pound associated it with both justice and law: "Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world" (1906, p. 446). Boland and Ross (2010) found that mediators high in emotional intelligence were more likely to promote mutually acceptable compromise. Kraybill's (2009) conflict style inventory lists "compromising" as a distinct set of individual preferences. Apparently compromisers have "a strong sense of reciprocity"; "value fairness and moderation"; and "tend to value efficiency of time and energy" (*ibid,* pp. 18/19).

Participants in the current study demonstrated the capacity to use the word in both noble and ignoble senses, approving the mediators' efforts to encourage compromise or noting with satisfaction their own acceptance of less than they hoped for; while expressing dismay at the other party's failure to compromise or irritation at being forced to compromise. This highlights a risk for mediation. It may be saddled with expectations it neither wants nor can fulfil. Those who have already been through the process will at times use the word in its positive sense, for example marvelling at an unexpected compromise (on their part as much as the other party's). Mediation's advocates have suggested this is one of its virtues (Smith, 1978).

However, potential users of mediation seem more conscious of its negative connotations. Feuille and Kolb spoke of litigants wanting "'justice' rather than compromise" (1994, p. 252) and a recent evaluation of court-referred mediation in England and Wales lists it as a potential deterrent (HM Courts and Tribunals Service, 2023, Section 9.11). More troubling, in terms of mediation's potential to be seen as fair and just, is the possibility that Western culture is becoming less tolerant of compromise. Tracking the rise of social-media-fuelled "conflict spectacles," Reynolds (2019, p. 2359) notes that "'mediation' sounds a lot like 'equivocation' or 'making compromises,' neither of which sounds much like justice" (*ibid,* p. 2375).

## C.3. Implications

### C.3.a. Justice and compromise in mediation

The two insights outlined in this section highlight mediation's distinctiveness from adjudication and arbitration. As soon as the justice system returns decision-making power to parties, that power is shared and thus limited. Instead of "autocratic decisionmaking" (Thibaut and Walker, 1978, p. 547) mediation participants find themselves, almost inevitably, required to do two things: accept the other party's decision and, as a consequence, compromise. These may in part explain why the majority of participants in this study expressed ambivalence or negativity about

receiving justice despite having co-authored the outcome. No matter how substantively fair or just the settlement may appear to others, neither they nor an authoritative state-appointed judge has imposed the decision. Welsh noticed that "*shared* control does not feel like *real* control [italics in original]" (2002, p. 183).

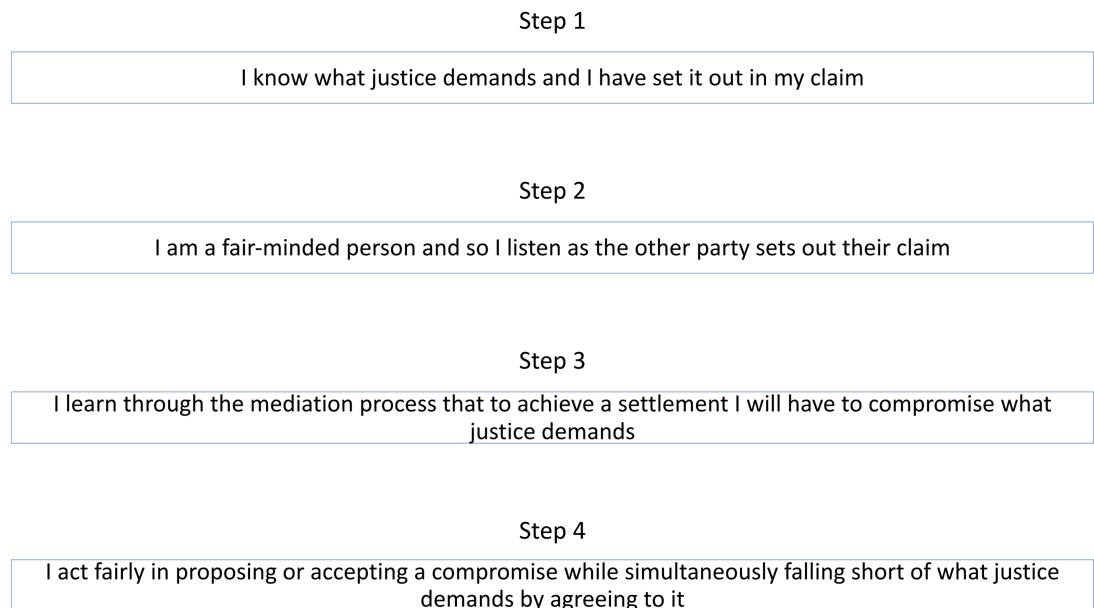
And yet a number of participants spoke of the "good enough" result (see Chapter 6.B.4. and C.1. above). Others spoke positively about self-determination (see "my choice," Chapter 6.C.3.c. above) and the value of getting closure (see Chapter 6.B.2.d. and C.3.b. above). The implications are uncomfortable for mediation. Those who take part may use it to forge agreements that incorporate their own morality, goals and tactics; they may derive satisfaction from exercising agency and bringing the dispute to an end; and they may produce outcomes similar to or more advantageous to them than those handed down by the courts. Yet it will not feel to most like "100%" or "absolute justice" or "10 out of 10 in justice" (to paraphrase participants, see Chapter 6.C.1. above). It cannot, because the other party, their adversary, has had a hand in the result.

There are echoes in this resistance to compromise of a tradition dating back at least to the ancient Greeks: "whatever else 'justice' names, it names a virtue" (MacIntyre, 1988, p. 23). The term virtue refers to an individual's personal qualities, as demonstrated in their actions (Aristotle, no date). Justice, in this sense, is something you do, not something you receive. Yet my question, "Did you get justice?", addressed the opposite sense. It is as if, when asked that question, participants heard another: "Did you do justice?" (Chapter 5.A.4. above). That appears to explain answers in which they described their own behaviour in terms of acting fairly and standing up to injustice (Chapter 5.A.4.b. above). Doing justice would appear to include both distributive justice, meaning treating people "equally in terms of their merit or desert", and corrective justice, "the rectification of past injustices" (Miller, 2015, p. 91, citing Aristotle's *Politics*).

The implications go further. Participants' ratings, above, suggest that the word "justice" may imply an ideal standard; anything falling short of this cannot be justice, no matter how pragmatic or reasonable. This is reflected in the term "absolute justice" and a poignant sense of disappointment in the eventual result despite having agreed to it. It is as if they were juggling two competing aspirations, between idealism (justice as a virtue) and realism (justice as dispute resolution) and recognised that the urge for the former could stand in the way of the latter. Realism, justice as dispute resolution, could readily incorporate compromise and deals, while idealism, justice as a virtue, could not.

This is consistent with the insight set out above (C.1.) that mediation parties, whether they like it or not, are both decision makers and decision recipients. As decision makers they would like to have done justice (and often felt disappointed that the outcome fell short of this high standard) while as decision recipients they would like to have received justice (often with equal disappointment). Not one of the 24 participants praised the other party's decision-making. If they spoke about the other party at all it was generally to criticise their behaviour. The impression they gave was that whatever they received in terms of the substantive justice of the settlement came about through their own efforts. The following model attempts to convey the demands mediation places on participants:

Diagram 15 Justice and compromise in mediation




C.3.b. Cognitive dissonance and moral intuitions

If the diagram above is accurate, then settling in mediation may bring about a state of "cognitive dissonance" (Festinger, 1962; Harmon-Jones and Mills, 2019), characterised by holding two contradictory beliefs at the same time (agreeing to a "good enough" settlement while falling short of what justice demands). This is said to trigger "mental discomfort, ranging from minor pangs to deep anguish; people don't rest easy until they find a way to reduce it" (Tesler, 2009, p. 69, citing Tavris and Aronson, 2007). Participants who rated their own agreement as less than fair may well have experience this discomfort.

However, dissonance theory holds that people will act to reduce that discomfort either by changing behaviour or modifying one of the conflicting beliefs. Participants in the current study did not appear to do so, suggesting that beliefs about fairness and justice are not cognitions over which we readily exercise control. The rankling sense of unfairness at settlements amounting to less than 100% of what justice demanded seems to have endured for the majority who were ambivalent or negative

about receiving justice (see Chapter 6.C. and D. above.) This is more consistent with an alternative view, popularised by Haidt (2001, 2012). He proposes that moral judgments are intuitions, with rational explanations following in their wake as post-hoc justifications: the "emotional dog" wagging the "rational tail" (2001, p. 814).

What may be taking place is that participants find it hard to quell the intuition that the settlement was unfair even though there are rational considerations in its favour. Experienced mediators often recognise the limited value of attempting to persuade or coax parties to change their views on deeply held beliefs (Macfarlane, 2001; Smithson *et al.*, 2017). Haidt calls such attempts "the wag the other dog's tail illusion" (2001, p. 823): the view that we can alter another person's moral views by successfully rebutting their argument. At some level the deals struck in mediation may just feel unfair. This insight offers a plausible explanation for participants' lukewarm estimates of the quantum of justice mediation delivers, and would be a fruitful area for further research.

These findings should also be set in their wider context: civil disputes within an adversarial system. At least fifty per cent of all parties are likely to feel equally ambivalent or negative about the result given the inevitable win-lose approach courts must take. That figure may well be higher for unrepresented people (most participants in the current survey) given evidence that they tend to fare less well in adjudicative settings (Sourdin and Wallace, 2014; Quintanilla, Allen and Hirt, 2017; Krantz, 2021; Toy-Cronin and Irvine, 2022). Clark asserts:

> adjudication through the courts may fall down in the eyes of litigants by the way the discourse of the dispute is shaped and compromised by the law, by the fact that parties' participation in the process may be limited and that the legal remedies available may not in fact meet either party's underlying interests (2012, p. 151).

Further research could mirror the current study by investigating the justice thinking of a similar sample of unrepresented people whose small claims have been resolved by

judicial decision. Like the current study it could seek to balance those receiving a positive judgment with those who do not, along with other factors like gender, ethnicity and consumer/business status.

