

Scotland's 'Mixed' Feelings About Mediation

This presentation formed part of a symposium entitled "ADR and local legal traditions: Comparing challenges for lawyers, clients and ADR promoters" featuring Adrian Borbély (France), Charlie Irvine (Scotland) and John Lande (USA). It considers Scottish judicial attitudes to mediation in the light of Scotland's distinctive history as a 'mixed jurisdiction' featuring elements of both common law and civilian traditions.

When I studied law at Glasgow University in the 1970's it was a truth universally acknowledged that Scots Law was a 'mixed system'. This, explained our professors, meant that it had its roots in the European Civil (or Roman) Law, but that this tradition had been overlaid with English Common Law, principally because of legislation from an English-dominated parliament and jurisprudence from an English-dominated House of Lords (the highest court of appeal in civil matters for the whole of the UK). Lacking its own Parliament to legislate, Scots law had been in danger of assimilation during the high-water mark of Unionism in the 19th Century, when it was fashionable in some quarters to call the country North Britain. Even today (the 1970's), went the story, this anglicising corruption was proceeding unabated because Scotland, being a country of a mere five million inhabitants, could not generate enough disputes to advance the law. Over the border, the fifty million souls of our larger English neighbour were litigating furiously, providing Lord Denning and other crusading judges with ample opportunity to set, and break, precedents. And, as we were all taught, the Common Law is judge-made law.

To a hammer everything looks like a nail: and to litigators most cases look ripe for litigation. But my generation entered the legal profession with an additional motivation: if a case runs its full course, it is not just good for our pockets, it is good for the law and good for the country. Justice is served and the shackles of English cultural domination are thrown off at the same time.

Thanks to Douglas Osler¹ and Kenneth Reid² I am now aware that this story, like so many cherished myths, serves some interests more than others. It was most powerfully articulated by TB Smith, one of Scotland's foremost legal scholars, in his Hamlyn Lecture of 1961.³ Unsurprisingly this view appeals to Scottish nationalists, who also tend to articulate their campaigns in terms of plucky little Scotland shaking off the yolk of English imperial domination. It may appeal to South Africans too, for according to Osler, *'In South Africa Smith found what he was looking for: a people who, incredible though it may seem, had succeeded in hating the English even more than do the Scots.'*⁴

However, it was a story that seemed to lack practical consequence for most of my career. Scottish academics may teach about civilian roots, but as far as day-to-day lawyering goes, Scotland very closely resembles a Common Law system.⁵ There is no Civil Code; the courts are staunchly

¹ Douglas J Osler 'Fantasy Men' *Rechtsgeschichte Vol 10 [2007], 169-193*

² Kenneth GC Reid 'The Idea of Mixed Jurisdictions' *78 Tulane Law Review, Vol.5 [2003-2004], 5-40*

³ See Osler, 2007

⁴ Osler, 2007, p.175

⁵ Alan Rodger 'Roman Law Comes to Partick' in Robin Evans-Jones (Ed.), *The Civil Law Tradition in Scotland* (Edinburgh, The Stair Society, 1995) p.209 *'Nowadays the courts have to grapple with Roman law only rarely.'*

adversarial; our judges are bound by *stare decisis*. Equally significantly, great tranches of contemporary law are shared with the rest of the UK: employment, tax, company and commercial, insurance, administrative and consumer protection law for example. In these areas precedents can be and often are set in London or Leeds.

So the Civil/Common Law debate⁶ was not something to which I had devoted much thought, particularly as, for the last twenty years, I have practised as a mediator rather than litigator. However, I did often puzzle over what I had come to think of as a form of ‘Scottish exceptionalism’.⁷ Why, in contrast to almost all other Common Law jurisdictions, is Scotland so resistant to mediation? The USA, Canada, Australia, New Zealand and, latterly South Africa, Hong Kong and India seem to be leading the charge. In the late 1990’s England & Wales had its ‘Woolf Reforms’, contributing to London’s development as an international mediation centre. In contrast, Scotland’s 2009 ‘Gill Review’ of civil justice was lukewarm.⁸ Considerably fewer than 1% of civil matters are dealt with by mediation, and if family matters are discounted this number looks closer to 0.1%.⁹ Scottish judges frequently take the opportunity to speak out publicly against mediation (see below).

It was therefore something of a jolt to read Adrian’s Borbely’s description of French legal attitudes to mediation. It is worth quoting Borbely’s words: *‘The French judicial system works like an attracting magnet: once a case enters, it has a 95% chance of finishing by a court decision (or legal bargaining aiming to anticipate the said decision). In America, the system works like a repelling magnet: when a court is seized, the case has a 95% chance of being settled outside the courtroom and the system has integrated numerous tools to do so (mediation, conciliation, pre-trial conferences, mini-trials, etc).’*¹⁰ Perhaps Scotland’s civilian roots are significant after all. Or rather, given that the empirical reality of our court system is more like America (with fewer than 5% of cases ending in a formal hearing¹¹), might the story I describe above be acting as an ideology¹², a set of beliefs about the world that make mediation a bad idea and litigation good?

