

## “Mediation: A New Enlightenment or Damp Squib?”

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### **Introduction**

It is a real privilege to speak here this afternoon. I have thought long and hard about what to say. It has not been not easy given that I have chosen such a potentially wide-ranging topic. I have also asked myself what, as a mediator, my approach this afternoon should be. I have found the answer by reminding myself that I left a good practice at the Scottish Bar nearly twenty years ago because I wanted to make a difference, to do things differently, and to see things done differently. That motivation remains and inspires these thoughts.

That motivation is also why what I am going to say this afternoon is not going to be particularly comfortable. This will not be a celebratory half hour. From a mediation point of view, it's really a reality check, with some tough questions. But I offer it to you as my gift to you at this time!

Firstly, an explanation about the title. In May, we had a really excellent international conference here in Edinburgh with the title “Mediation: A New Enlightenment?” The question mark was deliberate. I am in no doubt personally that, if we employed mediation and mediating ideas comprehensively, we would see a transformation in how we, as a species, conduct our affairs globally - and certainly in how we address disputes. Indeed, I would go as far as to say that our future as a species may depend on such a transformation. What a possibility. What a challenge. The same proposition, by extension, applies to how we do things here in Scotland.

But...there is a big “But”.

### **The Justice Committee**

Mediation has not taken root in Scotland as so many of us think it should and hoped it would. I look back over the last fifteen-twenty years here in Scotland and feel a real sense of frustration about what I perceive to be the relative lack of progress. The recent report of the Scottish Parliament Justice Committee, entitled [\*“I won't see you in Court”\*](#), is a notable contribution to the field and the Committee should be congratulated for taking this initiative. But the proposals simply largely mirror and repeat those made over the years, many of them nearly 20 years ago. Here I quote from the report:

*130. While progress has been made to encourage greater use of ADR, availability and uptake across Scotland remains patchy. This report therefore suggests a number of changes which could address existing barriers to using ADR, including:*

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

- reviewed training for the judiciary to encourage a more consistent approach to court referrals to ADR
- consistent provision and funding of in-court ADR services, particularly for simple procedure cases.

131. While these changes could result in more people using ADR, the Committee considers that more fundamental options should also be explored. In particular, mandatory information meetings on ADR prior to court action should be piloted, save in domestic abuse cases. Consideration should also be given to introducing legislation similar to the Irish Mediation Act or incorporating ADR in specific legislation as was done, for example, in relation to additional support needs. **These options could help to encourage the cultural shift the Committee heard is necessary to ensure a step-change in the uptake of ADR in Scotland.** (my emphasis)

I take these words as my starting point. It is not the Committee's fault, as it can only consider what it is asked to consider, but there is really nothing new here and I feel we should be well ahead of many of these ideas now. A "cultural shift" and "step-change" has been in the wind for years. They have not occurred. Progress in this jurisdiction is and has been slow, painfully slow. (Saying this, I would wish to acknowledge all the excellent work that has been done by individuals and groups in significant pockets throughout Scotland where many aspects of mediation are now well received and well recognised. Humbly, I include our own work at Core in that).

Why do I say progress is slow? I recently threw out forty-five bags of papers from my office. In going through the many files, I came across my papers from the start of Scottish Mediation and from many other initiatives. My overwhelming impression is this: "Oh dear...whatever happened to..."