## D. Conclusion

This study examined the justice thinking of unrepresented people who have taken part in mediation. The context was two mediation services, serving Scotland's two largest courts, from which the 24 participants were referred to mediation by a judge (known as a Sheriff) in the course of a small claim. The study addresses a notable gap in the literature on mediation: the relatively modest attention paid to parties' perspectives on substantive justice (see Chapter 3.C. above). Its aim was thus to provide a richer understanding of the thinking of mediation participants charged by the justice system with devising an outcome to their disputes, in particular their evaluations of the fairness and justice of that outcome.

It finds that those without legal training can nonetheless apply justice principles in resolving their disputes; this might be termed "justice outside the law." They were able to account for their decisions in terms recognisable to those working within the justice system: the encounter (equivalent to the day in court), the chance to tell their story, compensation, punishment of bad behaviour, closure and payment.

And yet most participants (including the two thirds who agreed a settlement) evaluated the outcome in ambivalent or negative terms. The study notes several reasons. First, they are decision makers who are also decision recipients. Secondly, they want to do, and be seen to do, justice. Thirdly, they also want to receive justice (and not injustice), yet often have to compromise and settle for "good enough" (see Chapters 5 and 6, below). And finally they have little interest in applying, still less in creating, legal norms.

In the following Conclusion I consider the implications of these findings for mediation, its participants and the justice system.

# Chapter 8 Conclusion

This thesis has taken me on an intellectual journey. An intuition that non-lawyers are more interested in outcome justice than they have been given credit for led me to investigate two rich sources of insight: first, the wealth of scholarship on mediation, law, justice and injustice; second, the lived experience of twenty four individuals invited to shape their own outcomes to legal disputes. I could not predict when I began what the end point would look like.

Early in the journey a university reviewer told me I must remain open to findings that do not please everyone. More challenging, I have learned, are findings that do not please me. At the outset I saw the study as an act of resistance, standing up for the majority of mediation's consumers, an understudied and neglected group, and demonstrating to litigation romantics and mediation sceptics that ordinary people can devise just settlements (readers will by now recognise the reference to Professor Genn's ringing phrase – see Genn, 2010, p. 117). I envisaged reclaiming their mediated decision making, elevating it from "second class justice" (Maute, 1990, p. 369; Cappelletti, 1993, p. 288) to its rightful place as a legitimate legal source. This would in turn force a revision of legal theory to account for judgments by those outside the "juridical field" (Bourdieu, 1987, p. 814), perhaps on a natural law foundation (given the central place of human rationality, see Rommen, 1998; Crowe, 2016) or even within a legal positivist framework (by extending official state recognition to mediation outcomes, see Hart, 1961; Edgeworth, 1986; Irvine, 2020).

This turned out to be wishful thinking. My participants were certainly interested in justice, even more so in resisting injustice, and at times law-like principles appeared in their reasoning. But the resemblance to law was mostly incidental. Other considerations predominated, like the urge for vindication, the desire to punish wrongdoing or, more prosaically, to get the dispute over with at minimal risk and

expense. And while they could behave in lawyer-like ways during the mediated negotiation this seemed to flow from the adversarial setting more than from immersion in a system of legal norms. It turns out that Fiss's "dispute resolution story" (1984, p. 1076) is a reasonably apt depiction: any norms applied or devised by these non-lawyers did not endure beyond the immediate case. That is not to say that the results were unjust, in most cases; simply that they were not law. Participants described the foundations for their decision making in moral, practical and instrumental terms.

Yet they also described a nagging sense of unfairness. I learned that the kind of decision making mediation offers feels very different, to most participants, from what they were hoping for and from the "autocratic decisionmaking *[sic]*" (Thibaut and Walker, 1978, p. 547) the justice system usually offers. Participants were simultaneously decision makers and decision recipients, and found themselves having to compromise while relying on their counterpart to do the same. Despite having made the decisions they seemed to experience a kind of buyer's remorse, the enduring feeling that they could have done better. It was as if they were saying "the settlement was good enough, but don't expect me to call it 100% justice."

For some it was not justice at all. This included most of those who did not reach agreement and a few who did but felt pushed around. I also stumbled on one instance that looked like injustice to me. And, despite participants' giving relatively little credit for it, the research revealed a crucial role for mediators as a backstop against unjust results. Their understanding of the background procedural and legal norms could come into play as needed, a move most participants saw as helpful. Mediator passivity did not come out well.

By the end of the study I no longer want to view mediation as a source of law. I do, however, see it as a source of justice. As importantly, when courts recommend (or require) mediation, this study shows that it need not be a source of injustice. Yet the

end goal of party decision making will inevitably leave that possibility open, highlighting the essential role for the mediator as backstop against a settlement that "shocks the conscience" (Waldman and Ojelabi, 2016, p. 426).

All of this brings me full circle. I have gained a better understanding of the justice thinking of unrepresented people in mediation, which I have shared in this thesis. I hope it will contribute to the continuing debates about how the justice system can best make use of mediation's best features, and how mediators can limit its worst. To recap an earlier insight (see Chapter 7.A.2. above) I conclude this thesis by reframing the statement that acted as its starting flag: "mediation is not about *legal* settlement; it is about settlement that delivers *justice as judged by the parties.*"

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# APPENDICES

## Appendix 1

Demographic data for all participants (24)

Referring Court

| | |
|---|---|
| Edinburgh | 14 |
| Glasgow | 9 |
| Paisley | 1 |

Pursuer or Claimant v Defender or Respondent (terminology changed for Simple Procedure)

| | |
|---|---|
| Pursuer or Claimant | 16 |
| Defender or Respondent | 8 |

Gender

| | |
|---|---|
| Female | 13 |
| Male | 11 |

Settlement

| | |
|---|---|
| Settled | 16 |
| Did not settle | 8 |

Subject matter

| | |
|---|---|
| Landlord/tenant | 2 |
| Housing (owners/factors) | 4 |
| Vehicle related | 2 |
| Unpaid bills | 7 |
| Goods and services | 8 |
| Employment (unpaid wages) | 1 |

Age

| | |
|---|---|
| 25-35 | 2 |
| 36-45 | 2 |
| 46-55 | 2 |

| | |
|---|---|
| 56-65 | 10 |
| 66+ | 5 |
| DND | 3 |

Household income (per annum)

| | |
|---|---|
| <£20,000 | 2 |
| £20-30,000 | 0 |
| £30-40,000 | 2 |
| £40-50,000 | 0 |
| >£50,000 | 11 |
| Company | 5 |
| DND | 4 |

Disability

One person disclosed a disability

Ethnicity

| | |
|---|---|
| White British | 22 |
| Asian or Asian British | 1 |
| Other European/white | 1 |

**Detailed breakdown by participant**

| | Date | Court | Pursuer/ defender Claimant/ respondent | Gender | Settled/ Did not settle | Subject matter |
|---|---|---|---|---|---|---|
| **SMALL CLAIMS CASES** | | | | | | |
| **1** | 12/10/16 | E | Pursuer | M | S | Goods and services |
| **2** | 7/11/16 | G | Defender | F | DNS | Landlord/ tenant |
| **3** | 21/11/16 | E | Pursuer | M | DNS | Unpaid bills |
| **4** | 22/11/16 | G | Pursuer | F | S | Unpaid bills |
| **5** | 30/11/16 | E | Pursuer | M | S | Unpaid bills |
| **9** | 7/9/17 | E | Defender | M | DNS | Unpaid bills |
| **SIMPLE PROCEDURE CASES** | | | | | | |
| **6** | 21/7/17 | G | Claimant | F | S | Goods & services |
| **7** | 21/7/17 | G | Claimant | M | S | Housing |
| **8** | 1/8/17 | G | Claimant | F | DNS | Housing |
| **10** | 11/8/17 | G | Claimant | F | S | Goods& services |
| **11** | 25/9/17 | G | Claimant | M | S | Unpaid bills |
| **12** | 24/4/18 | E | Claimant | M | S | Landlord/ tenant |
| **13** | 21/5/18 | E | Claimant | F | S | Vehicle related |
| **14** | 22/5/18 | E | Respondent | M | DNS | Goods & services |
| **15** | 23/5/18 | E | Claimant | M | S | Goods & services |
| **16** | 29/5/18 | E | Claimant | F | S | Housing |
| **17** | 31/5/18 | P** | Claimant | F | DNS | Vehicle related |
| **18** | 12/7/18 | E | Claimant | M | DNS | Unpaid bills |
| **19** | 18/7/18 | E | Claimant | M | S | Unpaid bills |
| **20** | 24/7/18 | E | Respondent | F | S | Employment (wages) |
| **21** | 24/7/18 | E | Claimant | F | S | Goods & services |
| **22** | 26/7/18 | E | Respondent | F | DNS | Housing |
| **23** | 12/9/18 | G | Claimant | F | S | Goods & services |
| **24** | 3/10/18 | G | C | F | S | Goods & services |

* Did not disclose
** Paisley Sheriff Court

All interviews except one were digitally recorded and professionally transcribed before being checked and anonymised. Interviews lasted from 24 to 83 minutes with a mean duration of 48 minutes.

## Appendix 2

**Note written following attendance at the evidential hearing in Participant 18's case.**

I attended this hearing as a result of one of my interviews where the interviewee (the claimant in a Simple Procedure action) had been involved in an unsuccessful mediation. He believed he had a strong case and I was curious to know how a sheriff would handle the matter. I also wanted to observe the way unrepresented people were treated in a Simple Procedure evidential hearing. Mediators sometimes adopt a strategy of contrasting the mediation process with litigation, portraying litigation as formal, unpredictable and at times incomprehensible. It was therefore useful to sample contemporary reality following recent Scottish civil justice reforms (Scottish Civil Courts Review, 2009b; Scottish Statutory Instruments, 2016a).

Preliminaries and waiting around

The hearing was scheduled for 10am but when I arrived there was a crowd of some dozen people waiting outside. After waiting until one group (including a sobbing woman) filed out of court we were ushered in at 10.30. Another two hearings then took place, one in which a party failed to appear and the other in which the sheriff engaged in lengthy technical argument with a young solicitor. Eventually my interviewee's case was called. The sheriff began by establishing who everyone was. When it emerged that the respondent had brought a lay representative with him the sheriff briefly adjourned to let him complete the appropriate form. The hearing started just after 11am.