A few choice judicial comments illustrate where we are. In 2007 four of Scotland’s Sheriffs Principal (senior judges of the second civil tier) published a response to a consultation on court rules designed to encourage mediation. Their opposition was trenchant. They said: *‘What is the mischief or failing*

⁶ Or ‘*bellum juridicum*’ Osler, 2007, p.175

⁷ A term originally plagiarised from ‘American exceptionalism’ to describe our cultural or literary history – *‘Wherefrom, then, the origin of this Scottish exceptionalism? Simply put, we were the first literate nation. The men and women of Scotland could read and write when the overwhelming bulk of European society could not. No wonder, then, at the scale of our impact on literature. No wonder that we created the first secular mass culture.’* See <http://www.arts.gla.ac.uk/ScotLit/ASLS/SWE/TBI/TBIssue1/Editorial1.html>

⁸ Charlie Irvine, ‘The Sound of One Hand Clapping: Gill Review’s Faint Praise for Mediation’ *Edinburgh Law Review*, Vol. 14, No. 1, pp. 85-92, 2010

⁹ See Charlie Irvine ‘Civil or Common Law: What are the sources of Scottish judicial attitudes to mediation?’ <http://kluwermmediationblog.com/2011/10/13/civil-or-common-law-what-are-the-sources-of-scottish-judicial-attitudes-to-mediation/> *‘In 2008/9 the number of court actions raised with a value exceeding £5,000 (5713 Euros) was just over 50,000. At the same period Scotland’s leading commercial mediation provider (Core Solutions) reported being involved in 130 mediations over two years between 2007 and 2009. Even if some additional mediations were taking place, the total still represents a tiny fraction (less than 0.1%) of the courts’ caseload.’*

¹⁰ Private correspondence with the author, 2011

¹¹ Jury trials for civil matters are extremely rare in Scotland

¹² *‘the set of beliefs by which a group or society orders reality so as to render it intelligible’* Collins English Dictionary, accessed from <http://www.thefreedictionary.com/ideology> on 7/7/12

in our current system that requires to be addressed?', before adding this swipe at another jurisdiction: *'in America the volume of litigation was so high that the only way the courts in some states could cope with the number of cases was to restrict access to the courts by requiring that parties endeavour to mediate their disputes'* [Emphasis added].¹³ They then turned their sights on England, contrasting its clogged justice system with the minimal delays, costs and inconvenience in Scotland and describing mediation as an *'expensive barrier'*¹⁴ to access to the courts.

What of more senior judges? In England and Wales Lord Woolf provided significant leadership in encouraging the use of mediation following the reforms that bear his name. Scotland's two most senior judges are those who sit in the UK Supreme Court, the final court of appeal in civil matters. One of them, recently deceased, was Lord Rodger, a noted Civil Law scholar. Addressing a conference in 2008 he said: *'society actually needs litigation... Unless there continues to be a stream of litigation with decisions of high quality from the courts, then individuals and businesses will lack guidance on all kinds of everyday situations.'*¹⁵ He spoke of two farmers who had taken a case worth £3,000 all the way to the House of Lords (it is hard to imagine their combined legal expenses being less than £1,000,000): *'The parties actually deserved not criticism for failing to settle, but the gratitude of anyone who advises consumers... Whether they realised it or not, the parties were performing a considerable public service.'*¹⁶ We hear echoes of the story that permeated my legal training: our courts need good, meaty cases to develop the law.

Another Scottish judge, Lord Hope (the Supreme Court's Vice President), has pitched in as well. In a recent speech he endorsed Lord Rodger's suspicion of mediation's proponents, asserting *'our courts and tribunals do indeed provide the best vehicle for obtaining justice.'* In support of this he cited *'the risk of under-settlement'* and the older chestnut of *'developing the law... Where would we have been without Donoghue v Stevenson?'*¹⁷

Lord Rodger's replacement on the Supreme Court, Lord Reed, has taken a similar line, describing the *'undue pressure'* applied by English courts to get litigants to mediate and the negative impact on judicial precedent. He also stressed that *'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.'*¹⁸

These few examples may indicate nothing more than slightly conservative judicial attitudes: so far so normal. Noting a similar phenomenon in parts of the USA, Frank Sander has gone so far as to propose a *'Mediation Receptivity Index'* to understand why some states seem much more receptive

¹³ http://www.scotcourts.gov.uk/sheriff/rules_council/consultation/docs/ADRDocs/Response_Sheriffs_Principals_Bowen_and_others.pdf p.2

¹⁴ *Ibid*, p.5

¹⁵ Lord Rodger 'Civil Justice in Scotland: Where Have We Come From, Where to Next?' on file with the author, p.4

¹⁶ *Ibid*. p.4

¹⁷ Lord Hope of Craighead, speech at official opening of Digby Brown Solicitors' Glasgow Office (6 September 2011) www.digbybrown.co.uk/index.php/site/news_main/glasgow_opening

¹⁸ Lord Reed, "The Civil Court and the Future of Dispute Resolution" (November, 2007) available at http://www.scottish-arbitrators.org/z_pdf/articles/the_civil_court.pdf

to mediation.¹⁹ A mediator friend who recently moved to New York was told that it is '*not a mediation state*'.