### **A Bit of History**

Among these, I found papers, including minutes, for the Scottish Mediation Network as far back as late 1998 and, from November 2002, a Scottish Mediation news release from Ewan Malcolm as the new Mediation Development Officer in Scotland. The majority of this news release focussed on the meerkats at Edinburgh Zoo to help the launch of Scottish Mediation Network. That was the cute bit. Now for the serious part: the "Strategic Outline" in that document reads:

#### **"Vision**

##### ***Embedding Mediation***

*The Scottish Mediation Network is working to embed mediation into the way that conflict and disputes of all forms are handled in Scotland.*

*Aim – by 2005*

##### ***Mainstream***

*We aim to put mediation into the mainstream, widely available and clearly understood as a first option for resolving disputes of all kinds in Scotland.*

##### ***Awareness and Understanding***

*To assist policy makers, the public, funders and the media to become better informed about mediation and its benefits."*

After a study visit in early 2003 to Maryland by various people in Scotland with an interest in mediation, Chief Judge Robert Bell of Maryland was the star guest at the first Scottish Mediation

conference in Stirling during September 2003 (indeed, I recall that he and I were on the radio together one Sunday morning, discussing the benefits of mediation!)

Judge Bell spoke of Maryland's state-wide action plan entitled "Join the Resolution" in which "courts were seen as a place of last resort". A significant structure had been devised to promote the use of mediation, called MACRO (The Mediation and Conflict Resolution Office). Judge Bell was a champion of mediation. That prompts me to ask myself: Where was / is our champion, judicial or otherwise? We talked about finding one back then.

At about that time, I recall addressing the Justice 1 Committee, as it was then known, of the Scottish Parliament, who subsequently said that mediation offers "substantial benefits and savings for the people of Scotland, commerce and public bodies". Plus ça change?

The Justice Department of Scottish Executive, as it was known at the time, announced support for methods of dispute resolution which "offer advantages over court-based processes in terms of speed, cost, reduction in conflict and preservation of relationships". A Scottish Executive research paper in 2004 into the use of mediation to settle civil justice disputes conducted a review of the evidence and produced significant commentary and proposals.

In October 2003, the Scottish Procurement Committee issued guidelines emphasising the need to use mediation: "it should be seen as the preferred dispute resolution route in most disputes..." in procurement in Scotland. The Committee offered an excellent analysis of recommended practices and an escalation framework, notably not muddling up mediation and arbitration. As an aside: how come mediation and arbitration are still mentioned in same breath as if they are somehow the same? The arbitrators have perhaps been clever, cleverer than the mediators?

I found a Scottish Legal Aid Board (SLAB) submission to an "Access to Justice" initiative, under the heading "Mediation and Legal Aid" stating that: "*The Board repeats its support for mediation as one method for the resolution of disputes and would like to do all it can to encourage its use... A pilot which actively encourages parties to attend mediation...*" Indeed, SLAB guidelines for legal aid for mediation in non-family cases were issued about that time.

Does this all sound familiar?

There were other initiatives in which mediation was being canvassed:

- in the Commercial Court Users Group in September 2003
- in a Sheriff Court Rules Council committee was set up to examine court rules on mediation (I remember drafting an initial version of them)
- in a number of Sheriff Court pilot schemes in the 2000s, so favourably reported on by Margaret Ross and others. What happened to that research?
- by The Royal Society of Edinburgh, which issued a comprehensive report on the value of mediation in medical negligence cases in 2001! What happened?

Back to 2001: in August of that year, the Scottish Consumer Council published a policy report entitled "Consensus without Court: Encouraging mediation in non-family civil disputes in Scotland". The preface by then chairman Graham Millar reads:

*“While mediation has flourished in other parts of the world, it has been slow to develop in Scotland outwith the family and community fields. By drawing on existing research and recent developments both in Scotland and England, together with experience elsewhere, this paper attempts to offer some insight into how the development of mediation in civil and consumer disputes might be encouraged in Scotland.*

*We believe that mediation can offer consumers an accessible, affordable means of resolving their disputes in appropriate cases, within the context of an integrated Scottish network of community legal services. The increased availability of mediation as an option for resolving disputes would be an important step towards achieving better access to justice for consumers in Scotland.”*

The report goes on to mention barriers to the development of mediation in Scotland:

*“The principal barriers to the development of mediation are cultural. There is a general lack of awareness of and/or support for mediation among members of the public, the legal profession, other advisers and the judiciary.”*