The hearing

The sheriff explained briefly that he would invite the claimant to present his evidence first, followed by the respondent. He also established what written evidence had been submitted and this was referred to throughout.

The case concerned interior design for a flat the respondent had bought as a holiday let. He planned to renovate it and met the claimant, an interior designer, to discuss what he would do and the cost. Here the evidence diverged. The claimant said he had provided a quote for £4,500 for the whole job after the respondent had rejected his two initial prices based on an hourly rate or a percentage of the development costs. The respondent claimed he had never named a price but said he would pay somewhere between £1,500 and £2,000 and possibly £500 more if he was pleased with the job. There was no dispute that he said "You won't be disappointed". There was also no dispute that the work had been carried out to a reasonable standard. The respondent had paid £2,000 in total, in 4 batches of £500.

The claimant's evidence was mostly led by the sheriff. When the respondent's lay representative started to cross examine the claimant he focused on the timesheet

the claimant had submitted. This showed 230 hours of work at £25 per hour (pointing to a fee of £5,750). He asserted that some of the time spent was unreasonable and some was the result of the claimant correcting his own errors. The sheriff intervened little but occasionally told the lay representative to allow the claimant time to answer before arguing with him.

The respondent was examined by his lay representative initially, but the sheriff quickly took over and in fact the respondent delivered most of the case himself. He disputed the claimant's version of events. The sheriff invited the claimant to cross examine him but he had no questions.

The sheriff then asked for submissions. The two sides of the case were restated fairly briefly and the sheriff said he would take time out and deliver a decision before lunch.

The decision

The sheriff spent a few moments going through each party's case and the problems it faced. He found that the claimant's behaviour was not consistent with a belief that he had entered into a contract for £4,500; for example he had accepted £500 deposit instead of the £1,000 stated in his contract; he later asked for a meeting to discuss price and payment. The sheriff also discussed the respondent's evidence, suggesting this wasn't clear on what basis the contract had been entered into. This led him to conclude that there had been no agreement on price. However, the absence of a contract did not mean the respondent paid nothing. The claimant was entitled to reasonable remuneration for his work. Taking account of some inconsistencies in the time sheet and the fact the some of it related to work carried out before the job started he said he would take a 'broad brush approach' and decided the job was worth £3,500. As he had already been paid £2,000 the claimant was awarded decree for £1,500.

The sheriff then went through the fiction of asking the claimant if he sought expenses. Taking the hint he said he did and was granted decree for £1,500 plus the £100 court fee.

Comment

The sheriff was courteous but firm throughout. He kept his interventions fairly minimal on legal matters but assisted both parties' presentations by asking questions (effectively running their examination-in-chief for them). He made little comment on the law and, when he turned to what is really an unjustified enrichment claim, used everyday language: "he's entitled to a reasonable reward for work carried out." Procedurally, however, the sheriff stuck to what may have seemed like legal fictions to parties: examination, cross-examination, submissions. I wondered if taking evidence under oath seemed a fiction too.

The sheriff also provided minor but important practical guidance – when to stand, when to sit, not to bother with the witness box: "this is fairly informal". I felt this put the parties at ease. There was some overlap with mediation in the informal, almost conversational tone. However, it was clearly not a negotiation but an adjudication. The sheriff is an authority figure, wearing a formal suit and an unusual kind of wide tie known as a "fall," and took charge of procedure in a way that a mediator would be unlikely to do. On one occasion he told the lay rep not to ask any more questions of the claimant, saying: "You've had your chance." His interventions were aimed at clarifying matters for himself rather than for the parties, treating their responses as evidence and employing them in his reasoning.

The eventual outcome was very close to what a mediated outcome might have been. The claimant told me he would have accepted £1,500 and that is exactly what he was later awarded by the sheriff, though he also received £100 for his court fee. The average settlement in the Mediation Clinic varies between 48% and 69%, so at 64% the £1,600 award in this case is within that range. The average settlement for those in my study sample was 45%.

Turning to whether the parties achieved substantive justice, from a legal positivist perspective (McCoubrey and White, 1996) they did. A legal official heard both sides, albeit without legal representation, and provided an authoritative, binding judgment. However, when the sheriff explained that he would have to take a "broad brush approach" it became clear that this was justice within practical constraints. Neither party had prepared for an argument over *quantum meruit* (the idea that one ought to pay a reasonable amount for a benefit received) and the sheriff made it clear he would not spend more time on that issue.

It could be argued that justice in Simple Procedure is intended to take such an approach. The Scottish Civil Courts Review named proportionality as one of the principles guiding reform of the civil justice system: "it should make effective and efficient use of its resources, allocating them to cases proportionately to the importance and value of the issues at stake" (2009, p. 2). This evidential hearing of a £2,500 claim lasted almost exactly two hours. The sheriff may have thought it disproportionate to adjourn and ask parties without legal representation to submit further arguments about the fair value of the design work carried out.

It could be argued that the sheriff provided procedural justice (Tyler, 1988; Vermunt and Steensma, 2016). He allowed both parties to make their case, or have it made for them; he demonstrated that he had heard their arguments in his summing up and by asking clarifying and challenging questions throughout; and he treated them in a manner that was dignified and even-handed. Even though the respondents were unhappy with the result it would be hard for them to argue that they did not have their say. Right at the close the sheriff expressed commiseration that his decisions often leave someone feeling unhappy.

Returning to one of the themes from the present study, this case sheds light on the question of whether mediators ought to provide more substantive input on legal norms. One cannot know how acceptable their views would have been to the parties, but they might, for example, have used questions to explore the contractual concept of *consensus in idem*. In this way they may have revealed to both parties potential difficulties in proving the existence of a contract. In its absence the claimant would be likely to receive a reasonable fee for the benefit received by the respondent.

Could this have prompted more realism? It is hard to know. Much may depend on the mediators' credibility and authority. In the event, by not settling for £1,500 in mediation, all the respondent lost was a morning of his time and £100 in legal expenses. The claimant recouped his outlay of £100 but suffered several months' delay to his cashflow.

**Appendix 3**

Full list of initial nodes and sub-categories.

Alternatives to mediation
Ombudsman schemes
Trading standards

Compliance, enforcement

Fairness and justice
Fairness and justice statements - evaluation
Fairness and justice statements - goals
Justice - philosophy
Self

Justice system
Expectations of the court
Experience of sheriffs
Experience of the court
Procedural justice - court

Mediation
Characteristics of the process
Critical statements about mediation
Evaluation of the process
Informed decision making
Limitations of mediation
Prior experience of mediation
Procedural justice
Reasons for agreeing to mediation
The suggestion of mediation
The written word

Mediators
Attributes
Critical statements
Evaluative moves
Non-directive moves
Skills
Things mediators said

Non-fairness and justice factors

Convenience
Interpersonal hostility
Point of principle

<u>Participants</u>
Prior experience of court
Prior experience of mediation
Tactics
Using mediation to negotiate

<u>Prior to mediation</u>
Attempts at resolution
Goals for mediation
Issues
Naming, Blaming, Claiming
Sources of advice
Suggestion of mediation
Sum sued for

**Appendix 4**

Interview Topic Guide (created 22/7/16; revised 3/7/17)

- Introduction
  - Aims of the research
  - Recap confidentiality and anonymity
  - Voluntariness – they may stop the interview at any time without giving a reason
  - [For Glasgow participants] my role in the Mediation Clinic – explain that this study is not about evaluating the project or the mediators; rather I am interested in their views about the fairness of the outcome, good or bad.

- History of the dispute
  - Naming – first realised they had a "justiciable problem"? Trigger?
  - Blaming – what led to the view that it was the other party's fault?
  - Claiming – efforts to resolve? Why did they raise a small claim?

- Expectations/hopes for the small claims process.
  - Previous experience
  - Understanding of the process

- The small claims process in reality
  - Information
  - Personnel – clerks, judge
  - Court appearances

- Mediation suggested
  - By whom?
  - At what stage?
  - Effect on their thinking about the dispute

- Expectations/hopes for mediation.
  - Any prior experience
  - Any views from others/media
  - Did they have a strategy for the mediation?
  - What did they expect to happen?

- Participant's general criteria for assessing fairness and justice.
  - Extent to which these came into play in
  - a) arriving at and
  - b) evaluating the mediation outcome

- Other factors that influenced the result. Explore themes (e.g. what they might have achieved in court; practicalities – speed, cost, difficulty)

- Actual experience of mediation.
    - Mediator behaviour – particularly evaluation/opinion about the case
    - Other party behaviour
    - Their own behaviour
    - Settlement/no settlement
    - Did it seem a fair process? Explore thinking behind answer.
    - Did it seem a fair outcome? Explore thinking behind the answer.
    - Do they believe they received/achieved justice?

    Added following pilot phase:
    - Relevance of legal norms in their thinking
    - Other sources of norms

- Thoughts on other aspects of the process.

- Any other comments

- Final comments
    - Recap confidentiality
    - Ask permission to archive transcript (anonymised) for future research
    - What happens now?
    - What will be done with the results
    - Unfinished business – unresolved conflict/complaints about the mediator or service – explain options for further action, entirely in their control

**Appendix 5**

Queen Margaret University

EDINBURGH

PARTICIPANT INFORMATION SHEET

My name is Charlie Irvine and I am a PhD researcher at Queen Margaret University, Edinburgh. I am studying the experience of people who have taken part in mediation through Edinburgh and Glasgow Sheriff Courts. The title of PhD is “Mediation and Justice: A Qualitative Study of Small Claims Mediation in Two Scottish Courts.” As part of the research I would like to interview people who have participated in mediation and hear their views on the process and the result.

The research findings will be useful because Scotland is in the midst of reforms to its court system and not enough is known about how mediation actually works for consumers. The study is being funded by a Queen Margaret University bursary.

I am looking for volunteers to take part in the research. You have received this letter because you have agreed to use mediation to resolve your dispute in either Edinburgh Sheriff Court (provided by Edinburgh Sheriff Court Mediation Service) or Glasgow Sheriff Court (provided by University of Strathclyde Mediation Clinic). If you agree to take part in the research I will ask you to be interviewed about your experience of mediation. The interviews will last approximately one hour and will take place either at University of Strathclyde (Glasgow) or Edinburgh Sheriff Court or

Queen Margaret University (Edinburgh) whichever is more convenient for you. You will receive a reimbursement of travel expenses of up to £10.

