

Mediation and Justice: An Empirical Investigation

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1. Brief summary of what the research is about.	This study considers the alleged gap between mediation and justice, taking as its starting point Professor Genn's assertion: <i>"[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."</i> The problem is usually expressed as a deficit for mediation rather than for other elements of the justice system. In these persistent critiques, court judgements are presented as the gold standard against which other forms of dispute resolution can be weighed: arbitration measures up reasonably well given its similarities to litigation; lawyer-negotiation, that mainstay of the justice system, is tolerated as 'bargaining in the shadow of the law'; mediation, however, is portrayed as a kind of rogue process: unregulated, private, informal and, potentially, unfair. In spite of this onslaught (and mediation advocates have been equally guilty of rhetorical	

	flourish) there have been relatively few attempts empirically to test whether mediation delivers justice, particularly in the UK. This proposal aims to address that gap. The key question is this: are mediation outcomes substantively just? There are both theoretical and empirical dimensions to the study. The literature review will examine ideas of justice. Some commentators have noticed that mediation has the potential to provide an alternative normative order.¹ While this may be worrying to those who operate within the justice system,² an alternative reading is possible: that in increasingly fractious and normatively contested societies mediation could provide more, rather than less, justice. By offering parties a voice in, not only the outcome to their disputes, but the criteria by which those outcomes are evaluated, mediation makes a radical move away from contemporary conceptions of justice. The study will examine ways in which mediation may contribute to the development of social and legal norms: for example through the setting of precedents or by developing innovative approaches to dispute resolution. The empirical element will involve small claimants in Scotland's busiest courts, examining outcomes for those whose cases are mediated and those who continue to a Proof hearing. As well as quantitative measures such as decree/settlement amount as a proportion of the sum sued for, any additional settlement terms and compliance, the study will include semi-structured interviews to elicit participants' views on the fairness and justice of both process and outcome.
2. What are the research questions?	• How do mediation outcomes compare to litigated outcomes in Scottish small claims actions? • How do parties to these actions view the justice and fairness of the outcomes? • Can mediation claim to bring about just outcomes to legal disputes?
3. What, if any, outputs so far?	None so far.

4. What outputs are planned?	PhD thesis; journal article(s) reporting research findings
5. What is the anticipated impact?	The study will contribute to our understanding of how mediation operates within the Scottish justice system and how it is viewed by consumers. This will assist mediation practitioners, advisers and policymakers in designing appropriate systems for consumer redress.
6. Comments / additional information / requests for data or input from the broader administrative justice community	