The report asks how the use of mediation can be encouraged in Scotland:

- *“There is a need for a full-scale review of the entire Scottish civil justice system. This review must recognise the potential value of mechanisms for resolving disputes outwith the traditional adversarial court system, including mediation.*
- *Mediation schemes must form an important part of any integrated network of community legal services. If efficient and effective community legal services are to become a reality, there is a need for central government support for mediation services as part of its overall civil justice policy.*
- *Mediation must be promoted in the context of a general culture of resolving disputes at the earliest possible opportunity. Consumers, businesses and public bodies alike, as well as their representatives, must be encouraged to see the benefits of settling their case before they get to the stage of using any formal process, whether this be court or an ADR process.*
- *Cultural barriers to mediation must be overcome. The key to changing attitudes lie in raising awareness about mediation among members of the public, the legal profession, lay advisers and the judiciary.*
- *There is a need for a large-scale publicity campaign in Scotland on the benefits of mediation.*
- *The Law Society of Scotland must take steps to promote the benefits of mediation to solicitors. It must encourage its members not only to consider becoming mediators themselves, but also to act as representatives in mediation.*
- *There is a need for increased consideration of mediation in the university law curriculum, to ensure that future solicitors are aware of mediation and its benefits before entering the profession.*
- *There is a need to raise awareness of mediation among lay advisers and staff in the civil courts.*

- *Sheriffs and judges must be made more aware of the benefits of mediation, and provided with suitable training. The courts should encourage the use of mediation as an alternative to a full court hearing in appropriate cases.*
- *If the use of mediation is to be promoted in civil and consumer disputes, mediation services must be supported by public funding. Such services will improve access to justice, while saving money currently channelled into court-based dispute resolution.*
- *How mediation schemes would be administered and run will require consideration. A useful starting point might be to examine how existing schemes elsewhere operate. Initially, pilot projects could be set up in different geographical areas, based on a variety of models, before rolling out the more successful models throughout Scotland.*
- *There is a need for further in-court advice projects, which can identify and refer appropriate cases to mediation either before a court action is raised or before a full court hearing.*
- *If the availability and use of mediation are to increase, it will be necessary to address the difficult question of regulation and quality control of those providing mediation services. Membership of any regulatory body for those practising as mediators should include a majority of consumer interests."*

The report concludes:

*"Mediation must be recognised as a central aspect of the civil justice system, particularly within the context of a community legal services network. It must be promoted to the public and those within the civil justice system as part of a general culture of early dispute resolution.*

*Ultimately, a **change in the culture** is required, from the present adversarial approach towards a more consensual, forward-thinking climate. Such a change will not happen overnight, but can be encouraged by raising awareness of mediation, making it a focus of the civil justice system, and providing adequate funding to make this vision a reality."* (my emphasis)

The report even discusses using the term "appropriate" rather than "alternative" in "ADR", something picked up 17 years later by the Justice Committee.

How can we stop reinventing wheels? Don't forget Einstein's definition of madness is to do the same thing over and over and expect different results.

The Scottish Executive (as it then was) Minister Hugh Henry was a great supporter in 2005: he is quoted as saying: *"mediation has a firm place in the civil justice system in Scotland"*

*"The Scottish Government is a strong supporter of the increased use of alternative forms of dispute resolution including mediation"*. So said Alex Salmond as First Minister in April 2008 to the European Mediation Conference in Belfast (hosted jointly by Scottish Mediation Network and Mediation Northern Ireland). (Incidentally, I was reminded that initial Scottish Mediation conferences were very international in scope. We do need to remember to look outward and learn from others, especially now, and avoid seeming to be too insular.)