Participation is entirely voluntary and you may withdraw at any time without giving a reason. All data will be anonymised as much as possible, but you may be identifiable from recordings of your voice (these will be stored confidentially). Your name will be replaced with a participant number, and it will not be possible for you to be identified in any reporting of the data gathered.

The results will be published in my doctoral thesis and may also be published in a journal or presented at a conference. If you would like to contact an independent person who knows about this project but is not involved in it, you are welcome to contact Carol Brennan, Director of the Consumer Dispute Resolution Centre at Queen Margaret University. Her details are given below.

If you do NOT wish to take part in the study, please let the mediation service know and I will make no further contact. The mediation services' details are below. If they do not hear from you the mediation service will pass me your details after the mediation has taken place. I will then contact you to ask whether you are willing to be a participant in the study. Ideally I would like to interview people as soon as possible after the mediation has taken place, while memories are fresh, and will try to arrange the interview at a time convenient to you.

If you have read and understood this information sheet, any questions you had have been answered, and you would like to be a participant in the study, please now see the consent form.

Contact details of the mediation services:

EDINBURGH

Heloise Murdoch
Mediation Co-ordinator

Edinburgh Sheriff Court Mediation Service

Edinburgh Sheriff Court

27 Chambers Street

Edinburgh

EH1 1LB

Email/telephone: court.mediation@caed.org.uk /0131 220 1092

GLASGOW

Pauline McKay

Administrator

University of Strathclyde Mediation Clinic

Law School

141 St James Road

Glasgow G4 0LT

Email/telephone: hass-mediation-clinic@strath.ac.uk /0141 548 5998

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Carol Brennan, Director

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**Appendix 6**

Queen Margaret University

EDINBURGH

PARTICIPANT CONSENT FORM

## “Mediation and Justice: A Qualitative Study of Small Claims Mediation in Two Scottish Courts”

I have read and understood the information sheet and this consent form. I have had an opportunity to ask questions about my participation.

I understand that I am under no obligation to take part in this study.

I understand that I have the right to withdraw from this study at any stage without giving any reason.

I agree to participate in this study.

Name of participant: ________________________________

Signature of participant: ______________________________

Signature of researcher: ______________________________

Date: _____________________________________________

Contact details of the researcher

Name of researcher: Charlie Irvine

Address: PhD Student, Consumer Dispute Resolution Centre, School of Arts, Social Science and Management, Queen Margaret University

Queen Margaret University Drive, Musselburgh, East Lothian EH21 6UU

Email / Telephone: cirvine@qmu.ac.uk / 0131 474 0000

**Appendix 7**

Queen Margaret University

EDINBURGH

DEMOGRAPHIC QUESTIONS

"Mediation and Justice: A Qualitative Study of Small Claims Mediation in Two Scottish Courts"

*You have agreed to take part in research into the experience of mediation participants. The following questions are designed to ensure that the research considers a representative sample of the population. This information will be kept confidential and all data will be anonymised in the final report.*

1) DID YOUR CASE SETTLE IN MEDIATION? (Please circle)

| Yes | No |
|---|---|

2) ARE YOU MALE OR FEMALE? (Please circle)

| Male | Female | Would rather not say |
|---|---|---|

3) AGE (Please circle)

| 25 or younger | 26-35 | 36-45 | 46-55 | 56-65 | 66 or older |
|---|---|---|---|---|---|

4) HOUSEHOLD INCOME (Please circle)

| <£20,000 | £20,001-30,000 | £30,001-40,000 | £40,001-50,000 | >£50,001 |
|---|---|---|---|---|

5) ETHNIC BACKGROUND (Please circle)

| White British | Dual heritage/ mixed race | Asian or Asian British | Black or Black British | Chinese | Other ethnic group* |
|---|---|---|---|---|---|

* If you consider yourself to come from another ethnic group, please specify below:

______________________________________________________________________________

6) DO YOU CONSIDER YOURSELF TO HAVE A DISABILITY?

YES/NO (Please circle)

If yes, please specify the nature of your disability:

______________________________________________________________________________

7) WERE YOU ACTING AS AN INDIVIDUAL OR AS THE REPRESENTATIVE OF A COMPANY OR ORGANISATION? (Please circle)

| Individual | Company or organisation |
| --- | --- |

Name: ______________________________________________

Date: ______________________________________________

Name of researcher: Charlie Irvine

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**Published Article (final author version)**

# What Do 'Lay' People Know About Justice? An Empirical Enquiry.[1]

**Abstract**

*When mediation places decision-making power in the hands of lay disputants it raises troubling issues. Can justice be delivered without judicial assistance? What is the effect on the legal system? And how should outcomes thus achieved be regarded? Critics have tended to answer negatively, pointing to a range of harms including individual oppression and the vanishing trial.*

*Such views, focusing too narrowly on conformity to legal norms, overlook ordinary people's capacity for justice reasoning. A recent Scottish pilot study of small claims mediation parties illustrates the richness and complexity of their thinking around whether, and for how much, to settle. This suggests that mediation settlements, rather than representing second-class justice, may enhance the legitimacy of the legal system. Implications for theories of justice are considered.*

Key words: alternative dispute resolution; mediation; justice; natural law theory; lay people; empirical research

[1] I would like to thank Prof Jane Scoular and Dr Saskia Vermeylen at University of Strathclyde for their feedback on an earlier draft of this article.

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**1) Introduction**

Mediation as a social process is elegantly simple: two people who disagree turn to a third for help. Yet its adoption by contemporary Western justice systems raises complex questions: who is responsible for mediation outcomes and by which criteria should they be evaluated? This article considers an important strand in current debates: how fair and how just are mediation outcomes? Perhaps equally importantly: who is entitled to decide what constitutes justice?

Much of the critical scholarship on mediation comes from the legal academy (see literature review at 2 below.) Given lawyers' key gatekeeping role in disputes this scholarship has been influential in fuelling scepticism about a process that places decision-making authority in the hands of ordinary people (Irvine, 2010). Concern about non-lawyers' ability to deliver just results seems to start early in a legal career. A first year law student wrote: 'One of the major drawbacks of mediation is that lay people are in control of justice' (Irvine, 2015). Indeed. A few months of legal education were clearly sufficient to set this this nascent professional apart from 'lay' people (Erlanger and Klegon, 1978).

My purpose is not to re-run arguments about mediation's superiority or inferiority to litigation. Rather it is to draw attention to the reflex dismissal of non-lawyers' capacity for justice. Induction into the legal profession seems to efface the swathes of history, philosophy and literature (not to mention war) animated by the human sense of justice and injustice. Ignorance of legal rules becomes ignorance, full stop. The justice system can be considered a 'regime of truth' (establishing what is true, how to distinguish true

from false and who has power to make that judgment) (Foucault 1980, cited in Shiner 1982, 384). 'Those who occupy the lowest status in the various institutions and conditions of life – the patient, inmate, prisoner, welfare mother, labourer, student – all find their knowledge discounted' (Shiner, 1982, 384). To this list could be added the lay litigant (Quintanilla, Allen and Hirt, 2017).

How might we view the outcomes from a justice event in which the primary decision-makers are not legally trained? Rather than dismissing mediation as second class justice (Frey, 2000; McGregor, 2015), I propose extending the ambit of its promised empowerment and self-determination to include outcome justice. First I review themes from the scholarly literature on mediation and justice, noting practical and philosophical concerns, before describing ADR developments in Scotland, one of the jurisdictions least receptive to such processes. This article then draws on the early findings of an empirical study into the justice reasoning of lay mediation participants. The sample is small, but it is not the purpose of qualitative research to draw conclusions about wider populations. It aims, rather, to explore complex and difficult questions in a way that is credible, authentic and critical (Whittemore, Chase and Mandle, 2001; Webley, 2010). The participants shed new light on ordinary people's thinking about fairness and justice.

This article's intention is twofold: first, to draw attention to the richness of lay people's justice reasoning, countering its simplistic characterization as 'subjective' or self-serving; second, to suggest that mediation outcomes resulting from that reasoning warrant serious consideration within the justice system. That is not to say that they are immune from error or injustice, but rather that these decisions are generally animated

by many of the same considerations judges apply in civil cases: fairness, retribution, restitution, proportionality, teaching someone a lesson and even making a public example of them (Maroney, 2012).

I conclude that critiques of mediation's justice capabilities have focussed too narrowly on conformity to legal norms, particularly given the impossibility of accurately evaluating outcomes without running a full trial (Menkel-Meadow, 2006). A broader conception of justice, acknowledging non-legally qualified people's interest in and capability for justice reasoning, is more likely to judge mediation on its own terms, as animated by principles of empowerment and self-determination. Fuller asserted: 'A serious study of mediation can serve, I suggest, to offset the tendency of modern thought to assume that all social order must be imposed by some kind of "authority"' (1971, 315). I will argue that mediation provides an alternative normative order by offering ordinary citizens a forum to negotiate not only the outcomes to their disputes but the criteria by which those outcomes are evaluated. Natural law theory, rather than legal positivism, may provide a way of conceptualising results arrived at through human rationality.

## 2) Mediation and Justice

When mediation was first adopted by Western justice systems expansive claims were made regarding its benefits: it would be faster, less expensive and more inclusive; (Sander, 1985) more democratic (Bush and Folger, 1994; Mayer, 2012); gentler (Bok, 1983); empowering (Beer and Packard, 2012); and help preserve relationships (Moore,

1986; Haynes and Haynes, 1989). It quickly spread across the USA, thanks in part to Sander's (1985) vision of the 'multi-door courthouse'.

Such ringing endorsements provoked an inevitable backlash; around the same time a number of academic commentators held mediation up to a more critical light. This wave of scholarship is captured in Abel's (1982a) collection, 'The Politics of Informal Justice,' though others entered the fray (Nader, 1979; Auerbach, 1983; Fiss, 1984; Delgado, 1988; Luban, 1995). Many of the scholars most critical of alternatives to the formal justice system were equally critical of the system itself, influenced by the critical legal studies movement. Their arguments, most of which remain 'largely unchallenged' (Roberts and Palmer, 2005, 9) are set out below.