In spite of this, the influence of local legal culture seems to provide a deeper and more plausible explanation for the anti-mediation sentiment in my jurisdiction. When it comes to the kind of radical innovation presented by mediation, it appears that the instincts of Scotland's lawyers place them closer to Borbely's France than either the USA or England & Wales.

If this hypothesis is correct, where does it leave us? In one sense exactly where we were before. Some jurisdictions (in the USA as well as Europe) seem highly disinterested in mediation's attractions. Enthusiasts find this frustrating, but the explanation is difficult to pin down. The incentives to use mediation seem to exist in similar measure in most jurisdictions: litigation's costs, delays and general frustrations are hardly unique to the USA.

This forum then, seems to be going in the right direction in focusing on local disputing culture. Mediation research has typically focused on structural factors such as cost, availability, awareness and the role of lawyers as gatekeepers²⁰. Little attempt has been made to speak to lawyers and their clients about how well the prospect of mediation sits with their cultural preferences for dealing with disputes. Of course 'culture' is a term with multiple and contested meanings.²¹ Geertz defines it as '*the structure of meaning through which men give shape to their experience.*'²² 'Disputing culture' refers to the array of rules, practices and attitudes surrounding disputes: in effect, 'how we do things round here'. When people choose a particular form of dispute resolution they both draw on and contribute to this culture.

One possible explanation for the low uptake of mediation in Scotland is cultural distinctiveness: there may be factors in US or Australian disputing culture that render mediation at least plausible, if not an actual preference, as Borbely speculates. If those factors do not exist in Scotland, attempts to encourage its use may be futile or even counterproductive.

Also neglected is the fact that mediation has its own culture. While there is a considerable body of work on the importance of culture in negotiation,²³ when it comes to mediation the literature tends to focus on cultural differences between the parties, or between the parties and the mediator.²⁴ Little attention has been paid to the cultural significance of mediation itself, a factor that may be particularly overlooked when cultures share the same language: the exponents of mediation may take less care to ensure its applicability where there is no need for an actual translation.

For example, US mediation literature is replete with references to 'empowerment', staking its appeal on delivering decision-making power to citizens.²⁵ And yet the key Scottish study on people's approach to legal problems was categorical: '*They did not want to be empowered, they wanted to be*

¹⁹ Frank EA Sander 'Developing the MRI (Mediation Receptivity Index)' 22 *Ohio State Journal on Dispute Resolution* (2006-2007) 599-618

²⁰ Lewis, 1999; Davis, 2000; Webley et al, 2006; Prince & Belcher, 2006; Genn et al, 2007

²¹ Eagleton, 2000

²² Geertz, 2000, p.312

²³ Hofstede, 1980; Kimmel, 2000; Docherty, 2004; Wanis-St. John, 2005

²⁴ Augsburger, 1993; Shah-Kazemi, 2000; LeBaron, 2003

²⁵ Mayer, 2000; Moore, 2003; Bush & Folger, 2005

saved'.²⁶ Other UK writers have speculated that mediation's low takeup may derive from the fact that the central place of empowerment is anathema to many of those in dispute.²⁷ One prominent US commentator has posed the question: *'Is mediation based on Western notions of problem solving and "open communication" - a culture of mediation informed both by the technocratic optimism of American "can-do-ism" with a peculiarly intrusive... focus on feelings?'*²⁸

This quote leads me to speculate about other elements of Scottish culture that may work against the use of mediation: a concern with privacy (*'we don't want strangers involved in our private business'*); a Presbyterian rejection of emotionalism; simple conservatism; and another factor identified by Genn and Paterson – a *'general sense of powerlessness'* much more pronounced in Scotland than in England and Wales.²⁹

All of these are speculations. It is human nature to try to make meaning from inexplicable events. The challenge for the academic community is to look more closely at the impact of local disputing culture when attempting to account for differences in 'mediation receptivity'. 'How we do things round here' is a compelling argument for most lawyers. The myths we are taught at Law School have a lasting grip on our imagination. Whether Scotland is in fact a mixed, still less a civilian, system matters less than that it believes it to be so.

Charlie Irvine, July, 2012

²⁶ Genn & Paterson, 2001, p.117

²⁷ Davis, 2001; Walker & Hayes, 2006

²⁸ Carrie Menkel-Meadow 'The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices' *11 Negotiation Journal (1995) 217-242 @ p.217* p.223; see also Graham et al (1994) in which a study of negotiating behaviours across ten cultures found that, in marked contrast to the USA and Canada, use of a problem-solving approach had a negative impact on UK negotiators' satisfaction.

²⁹ With 23% accepting a judgement for this reason compared to 6% south of the border, Genn and Paterson, 2001, p.254