I conclude this historical survey of my filing cabinets with this from respectively 22 and 24 years ago:

An August 1996 Scottish Courts Administration booklet entitled “Resolving Disputes Without Going to Court” had two chapters on mediation. The Faculty of Advocates launched its ADR service in 1994 with these words from the then Dean of the Faculty, Andrew Hardie QC:

*“The Faculty’s decision to offer an Alternative Dispute Resolution service flows from the principle that where the possibility exists, problems should be solved without the need for a judicial decision. ADR, which has made a significant contribution in other legal environments notably that of the USA, offers new, informal ways of leading parties in disputes to acceptable solutions. Or new services casts counsel in the role of mediators rather than protagonists, putting their exceptional legal skills and special experience to work for the benefit of the parties in dispute.*”

*ADR offers quick but acceptable solutions to problems which might otherwise last for months and years, devouring resources unnecessarily and causing long-term damage to relationships between the parties.”*

An addendum: a 1997 article by Bryan Clark in the Dispute Resolution Journal entitled: “Getting Started hasn’t been easy: Scotland tries ADR” concludes thus: *“It is acknowledged that in some cases recourse to traditional dispute resolution for a will remain the only option, but the diversion of appropriate cases to ADR can only reap benefits for both disputing parties and also the public at large. In many cases there are surely better ways to resolve disputes.”*

Bryan Clark concludes by quoting Victor Hugo: *“the invasion of armies may be resisted, but not an idea whose time has come”.*

## Some Questions

We must ask: What happened? Why didn’t it happen? Why have we made so little progress here in Scotland? Where is the resistance? One senior mediator posed this question years ago: “Are we there yet?” Where is there? How can we apply our skills as mediators to this conundrum?

There is a question for me: in what way might I have impeded mediation’s development in my fields of interest in Scotland? Mea culpa? I am not sure, but we need to be alive to all possibilities.

A question for you: what are the impediments that are holding you back? Or holding mediation back? What can we and you do differently? How can we really bring mediation into the heart of things? What have we not understood? What sides of the story have we not seen? What relationships have we failed to build? Whose interests have we ignored? What options have not been developed? What biases have got in the way?

We may not be alone: just this week I had a conversation with a public sector leader. They have been talking about the same changes in leadership models in Scotland for 20 years.

So, how do we turn the rhetoric into reality?

As ever, the picture is complicated and certainly not binary. There is something called “solution aversion”: if the solution doesn’t fit our picture of things, we distort or deny the reality. Climate change is an obvious example. Could this be happening to us? Even if, in mediation in Scotland, the evidence is clear before us...?

This is why I fear that mediation may fizzle, become a damp squib, fail to gain the traction it really needs to transform the way we deal with difficult situations. I fear that experience to date may support such a conclusion.

### **The Future of Dispute Resolution including Mediation?**

This fear is reinforced by what is happening more widely. The retrenchment to power-based, polarised decision-making and downright authoritarianism is a real shock. Who would have thought that by 2018 we would be going backwards as we seem to be in so many parts of the world and in so many ways?

Mediation is arguably an aspect of open society, a symbol of liberal democratic ideals. It fits well in a direction of travel which recognises cooperation and civility as central and essential to human progress. That these are no longer givens is obvious. We may need to begin to fight a rear-guard action to protect and preserve the institutions that underlie consensus and the common good. Looking forward therefore, we can ask is the future going to be one of cooperation or competition?

There are other factors too: justice systems are changing and will change radically in the years ahead: not just with online dispute resolution but with algorithmic dispute resolution. The number of civil cases is rapidly declining, and that trend will continue in any event as the traditional justice system struggles to cope with new realities. We might need to ask: what role does face to face, or any form of, mediation have in such a new culture?

In passing, I mention a fascinating Law Society of England Inaugural Lecture on the Future of Law by Sir Geoffrey Vos, the Chancellor of the High Court, given on 8 May this year.