At the heart of academic critiques lies the accusation that alternative forms of dispute resolution fail to deliver justice, providing instead: "poor justice to the poor" (Abel 1982, cited in Cappelletti, 1993, 288, fn 19). More recently a prominent UK scholar asserted:

> It does not contribute to substantive justice because mediation requires the parties to relinquish ideas of legal rights during mediation and focus, instead, on problem-solving…. The outcome of mediation, therefore, is *not about just settlement* it is *just about settlement* [emphasis in original] (Genn, 2012a, 411).

In assessing the purported justice of dispute resolution processes, the adversarial system and resultant judicial determinations tend to be presented as the gold standard (Nader, 1979; Fiss, 1984; Luban, 1995). Lawyer-negotiation, mainstay of the justice system,

is tolerated as 'bargaining in the shadow of the law' (Mnookin and Kornhauser, 1979). Mediation, however, is portrayed as a rogue process: unregulated, private, informal and, potentially, unfair (Frey, 2000; Genn, 2012b). Four persistent critiques can be identified in the literature: a) informalism, b) sources of norms, c) confusion of fairness and justice, and d) the distinction between procedural and substantive justice.

a) Informalism

The first wave of critical thinking about ADR tended not to distinguish mediation from other non-court processes such as arbitration; all were seen as 'informal'. While informality had its attractions, critics were quick to point out its drawbacks.

i) Neutralising conflict.

Nader argued that consumers were short-changed by informal processes, whose case-by-case approach left systemic abuses by powerful corporate interests unchallenged and unscrutinised (Nader, 1979). Others were concerned about losing the deterrent impact of such scrutiny (Singer, 1979; Budnitz, 1994). Abel claimed: 'informal institutions neutralize conflict by responding to grievances in ways that inhibit their transformation into serious challenges to the domination of state and capital' (Abel, 1982a, 280). From this perspective, processes designed to reduce or resolve conflict play into the hands of elites whose interests lie in maintaining the status quo. Similar concerns are voiced by those who see mediation aiding neo-liberal efforts to privatize and depoliticize the justice system (Resnik, 2002; Cohen, 2009a). Such critiques come from the left, political home of the critical legal studies movement (Delgado *et al.*,

1985). They raise questions of their own: must a process deliver social equality to be considered just? And is that standard applied to courts and tribunals? (Silbey, 2005)

ii) Expanding the reach of the State

Abel discerned a more sinister side-effect of well-intentioned efforts to empower communities through mediation. Authorities could thereby 'seek to review behavior that presently escapes state control' (1982, 272). Harrington (1982, 63) employed almost opposite logic to assert that referrals to mediation amounted to 'delegalization', expanding the reach of the state by removing these matters from judicial scrutiny. Others accused governments of seeking to co-opt mediation (Menkel-Meadow, 1991; Engle-Merry, 1993; Coy and Hedeen, 2005), although such views may underestimate mediation's potential to support resistance to state power (Mulcahy, 2000).

iii) Removing protection from the disadvantaged

Critics were also concerned about the loss of procedural protections, claiming that informal processes 'provide advantaged plaintiffs with a sword to enforce their rights while denying disadvantaged defendants an equivalent shield' (Abel, 1982, 296). Engle-Merry observed judges and lawyers framing low value disputes as moral dilemmas, 'offering lectures and social services rather than protections or punishment' (1990, 1). Grillo (1991) made a highly influential claim that mediation's informality particularly disadvantages women and minorities (Menkel-Meadow, 1997). Others have reached similar conclusions (Delgado *et al.*, 1985; Noone and Ojelabi, 2014), although Reda (2010) distinguishes feminist critiques of mediation from 'first wave' critiques such as Abel's in their focus on individuals rather than structure.

iv) Loss of law

Fiss added a further complaint about the loss of legal formality: we lose the benefit of public judgments in developing societal norms, 'reducing the social function of the lawsuit to one of resolving private disputes' (Fiss, 1984, 1085). These sentiments have been echoed by scholars concerned about diluting the courts' function in enunciating public norms (Luban, 1995; Weinstein, 1996; Resnik, 2002; Perschbacher and Bassett, 2004, Cohen, 2009b). Fiss's arguments have been revived by UK academics (Genn, 2012b; Mulcahy, 2013) and adopted by senior judiciary (Leveson, 2015; Lord Thomas of Cwmgiedd, 2015; Ryder, 2015). All deplore the potential harm caused by diverting cases to ADR and an 'anti-adjudication and anti-law discourse' (Genn, 2012a, 409). Genn's views convinced the Scottish Civil Courts Review to limit judicial encouragement for mediation (Irvine, 2010).

This argument follows a seam of US scholarship on the 'Vanishing Trial', even though its author concedes that the reduction in full hearings is 'not confined to sectors or localities where ADR has flourished' (Galanter, 2004, 519). The vanishing trial has been critiqued for reflecting the justice industry's prejudices: 'Like medieval astronomers who mapped the Earth as being the center of the universe, most professionals in the legal system – including lawyers, judges, and legal scholars — place the courts in the center of the world of conflict resolution'(Lande, 2005, 199).

This brief survey of the first wave of mediation critics highlights a range of issues bearing on justice and injustice: does mediation allow the powerful to evade scrutiny, bring government into more of our lives, work against the powerless and undermine a functional litigation system? Two unarticulated premises seem to underpin them all:

1) The legally disadvantaged – lay, unrepresented, poorly educated or simply poor – lack the ability to assert their own needs and to produce results that are fair and just. This empirical question will be discussed in part 3.

2) The courts are the appropriate source of normative authority to be applied in disputes. This is both a political and philosophical matter and will be discussed in the next section.

b) Legitimate sources of norms in litigation and mediation

In common law systems courts derive norms from two principal sources: legislation and judicial precedent. Both claim authority. Parliaments can point to their electoral mandate; courts to the logic of legal reasoning in real cases (although this has been questioned: Schauer, 2006). In principle things are equally clear-cut for mediation. Norms pertaining to outcome come from the parties and the mediator's role is confined to process (Haynes and Haynes, 1989; Mayer, 2012; Moore, 2014). In this vision, whether a settlement is just or unjust is none of the mediator's business: the principle of self-determination leaves parties free to arrive at any outcome they choose (Stulberg, 2005). Scholars, however, have questioned the empirical reality (Greatbatch and Dingwall, 1989; Coben, 2004) and theoretical desirability (Rifkin, Millen and Cobb, 1991; Astor, 2007; Mayer *et al.*, 2012) of mediator neutrality.

An alternative approach would be to see mediators as a potential source of normative guidance. Riskin contrasts the 'facilitative' style, where mediators assume parties can solve their own problems given a helpful process, with the 'evaluative' style, where mediators with legal expertise believe their evaluation will help parties achieve

settlement (Riskin, 1996, 2005). The evaluative/facilitative debate has had huge resonance within the mediation community (Wall and Chan-Serafin, 2014; Rubinson, 2016). An alternative view is that wider social norms guide parties' decision-making (Waldman, 1997; Belhorn, 2005). Waldman divides mediators into 'norm-generating' ('disputants… generate the norms that will guide the resolution to their dispute') (p. 708), 'norm-educating' (mediators provide normative guidance but parties ultimately decide) (p. 727) and 'norm-advocating' (mediators ensure outcomes conform to legal or regulatory norms) (p. 745). Both Riskin and Waldman acknowledge that mediators may change style from context to context, suggesting a situational dimension to any mediator guidance.

Some see legal information or advice as the guarantee of informed consent (Nolan-Haley, 1999; Korobkin, 2005). For others this is impractical and wrong: if anything trumps self-determination, even the mediator's sense of fairness or justice, party autonomy is compromised (Stulberg, 1998; Bush and Folger, 2005). A key battleground in these debates is the appropriate source of normative guidance in mediation. Scholars have tended to assume that such guidance can only come from the 'juridical field,' characterised by Bourdieu as 'the site of competition for monopoly of the right to determine the law' (1987 p. 817). It includes judges, lawyers and jurists: 'an entire social universe which is in practice relatively independent of external determinations and pressures' (p. 816). It may conceivably include lawyer mediators providing evaluative guidance.

Little attention has been paid to parties themselves: what weight, if any, should be granted to their justice judgments? Do they look to mediators to inform them about

social and legal norms? Or do they see themselves as best placed to select the standards by which mediation outcomes should be evaluated? Put more simply, can we, should we and do we trust lay people to decide what is fair and just?

c) Justice and fairness

i) Etymology

Much of the discussion above employs the terms fairness and justice interchangeably. Yet the two English words have distinct tones of meaning. 'Justice' derives from French and Latin, languages of the King and the court, of authority and officialdom. 'Fairness', on the other hand, is a Norse word originating in the visual qualities of a longboat's 'fair' payload (Wilson and Wilson, 2006). It is everyday and self-evident, not dissimilar to reasonableness (Wheeler, 2014). Anyone may have a view on fairness, whereas justice embodies the means by which the state applies and enforces the law: it is the prime Aristotelian virtue (Reid, 2008), the 'virtue of the magistrate' (Aristotle, no date). Fairness, then, is 'bottom-up,' a universal urge but subjective standard; justice is 'top-down,' emanating from societal elites yet aspiring to set universal standards.

Most have little difficulty in accepting that ordinary people understand fairness, while regarding justice as the domain of legal professionals (a view echoed in Bourdieu's (1987) critique of the juridical field). Little wonder, then, that critics express concern when legal systems adopt processes allowing lay people to determine outcomes, a role hitherto reserved for state-appointed judges.

ii) Criteria for evaluating justice and fairness

Some scholars see litigation as the benchmark for the quality of justice achieved in mediation (Sabatino, 1998; Frey, 2000); others see the two processes as alternatives, justice in court coming from 'above', mediation being more 'horizontal' (Hyman and Love, 2002, 160) or 'justice from below' (Stulberg, 2005, 5). A related debate asks whether mediators should tilt the justice playing field to protect the ostensibly less powerful party. Responses range from not at all (Stulberg, 2012); through a relatively thin vision where mediators intervene where agreements 'are so one-sided and unfair that they shock the conscience' (Waldman and Ojelabi, 2016, 423); to acceptance of mediator influence to ensure compliance with legal norms (Carmichael, 2013). Like their critics, those defending mediation's fairness credentials appear to echo 'the complacent assumption among jurists that state law is the most influential source of normative order in society' (Tamanaha, 2019, 173).

Even where attention is paid to non-legal norms the mediator is often presented as guarantor of fairness, while parties' views are characterised as subjective (Hyman, 2014, 34) or merely the opinions of 'lay' people (Schwartz, 1999; Shestowsky and Brett, 2008). Colatrella proposes twin standards: first, an outcome 'is "fair" if the participants deem it acceptable'; second, the mediator must find it 'sufficiently and substantively fair too' (2014, 715). Waldman differentiates 'self-determination theorists' from 'social norm theorists', the latter less optimistic about human capacity to reach just decisions and more concerned about inequality and power (2004, 250).

d) Procedural and substantive justice

Genn's complaint about mediation focused on its capacity to deliver 'substantive justice' (Genn, 2012a, 411). This describes the outcome of a process; the fairness of the process itself is known as procedural justice. Across multiple cultures and contexts procedural justice is a more reliable predictor of party satisfaction than substantive justice (Brockner *et al.*, 2001; Lind, 2001; MacCoun, 2005; Solum, 2005; Tyler, 2006; Bollen, Ittner and Euwema, 2012; Nolan-Haley and Annor-Ohene, 2014). Despite critiques of its conclusions on the grounds of confirmation bias (Silbey, 2005), attribution errors (Collett, 2008) and research design (Creutzfeldt and Bradford, 2016) this research offers evidence of what people value in dispute resolution processes:

i. Voice: the opportunity to present views, concerns and evidence to a third party (Brockner *et al.*, 2001; Lind and Arndt, 2017)
ii. Being heard: the perception that the 'third party considered their views, concerns and evidence' (Welsh, 2001, 820)
iii. Treatment: dignified and even-handed (MacCoun, 2005).

Unsuccessful litigants are more likely to rate themselves satisfied when they believe they have been fairly treated: 'fair procedures are a cushion of support against the potentially damaging effects of unfavourable outcomes' (Tyler, 2006, 101). Welsh (2001) believes mediation can offer a procedurally fair experience, leading parties to feel valued and respected.

e) Conclusion: a critical response to the critics

These scholarly debates should give pause to even the most starry-eyed mediation enthusiasts. A recurring concern is that participants with the least bargaining power will end up with 'less' than they would have received from a judge. Does this mean

that mediation should not be practised when one party is disadvantaged in some way? How would disadvantage be measured? Below average income? Failing to attain a certain educational level? The range of potential disadvantages could include gender, cultural heritage and structural factors like occupying a lower place in an organisational hierarchy (Delgado *et al.*, 1985; Seth, 2000).

One contextual factor often overlooked by mediation's critics is that those with least power and resource are also unlikely to fare well in the courts (Wexler, 1970; Sarat, 1990). It is not simply a matter of income poverty: Galanter famously set out the range of practical and systemic challenges faced by 'one-shotters' pitched against 'repeat players' in litigation, severely limiting the courts' redistributive capacity (1974, 97). Sandefur (2008) identified a range of complex, interrelated factors limiting poor people's successful use of legal institutions, including social status, feelings of disentitlement and previous negative experiences. Studies highlight the impact of poor or no representation on outcomes (Seron *et al.*, 2001; Yoon, 2009; Quintanilla, Allen and Hirt, 2017). In an imperfect world mediation may deliver less than perfect justice; but so may litigation and other processes touched by the logic of the market.

The notion of obtaining 'less' raises further problems. By what criteria should outcome be evaluated? And by whom? To ensure the disadvantaged do not do worse than at trial, a mediator would require a judge's legal knowledge and the means to take evidence under oath and probe competing accounts. One may as well run the trial.

And if the mediator does tilt the playing field to protect the ostensibly weaker party, inescapably she tilts it against the other party. Mediation's critics have paid little

attention to 'advantaged' participants; here again, how to measure advantage? Rhetoric on this issue often juxtaposes a poor, unrepresented individual with a major utility or multinational bank. But legal claims can equally involve two small businesses; or a self-employed tradesperson and a retired professional couple; or an SME in financial difficulty and a late-paying customer. Who is disadvantaged and, once again, who should decide? More pragmatically, if mediators make efforts to support one party, how will the other party view a process that claims to be consensual yet seems weighted against them? Mediation's credibility is unlikely to be enhanced by moves depriving one of its participants of even-handed treatment, a key dimension of procedural justice.

Most problematic of all is that the 'less' critique fails to judge mediation on its own terms. Mediation claims to empower participants to make informed choices. This goes beyond simple preference: mediators generally invite people to choose not only the outcome to their dispute but the criteria by which that outcome is evaluated (Waldman, 1997). This complex form of thinking involves finely-tuned judgements about personal and community norms as well as factors like expectation, risk, commitment and personal resources. Little attention has been paid to that thinking.

Mediation scholarship appears to have fallen into the habit of assuming that 'lay' people's lack of legal knowledge effaces their capacity for thinking about substantive justice. Studies involving participants tend to focus on factors such as satisfaction, improved relationship and procedural justice (Wissler *et al.*, 2002; Eisenberg, 2016; Charkoudian, Eisenberg and Walter, 2017). Where substantive justice is considered, the views of lawyers predominate (Genn *et al.*, 2007), fulfilling Bourdieu's prediction

that the juridical field maintains its monopoly through 'the disqualification of the non-specialists' sense of fairness' (1987, p. 828).

It is thus timely to investigate the thinking of non-legal actors in disputes where they are the decision-makers. Small claims, with its preponderance of unrepresented parties, provides an ideal setting. The study described below took place with people referred to mediation in Scotland's civil courts. The research question is: 'What is the place of justice in the thinking of small claims mediation participants?'

3) The study

Scotland

Scotland is an unusual jurisdiction. A nation with a thousand year history (Davis 1999, 263-5), union with England in 1707 meant that for almost 300 years Scotland had its own legal system[2] without its own legislature (Smith, 1970) until 1999, when the Scottish Parliament was re-established. Its highest civil court is in London. Scots law, with roots in European canon and civil law (Reid, 2008), has thus been overlaid with judicial decisions reflecting the English common law tradition and is now generally categorised as a 'mixed' legal system (Reid, 2003; but see Osler, 2007).

Scotland also stands apart from a striking recent development across the common law world: the growth in ADR (King *et al.*, 2014). Despite the passage of the Arbitration (Scotland) Act 2010 only 22 arbitrations took place between July 2013 and June 2014

[2] Along with its own education system and national church: Union with Scotland Act 1707.

in a country of 5.4 million people (Auchie *et al.*, 2015). And after positive early endorsement of family mediation, including confidentiality legislation (Civil Evidence (Family Mediation) (Scotland) Act 1995), judges and much of the legal profession have shown indifference or hostility towards general civil mediation (Ross, 2006; Ross and Bain, 2010; Clark, 2011). In contrast to the Woolf reforms in England and Wales, the last major review of Scottish civil justice rejected judicial encouragement for ADR (*Report of the Scottish Civil Courts Review*, 2009, 172-3; Irvine, 2010). Mediation is attempted in less that 1% of non-family civil litigation (Civil Justice Statistics in Scotland 2015-16, 62). A senior Scottish judge (now on the UK Supreme Court) typifies judicial attitudes: ‘it would not be right to require persons who wish a legal solution of their dispute to participate in a process which is far from pure in its application of legal principle’ (Lord Reed 2007, cited in Irvine, 2012).

Nonetheless some within the justice system favour greater use of ADR. In 2013 the Law Society issued guidance to the effect that solicitors should be able to advise clients on ADR options (Law Society of Scotland, Guidance in relation to Rules B1.4, B1.9: Dispute Resolution). Scotland’s Employment Tribunals have offered judicial mediation since 2009. A small claims mediation scheme has existed in Edinburgh Sheriff Court since 1998. And in 2016 new rules came into force requiring judges to encourage ADR in actions of up to £5,000 (Act of Sederunt (Simple Procedure) 2016, SSI 2016/200), a significant and surprising innovation (Irvine, 2016).

What lies in the future for ADR in Scotland is hard to predict. The simple procedure rules were followed by similar encouragement for ADR in commercial actions (Court of Session Practice Note 1 of 2017 – Commercial Actions, 11). Yet this is absent from

the general civil procedure rules (Scottish Civil Justice Council, 2017) and a 2013 review of the costs of litigation managed to avoid a single reference to ADR in its 334 pages (Taylor, 2013). There is evidence that wider debates about the efficacy and fairness of ADR have influenced Scottish policymakers (Irvine, 2010). There has, however, been a notable lack of empirical research into mediation in Scotland's civil justice system.

To address this gap I initiated a qualitative study of small claims mediation in Glasgow and Edinburgh Sheriff Courts. The pilot phase took place in 2016 under the older, Small Claims, rules. Sheriffs (judges) referred cases to mediation at a procedural hearing; parties were encouraged but not compelled to take part. The full study, including parties referred to mediation under the new Simple Procedure rules, is currently underway.

Methodology

A philosophical difficulty is engendered by applying social science methods to matters falling within law's domain. Law seeks to provide a normative system applicable to everyday life (McCoubrey and White, 1996). It is prescriptive. Its epistemology is deductive, enabling those skilled in its methods to deduce what is just in particular situations (Halpin, 2006).

Justice is both a psychological and legal concern. However, insofar as courts and other legal actors seek binding rules from justice events they engage in a form of ontological transformation (Teubner, 1989): subjective judgements about disputes become sources

applicable across whole societies and, in the process, acquire objectivity. The doctrine of legal precedent crystallises this transformation, providing a public good argument for dispute resolution via courts: 'from the moment a body of precedents is formed, an unlimited number of individuals can make use of this legal corpus and derive from it the entire diversity of attendant utilities' (Bilsky and Fisher, 2014, 82). The doctrine of legal positivism, seeing law as rules, reinforces the idea that justice can only come from official sources (Farrell, 2006; Dwyer, 2008; Samuel, 2009).