Here are some snippets:

- *“Most importantly of all, engaging technology in dispute resolution will speed up the process dramatically. As I so often say, the millennial generation, which expect to be able to obtain everything they want in an instant on their mobile devices, will not make an exception for justice.*
- *We are told also that machine learning is already able to predict the outcome of all commercial disputes with much greater accuracy than lawyers who give advice.*
- *There will still be commercial disputes, but they will need to be resolved with the benefit of legaltech software that will much reduce the workload of litigation lawyers.*
- *I think there will be less judicial work within a generation for some of the reasons I have already given. I also think it will be different. For example, some of the future judicial work will involve the promotion of mediated settlements before cases reach the final determinative stage.*
- *In my view, online dispute resolution, mediation and ombudsman platforms will absorb much of the small legal work in years to come.”*

I haven't thought about what the implications of all of this may be, but I ask: where might all of this take us?

If 70-80% or more of mediations provide a satisfactory outcome and save people all sorts of losses, monetary and otherwise, it is a remarkable thing. It fits in with the narrative of returning choice and self determination to people. I note the view of Norwegian criminologist, Nils Christie, that conflict belongs to the parties, just like property, and that the state and professions have, in the justice system, appropriated conflict. Mediation at its best addresses that issue too. It is clearly a better alternative

in most situations to adversarial choices, especially court. And it fits with a relationship-centred approach to society.

As Margaret Mitchell MSP, convener of the Justice Committee said in launching her Committee's report, there is "*compelling evidence about the benefits of alternative dispute resolution methods that already exist*".

### More Questions

We have to ponder whether we have been radical enough. We are nice people. A bit diffident. I don't know about you, but I realise that I still feel a bit sheepish about mediation and about promoting it. That may seem strange to some of you who know me but, inside, there is still a voice saying, you are not really entitled to boast about mediation's power and to extol its virtues. That voice says that it is better to try and fit in with the system, and don't rock the boat too much. Could it be that we are rather vulnerable souls, acting merely as derivative parts of the traditional system?

I think we, as mediators, need to try to understand all of this. And we all need to challenge our own perception of ourselves, as well as understand how others see us. Have we failed to tell our stories sufficiently well? How much of this is about leadership of a new kind? As one witty commentator asked: is this the New Testament or an extension of the Old Testament? If the former, what does that mean? Or are we actually conformists? Socially pressured to conform? Scared to challenge the system? If so, what does that mean for us?

Maybe we have to take more of a stand. Does mediation sit within or outside the system? Or a bit of both? What bigger system is it part of? What do the answers to these questions mean for how we promote it? ([see my Kluwer blog on this and related topics](#)).

Given that "the system" was constructed a long time ago and we now understand so much more about our brains, our biases and our behaviours, is there actually a need for a radical overhaul? And what part do we play? Actually, this may give us a lead. What has changed since the early 2000's? There is one thing that might help. Our understanding of human behaviour and neuro-psychology has grown, it seems exponentially. So, what are the cognitive biases that are holding us back? There's some good research to be done there.

Back to the Scottish Parliament Justice Committee, then: is it enough to accept the report and work with it? Or, can we and should we do more? If so, what? (By the way, I answer my own questions in my own [submission to the Justice Committee](#)!)

In conclusion, as the Justice Committee says, we need **a step change, a cultural shift**. So, can we bring about a new enlightenment? Perhaps. Or is mediation, and will it continue to be, a damp squib? Possibly.

### Finally

I'd like to end with these words:

*"We now have in Scotland a perceived political will... to recognise the important part played by mediation. For the last 15 years and more, those involved in mediation have been working towards*



*securing that political will and direction... With that commitment and a declared political will, I believe that we now have a sound platform for the future to provide the services so needed...*

*However, all of us in mediation in Scotland recognise this is not a time to be complacent. We are just embarking upon another journey and will face as many issues and challenges as we have faced in the past. Whilst our commitment remains to make mediation available and accessible to all those who need it throughout Scotland, in reality we are yet far removed from being able to achieve this."*

These are the words of my good friend, Hugh Donald, in his chairman's report for Family Mediation in 2001.

Over to you all! Thank you.