Social science, whether realist or idealist, tends to reject normativity in favour of description. Its epistemology is inductive (Ritchie *et al.*, 2014): phenomena need to be observed prior to the development of theory and principles. The constructivist turn sees the social world as produced by social interaction, and subject to revision (Grix, 2010). Thus the empirical study of legal matters faces a challenge that is both principled and practical: how to avoid diminishing either law's deductive, normative approach or the inductive, descriptive tradition of the social sciences. Legal scholars run the risks of a closed system, uncorrected by empirical data. And social scientists risk discounting legal ontology, missing law's normative intentions (Pavlakos, 2004). The study described in this article can be located within empirical legal studies (Menkel-Meadow 2006; Hillyard 2007; Webley 2010; Epstein and Martin 2014), defined as "the study through direct methods of the operation and impact of law and legal processes in society" (Genn, Partington and Wheeler, 2006, 3).

The complexity of the research question (examining both justice and thinking about justice) lends itself to a qualitative approach: semi-structured interviews (King, 2004; Ritchie *et al.*, 2014, 4). In this interpretive tradition reality is viewed as subjective, and

mediated by senses and consciousness. Language does not simply describe the world but shapes our view of what can exist. Meaning is not discovered; it is constructed by "interaction between consciousness and the world… truth is a consensus formed by co-constructors" (Scotland 2012, p.12). Interviews explored the life history of disputes, from their inception in 'naming, blaming and claiming' (Felstiner, Abel and Sarat, 1981) through the raising of court action and the experience of mediation to resolution or otherwise.

Participants were individuals taking part in small claims mediation in Scotland's two largest courts (Glasgow and Edinburgh Sheriff Courts). During the pilot phase I conducted five face-to-face interviews. None of the cases had a value greater that £3,000. Three concerned unpaid bills, one goods and services and one a landlord/property agent dispute. Three settled and two did not. Three participants were male and two female. None was legally represented in mediation, although one employed a lawyer for court hearings.

Interviews lasted an average of 46 minutes and were semi-structured. They were recorded, transcribed, then analysed using thematic analysis (Miles, Huberman and Saldana, 2014). The goal of this approach is to build theory rather than to test it, so as to remain open to new insights emerging from the data (Ajjawi and Higgs, 2007).

Findings

These are grouped in themes and illustrated by extracts from the data. Four follow justice issues identified in the literature review: procedural justice, fairness and justice

(goals), fairness and justice (evaluation) and the limitations of mediation. A fifth, unanticipated, theme emerged and is included for its explanatory power in relation to mediation's success: participants' self-presentation.

a) Procedural justice

Researchers have generally been willing to cede to lay people the capacity to determine the fairness of a process (as distinct from its outcome): most procedural justice research is conducted with non-lawyers (see 2(d) above). Before examining substantive justice, it is valuable to consider whether participants believed they had been fairly treated; Welsh (2002) sees this as a baseline or minimum standard for mediation.

These Scottish participants appeared to believe their voice had been heard. One said:

> 'It gave me an opportunity to put my point across.'

However, being heard by the mediator was less important than being heard by their opponent:

> 'It gave an opportunity cos, prior to that point, you, you're not having conversations directly with the other party.'
>
> 'I can't remember who spoke first but we both did speak and we spoke quite a lot, you know what I mean.'[3]

This runs counter to much procedural justice research, where the legitimacy of a process turns on the behaviour of an authority figure/decision-maker (though see Nesbit,

[3] Unless indicated otherwise all quotations are from individuals who were also pursuers (plaintiffs).

Nabatchi and Bingham, 2012, for a similar finding). In a process where parties are themselves decision-makers fairness may depend more on the opportunity to be heard by one's counterpart.

b) Fairness and justice – goals

Respondents were asked about their goals for raising or defending a small claim. Their answers reveal a wide range of considerations, including pragmatism, principle, complaints handling, risk, hassle, precedent and even the public interest, similar to those of represented parties in Relis's (2007) study of Canadian medical negligence mediation.

For example, one participant appeared to have some form of precedent in mind:

> 'Those judgements collectively, if they're used properly, can actually improve things.'

A business defender, whose case had not settled, spoke of the importance of good complaints handling:

> 'You know, kind of… are we being responsible? Have we been professional? Because sometimes we do things wrong and if we do things wrong I think that it's fair that we have to offer some form of compensation for it.'

Another participant reflected a principle embedded in Scots law: restitution, where a person harmed by another is restored to the position they would otherwise have enjoyed:

> 'I'm quite happy to take… not be out of pocket from what I intended.'

c) Fairness and justice – evaluation

At the heart of the research lies the question of substantive justice: did lay people see the mediation outcome as fair and/or just? Interviews employed both terms given their rather different meanings (see 2 (c) i above). As well as discussing fairness, participants were asked the direct question, 'Did you get justice?' One woman, who settled for considerably less than she claimed, replied:

> 'I think I got more than justice. I think I got, em… I don't want to say teach him a lesson but, you know he, he needed to learn that he can't just get away with things.'

This statement reflects not so much a punitive motivation as a didactic one: people learn lessons from justice events and the financial penalty drives the lesson home.

If the other party was seen as particularly blameworthy, for example a professional who should adhere to higher standards, the punitive motivation was fiercer:

> 'I'd actually said to the lawyer… look even if this costs me £5000 it doesn't matter because what they have done is despicable… And this woman's a lawyer, she should know better. Well, had she been a lay person, I might have taken a different view.'

This response echoes findings that medical negligence claimants sought a large monetary award not (or not only) for compensation but to punish and deter errant doctors (Relis, 2009).

At the same time a distinctive feature of mediation is that outcomes are consensual. No matter how strongly one party feels they must also convince the other to settle. The punitive urge could thus be tempered by pragmatism and a sense of reasonableness:

> 'Did I feel that he could have gone a bit further? Well, I took a view – it's reasonable we're meeting in the middle, can he be squeezed any more? And knowing [Defender] I thought, well, you could well squeeze him and he'll go the other way. So a bird in the hand…'

> '… there was justice. Absolute justice, if there is such a term, would have been that I would have got the full amount.'

Unsurprisingly mediators played a part in brokering these settlements. One response chimes with US research revealing mediators' focus on lowering client aspirations (Wall and Kressel, 2017):

> '…the only reason I think anyone would accept a vastly reduced sum, because that's what it is, in mediation would be because the mediator's saying, look, when you go to court, it's a 50/50, there's no guarantees (LAUGHS) one way or the other… and it's probably not worth the aggro... You'd be as well accepting it.'

This excerpt illustrates the complex decision-making unrepresented people face in mediation. They must juggle their sense of how much they are entitled to, the practical challenges they face in recovering it ('the aggro'), the risk of failure ('no guarantees') and the effort already expended in getting the other party to offer anything at all – the sunk costs of time spent on the case.

One source of the concern that lay people will settle for 'less' is the view that natural sympathies will cloud their judgment in ways to which judges are inured (Maroney, 2011). Participants did demonstrate signs of empathy, but responses indicate a careful weighing up of competing factors rather than a straightforward emotional reaction.

> 'I felt he was quite vulnerable and he was quite… he'd just got a, a new baby and… I just thought, well, he's learned his lesson basically, he'll not do that in a hurry again.'

Another described how the Defenders, a medium sized company, had sent a young graduate to represent them. Apparently this influenced his decision to mediate:

> 'I thought – this lad's wet behind the ears, this could be a good thing to go for it (LAUGHS).'

Such tactical considerations may seem unconnected to either fairness or justice, but will be recognisable to legal professionals versed in the idea of litigation as a game (Galanter, 1974; Bok, 1983). Unrepresented people can also take a strategic view of dispute resolution processes.

<u>d) Mediation's limitations</u>

One participant with a positive view of the outcome nonetheless spoke of wishing for a more public setting.

> '…one slight regret I've got on that moral issue of somebody challenging their terms and conditions and such like in court and getting them to understand it… there was a lack of, em, ombudsman type services that could have done a quasi-legal review… there was this jump from the one to one, sort of, between myself and the company… then the next redress had to be at the small claims level rather than at a level beneath. And that was a gap I felt…'

This small claimant echoes concerns about ADR's privacy and the loss of a public declaration of norms (2(a) above). He suggests that an ombudsman scheme, a 'level beneath' the courts, could ensure that companies are publicly named and shamed to discourage them from repeating offending behaviour. While this perspective highlights a troubling issue for mediation, it underlines the point that 'lay' people's justice reasoning extends beyond their immediate interests.

e) Fairness and justice – self-presentation

As well as reporting what is said, qualitative research emphasises the work language is doing: 'the world is made, not found' (Pearce, 2006, 7). Respondents do not simply relate objective facts; they co-construct, with the interviewer, a version of reality that may fulfil other purposes. This was evident in participants' statements about the fairness of their own actions:

> ‘I said, this is where I will meet and I said, I think this is fair. I said, I will meet in the middle and it’s £500.’

> ‘It’s made me feel as if I’m, eh, quite a nice person, to be quite honest with you. I’m fair… it’s my personal position, you know what I mean. I, I dislike social injustice. I really dislike it. So I’m quite thingmy[4] on things like that.’

> ‘I didn’t chase them for the 5 hours delay. I chased them for the extra cost beyond that which… which had been incurred.’

Here the respondent demonstrates his own fairness by describing what he could have sued for but didn’t. Mediators often hear this sort of self-justification. It speaks of the need to be seen as fair, not only by others, but also in one’s own self-image; these may be factors in the eventual outcome.

Participants tended to provide arguments for evaluating their own behaviour, potentially attempting to convince the interviewer (‘the tribunal of the man without’) and perhaps themselves (‘the tribunal of the man within’) (Smith, 1759/1976, 130-131) of their fairness. They were thus not only evaluating the outcome but also their own contribution to it, and answering a question not put to them: ‘what kind of person are you?’ This species of question has been found particularly influential in motivating people to participate in mediation (Sikveland and Stokoe, 2016, 247). It may play an equally strong role in achieving settlement. By the time disputes reach the courts

[4] ‘Thingmy’ is Scottish slang, used when a person cannot find the right word. It can therefore mean more or less anything. Here I took it to mean ‘strict’ or ‘firm’.

parties may not care what their adversary thinks, but probably want to be seen in a good light by the mediator (despite claims of impartiality). Clearly they also want to see themselves in a good light.

f) What do the findings tell us?

These findings contradict the idea of mediation as simple horse-trading between two financial positions; rather it is a complex web of factors and people. In the next section I propose ways of conceptualising ordinary people's justice reasoning.

4) Discussion: how might we account for lay people's answers to questions about justice in mediation?

a) The Social Construction of Fairness and Justice

Ordinary citizens faced with the opportunity to negotiate substantive outcomes to their disputes described a wide range of criteria to explain or justify their decisions. These included: recompense for loss; punishment of bad behaviour; teaching someone a lesson (deterring future poor behaviour); holding businesses to account; pragmatism (how far the other party can be pushed); risk of further proceedings; empathy for the other party; reasonableness; and the urge to be, or be seen to be, a fair person.

In the diagram below this complex matrix of decision-making is conceptualised as a multi-party negotiation. Parties negotiate with the mediator; the other party; their supporters; the wider community; and, to an extent, themselves. All of these

conversations may be one-way (monologue) two-way (dialogue) or include three or more parties (facilitated dialogue); and may be private or public. Wider society is also shown. One practice model, narrative mediation (Winslade and Monk, 2002), overtly acknowledges the impact of societal discourse on possible outcomes.

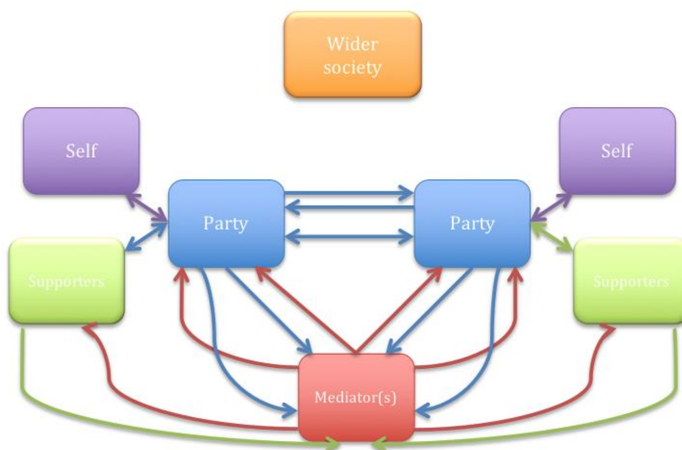


Figure 1: Matrix of Fairness and Justice Negotiation

In this negotiation process, as in real-world litigation, fairness is not fixed. It is a social construction (Macfarlane, 2001; Paul and Dunlop, 2014) refined through discourse: the interaction provided by the mediation setting. Court judgments are also socially constructed (Silbey, 2005; Schauer, 2006; Finnis, 2011). Judges often disagree in significant cases and minority reports present plausible counter-arguments. Judicial opinions are addressed as much to the wider legal system as to litigants.

Judges, however, are disinterested participants in legal disputes. By contrast, the model above presents mediation as a multi-party negotiation involving interested parties (litigants, representatives, supporters) and a disinterested facilitator (the mediator). Does this prevent it from arriving at just outcomes? While the results have been characterised as 'subjective' (see 2, C, ii above), Seul (2004) argues that negotiated settlements are capable of producing outcomes that are as just, from a societal viewpoint, as those produced by trials. Sturm proposes that court-ordered conflict resolution by non-legal actors can result in 'efficient, fair, and workable norms' (2005, p. 50).

b) Implications for Theories of Justice

Justice overlaps with, but is not identical to, legality (Gardner, 2018). While the 'shadow of the law' plays an important part in lawyer negotiation (Mnookin and Kornhauser, 1979) justice exists outside the legal system. Society could not function if the courts had to be consulted on every decision touching on fairness and justice, and the adversarial system has long encouraged negotiated settlements (Galanter, 1988). Mediation parties may indeed be ill-informed about legal rules; participants in the

present study made little mention of the law. They appealed to ethical or moral norms: holding bad behaviour to account; achieving restitution; teaching the offender a lesson; behaving fairly; discouraging others from behaving badly. They also displayed tactical awareness (not unlike legal practitioners): exploiting inexperience, not provoking resistance, assessing the costs and benefits of continuing the dispute.

Alasdair MacIntyre once complained that academic philosophy had become so complex most people believed it had nothing to offer them: 'The attempted professionalization of serious and systematic thinking has had a disastrous effect upon our culture' (1988, x). That accusation could equally be levelled at law and lawyers. The professionalization of serious and systematic thinking about justice is not a new endeavour (Pound, 1944), but it may blind us to other sites of justice reasoning.

Critical work on ADR, emanating largely from the legal academy, tends to replicate the hierarchical structure of the justice system itself: 'superior' courts at the top, supported by a pyramid of appellate and ordinary courts; below them another pyramid of legal professionals; at the bottom 'lay' people (Kennedy, 1982; Arthurs, 1985). Those people's capacity for serious and systematic thinking, or indeed any thinking about justice, is generally regarded through a lens of paternalistic concern. Raz noted law's claim to 'provide the general framework for all aspects of social life' (1975, 154). In this view, if non-lawyers do think about justice it is only to advance their own cause or avoid trouble.

The law's hierarchical logic may derive from another era when its purpose was 'to ensure deference by the lower orders to the world-view of the higher' (Arthurs, 1985,

6). Galanter also notes ‘the pretensions of the official law to stand in a relationship of hierarchic control to other normative orderings in society’ (1981, 20). It seems oddly out of step with contemporary democratic societies where each vote carries equal weight and little deference remains. Mediation’s early pioneers made great play of its egalitarian and democratic credentials (Menkel-Meadow, 1991, 6). Critics, however, have tended to portray this as naïve, warning that empowering ordinary people to make their own decisions would simply lead to exploitation of the vulnerable (see 2 (a) ii above). The idea that lay people might be capable of producing just results seems not to have occurred to them, far less that those results may have derived from a set of norms that includes, but is not limited to, the law.

This may be because jurisprudence, the theory of law, struggles to account for ‘bottom-up’ normativity. The hierarchical universe set out by Arthurs is evident within legal positivism with its efforts to derive rules from a ‘basic norm’ (Kelsen, 1967, 46) or ‘ultimate rule of recognition’ (Hart, 1961, 100). One of legal positivism’s avowed goals is to keep law separate from everyday moral reasoning, to study what law is rather than what it ought to be (Kelsen, 1934, 477). Non-lawyers’ views about fairness and justice are thus rendered interesting but irrelevant.

The ancient natural law tradition may prove more apt in conceptualising lay people’s thinking about justice. The idea of discerning how just the law is goes back at least to the time of Plato (Rommen, 1936/1998), but it was the Roman jurist Cicero who most clearly articulated the role of human reason in this endeavour:

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; … We cannot be freed from its obligations by

> senate or people, and we need not look outside ourselves for an expounder or interpreter of it (1961, III, xxii).

Cicero sees law as deriving from everyday moral reasoning rather than superior to it. Later natural law theory is associated with religion, but rationality remained central. Scots Law's founding father, Viscount Stair, declared 'Law is the dictate of reason' (Stair, 1681, 1, 1, 1). As Europe secularised following the Enlightenment the role of reason in justice was articulated afresh. Adam Smith saw our sense of justice as innate and mysterious: 'somehow or other, we feel ourselves to be in a peculiar manner tied, bound and obliged to the observation of justice' (1759/1976, 80). Later natural lawyers lend support to the idea that moral reasoning about justice precedes rather than derives from legal rules. Fuller refers to 'the morality that makes law possible' (1969, 89).

This article does not seek to revisit the complex debate between natural law theory and legal positivism. A natural law approach, however, does have potential in accounting for the role of justice in mediation. It links reason and justice and brings both to bear in evaluating substantive legal rules (as do contemporary lawyers, claims Gordon, 1999). It seems a good fit with mediation models which place the parties as decision-makers and express faith in human rationality (Irvine, 2007). Other approaches may also prove fruitful, such as identity theory (Stets and Osborn, 2008), the notion of moral community (Deutsch, 2014) or Gilligan's (1982) ethic of care/ethic of justice dichotomy.

C) Limitations

The small sample means further investigation is needed to test its conclusions (the full study of 24 participants is underway). Scotland's new Simple Procedure rules mandate greater judicial encouragement for alternative dispute resolution (Scottish Statutory Instruments, 2016). Thus they create ideal conditions for enriching our understanding of ordinary people's thinking about a justice event in which they are primary decision-makers. Further research should examine non-lawyers' thinking about justice in other contexts and cultures.

6) Conclusion

Scotland provides a distinctive backdrop for the empirical study of mediation and justice. Its legal institutions have until now provided little encouragement for alternatives to litigation. It is therefore a useful setting in which to consider the perspectives of mediation participants with few preconceptions and a distinct lack of lawyer briefing.

Despite Genn's (2012a) ringing dismissal of mediation as having anything to do with justice, the concept is central to much mediation and conflict resolution literature. The formal justice system is a key battleground, with critics alleging the process dilutes cherished values like the right to a fair trial while appearing to empower individuals. While lay people's views have been widely canvassed on procedural justice, researchers have tended to leave substantive justice to lawyers. Genn *et al's* (2007) study devotes nine pages to lawyers' views on mediation and three to those of the parties.

If we are to account for ordinary people's thinking about justice we need a thicker description than the lay/professional distinction. To characterise that thinking as subjective is to grant legal rules an objectivity belied by the existence of courts and disputes. Natural law theory, with its emphasis on human rationality, may provide a foundation for conceptualising non-lawyers' justice reasoning; legal positivism seems likely to reject that reasoning as failing to emanate from or contribute to legal rules (Gordon, 1999).

To return to the question posed in the title, the lay people in this study seem not to consider ignorance of legal rules a barrier to achieving justice. They have their own criteria for evaluating whether they got a fair result; Figure 1 (above) characterises this as a complex internal and external negotiation. As for whether they got justice, most conceded mixed feelings: on one hand not 'absolute justice'; on the other 'more than justice'. I do not suggest that lay people's thinking on justice should supplant legal rules. Mediation does, however, offer an opportunity for justice to be co-constructed between disputing parties, advisors, mediators, the courts and wider society.

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